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JUDGES OF THE HIGH COURT.

JULY—DECEMBER, 1940.

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THE

Madras Law Journal Reports

II] JULY [1940

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

B. N. Chowdappa Chetti .. *Petitioner**

v.

President, Panchayat Board, Karimangalam .. *Respondent.*

Chowdappa Chetti *v.* President, Panchayat Board, Karimangalam.

Madras Local Boards Act (XIV of 1920), S. 193—Power of President of Panchayat Board to grant or refuse a licence.

Under S. 193 of the Madras Local Boards Act the president of a Local Board has in a proper case the power to refuse to renew a licence. His order can only be set aside if he has exercised that power in an arbitrary or illegal manner.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a *writ of certiorari* to the President, Panchayat Board, Karimangalam to send all the papers and orders dated 24th February, 1939 and 1st April, 1939 in the issue of license to the petitioner and quash his proceedings declining to issue the license for the full period.

K. Bashyam Aiyangar and *T. M. Venugopal Mudaliar* for Petitioner.

K. Rajah Aiyar for Respondent.

The order of the Court was delivered by

Leach, C.J.

The Chief Justice.—Since the year 1930 the petitioner has been carrying on a rice milling business at Karimangalam in premises which had been used for the same purpose from 1920 to 1930 by his brother. By virtue of the provisions of S. 193

* C. M. P. No. 5569 of 1939. 2nd April, 1940.

of the Madras Local Boards Act, 1930, the Panchayat Board of Karimangalam was empowered to require the petitioner to take out a license in respect of the premises. Licenses were issued to the petitioner from year to year but in 1939 the Board refused a further renewal. The petitioner says that in doing so the Board has acted in excess of its powers and asks that its order be quashed.

Sub-S. (1) of S. 193 states that the Panchayat Board may notify that no place within the limits of the village shall be used for any one or more of the purposes specified in Sch. VII without a license issued by the President of the Board and except in accordance with the conditions specified in the license, provided that no notification shall take effect until 60 days from the date of publication. The purposes for which premises may not be used without a license include the " using for any industrial purpose any fuel or machinery". Sub-S. (2) says that the owner or occupier shall within thirty days of the publication of the notification under sub-S. (1) apply to the president of the Board for a license for the use of the premises for the purpose intended. Sub-S. (3) says that the president may, by an order and under such restrictions and regulations as he thinks fit, grant a license or refuse to grant it.

On the 20th September, 1932, the Panchayat Board caused a notification to be issued under S. 193 (1) to the effect that no place within the limits of its jurisdiction should be used for specified purposes without a license from the president. The notification applied expressly to rice mills and the license fee was fixed at Rs. 5. In pursuance of this notification the petitioner applied for and was granted a license by the Board and he renewed his application every year. On the 21st January, 1938, a fresh notification was published by the Board. It differed from the earlier notification only in that it increased the license fee from Rs. 5 to 10. On the 18th February, 1938, the Board issued a notification under S. 215-A of the Act. This section says:

> " Whenever a local board sets apart any place for any purpose or prohibits the doing of anything in any place, the president shall forthwith cause to be put up a notice in the chief vernacular language of the locality specifying the purpose for which such place has been set apart or the act prohibited in such place."

The notification purported to create an industrial area within the jurisdiction of the board.

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On the 19th February, 1938, the board issued to the persons having Mills in Karimangalam a notice in these terms:

"As the sites noted in the margin have been declared as the Industrial area of this Board, with the approval of the District Health Officer and Director of Town Planning and as the District Health Officer insists upon removing all the mills to the Industrial area in the interest of Public Health, I hereby give you three months notice to shift your mills to the Industrial areas approved by this Board failing which action will be taken to remove the mills."

On this date there were six persons carrying on milling businesses in Karimangalm, of which the petitioner was one. The record discloses that the Health Officer considered that from the standpoint of health it was undesirable to have mills in the residential part of Karimangalam. In his opinion the petitioner's mill was particularly objectionable.

On the 6th April, 1938, the special officer who had been appointed by the Government to fulfil the duties of the Panchayat Board for the time being, wrote to the millowners informing them that they would be granted temporary licences upto the 18th May, 1938, the intention being that after that date no licences would be issued to them unless they removed their mills to the industrial area. On receipt of this letter the mill owners moved the Government to cancel the notification of the 19th February, 1938. Pending inquiry into the matter the Government suspended the operation of the notification and allowed the mill owners to run their mills in the premises they then occupied. On the 16th January, 1939, the Government passed an order which in effect rejected the application of the mill owners. The order was in these terms:

"The President, Panchayat Board, Karimangalam, (Salem District) is informed that the rice mill owners who have not yet moved to the industrial area should be directed to do so at an early date. They may be given time for the purpose, as may be fixed by the Panchayat Board. The time limit should not however exceed one year. Meanwhile the prosecutions pending against them may be withdrawn."

On the 12th February, 1939, the Board gave the mill owners six months time from the 1st February, 1939, to remove their mills to the industrial area. With the exception of the petitioner all the mill owners have complied with this direction. On the 15th February, 1939, the petitioner applied for a license in respect of his mill in the residential area for the year commencing the 1st April, 1938, and the licence was issued to him. On the 23rd February, 1939, he applied for a licence

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for the year commencing the 1st April, 1939. This was refused, but he was informed that he could apply for a temporary licence until the 31st July, 1939, subject to the condition that he should then remove his mill to the industrial area. This permission was in accordance with the notice issued to the mill owners on the 12th January, 1939. In spite of this decision the petitioner wrote to the president of the board on the 30th March, 1939, requesting that licence be issued to him 'according to mamool', which means according to the usual practice. This letter resulted in an order granting a temporary licence from the 1st April, 1939, to the 31st July, 1939, subject to the condition that he should then remove his mill to the industrial area. The board refused to alter this decision and consequently refused to issue a licence to the petitioner after the 1st August, 1939. The petitioner has now moved this Court to quash the orders of the 24th February, and of the 30th March, 1939.

The petitioner says that the Board had no power to notify an industrial area and, as it has not got this power, it is not entitled to refuse him a licence in respect of the premises in which he has carried on a milling business for so many years. For the purposes of the present application the Court may assume that the board had no power to notify an industrial area. It is not necessary for the Court to examine S. 215-A and the relevant sections which precede it, because it is clear that the petition must be dismissed on another ground. S. 193 (3) empowers the president of the Board to grant or refuse a licence; and as pointed out by this Bench in *Khan Bahadur Abdul Kareem Sahib* v. *The Commissioner, Corporation of Madras*[1], when considering the corresponding section in the City Municipal Act, 1919, the section must be construed according to the words used therein and when it is so construed there is no room for reasonable doubt that the president has in a proper case the power to refuse to renew a licence. Of course, if the refusal were arbitrary or prompted by some ulterior motive the position would be different. In this case it cannot be said that the Board has acted arbitrarily or in any way improperly. There was material before the Board on which it could come to the conclusion that it was in the interest

1. Application No. 1900 of 1939 on the file of the High Court, Madras.

Chowdappa Chetti v. President, Panchayat Board, Karimangalam.

Leach, C.J.

of the residents of Karimangalam that the mills in the residential quarters should be removed to another area. The board gave ample opportunity to the mill owners to remove their mills from the residential area and when refusing licenses for their old premises the board made it quite clear that licenses would be issued in respect of premises within the industrial area. It is not disputed that the board acted entirely *bona fide*. Its action is only challenged on the ground that it had no power to notify an industrial area. That is not sufficient to entitle the petitioner to succeed, even assuming that his contention in this respect is correct. The president had power to refuse to renew and his order can only be set aside if he has exercised that power in an arbitrary or illegal manner, which is not the case.

The petition will be dismissed with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

C. Thiruvengada Mudaliar .. *Appellant* (Plaintiff)*

v.

M. Rajabadar Mudaliar and others .. *Respondents (Defendants).*

Thiruvengada Mudaliar v. Rajabadar Mudaliar.

Religious Endowments Act (XX of 1863)—Trustees appointed by Hindu Devasthanam Committee—Dismissal by Committee—Whether can be at its own pleasure or must be only for good and sufficient cause—Power of Committee to appoint trustees for limited period.

Trustees to be in management of Thiruvateeswarar Devasthanam in Madras, were appointed under Act XX of 1863 by Madras Hindu Devasthanam Committee. When a vacancy occurred in 1934 the committee appointed a trustee for a period of 3 years. A previously appointed trustee objected to the new trustee taking charge on the ground that he could not be appointed for a limited period and could only be appointed for life. On the failure of the protesting trustee to appear before the Committee to consider his conduct in disobeying the Committee's orders, he was dismissed. That trustee then filed a suit for a declaration that his dismissal was illegal and he had also filed a suit for declaration that the new trustee was not lawfully appointed. The City Civil Judge dismissed both the suits and on appeal

Held, (1) The status of a trustee is not that of a servant and he can be dismissed only on good and sufficient grounds and after an enquiry into the facts and a dismissal which is not justified may be set aside by the Courts of law.

Seshadri Ayyangar v. *Nataraja Ayyar*, 21 Mad. 179 (F.B.) followed.

On the facts the action of the trustee was not *mala fide* and his dismissal was wrongful.

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* C.C.C.A. Nos. 54 and 55 of 1938. 2nd April, 1940.

Thiruvengada Mudaliar v. Rajabadar Mudaliar.

(2) A temporary appointment cannot be held to be void in all circumstances and the appointment for three years in this case is valid.

Appeals against the decrees of the City Civil Court, Madras in O. S. Nos. 1095 of 1935 and 1130 of 1935 respectively.

V. Ganapathi Ayya and *A. Venkatasubba Mudaliar* for Appellants.

T. R. Srinivasa Aiyar, S. G. Rangaramanujam and *T. Pattabirama Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—These appeals are concerned with the affairs of the Sri Thiruvateeswarar Devasthanam in Madras. It is common ground that it has been the usual custom for two trustees or Dharmakartas to be in joint management of those affairs. They are appointed under Act XX of 1863 by the Madras Hindu Devasthanam Committee, and are subject to whatever control is given to the Committee by that Act. Appellant was thus appointed in 1929. In 1934 appellant's colleague died, and his vacancy was finally filled up by the appointment of one M. N. Rajabathar Mudaliar (hereinafter to be referred to as respondent 2) on 18th November, 1935, the appointment being expressly limited to a period of three years. On 27th November, respondent 2 informed appellant that he proposed to take charge of his office at the temple the next morning. Appellant refused however to recognise the validity of respondent 2's appointment on the ground that a trustee could be appointed only for life and so did not permit respondent 2 to assume joint charge with him. After waiting some days respondent 2 on 4th December, affixed his own lock and seal to the temple office. On 5th December, appellant filed the first of his two suits (1095/1935) in the City Civil Court. In that suit he prayed for a declaration that respondent 2 was not a lawfully appointed trustee, and an injunction to restrain him from interfering with appellant's management. An interim injunction was granted, but was revoked on 12th December.

Meanwhile on 9th December, a notice was sent by the Honorary Joint Secretaries of the Committee to appellant informing him that an urgent meeting of the Committee would be held on the 11th to consider his conduct in disobeying the Committee's orders to give joint charge of the temple

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management to respondent 2; and calling upon him to attend that meeting if he wished to show cause against the proposal to remove him from his office. Appellant sent a lawyer's notice protesting against the Committee's actions and procedure, and refused to attend the meeting. The meeting was held, and the five members who attended it (out of a total strength of fourteen) unanimously resolved to dismiss the appellant. Appellant thereupon filed his second suit 1130 of 1935 in which he prayed for a declaration that his dismissal was illegal, and that he was therefore entitled to continue in office; and for an injunction restraining the Committee and respondent 2 from interfering with his possession and management. The two suits were tried together by the learned City Civil Judge and were both dismissed. These are appeals against the decrees in the two suits.

There are three questions for determination in these appeals; (*i*) what are the powers of the Committee in the matter of the dismissal of a trustee? Can it dismiss him at its own pleasure, or must a dismissal be only for good and sufficient cause?

(*ii*) If the latter, did such good and sufficient cause exist? and

(*iii*) Has the Committee power to appoint respondent 2 (or any other trustee) for a limited period?

The learned City Civil Judge held that there must be good and sufficient cause; that the conduct of appellant afforded that good and sufficient cause; and that the appointment of respondent 2 for three years was within the Committee's powers.

The learned advocate for the respondents attempted to argue that a trustee is a mere servant of the Committee who can be dismissed at the Committee's will and pleasure, and cited *Golam Hossain Shah* v. *Altaf Hossain*[1], in support of this proposition. It is however too late in the day for any such argument to be upheld by a judge sitting singly in Madras. Ever since *Seshadri Ayyangar* v. *Nataraja Ayyar*[2], it has been uniformly held by a long series of decisions in this Court that the status of a trustee is not that of a servant, that he can be dismissed only on good and sufficient grounds and after an enquiry into the facts, and that a dismissal which is not so

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1. (1933) I.L.R. 61 Cal. 80. 2. (1898) I.L.R. 21 Mad. 179 (F.B.)

justified may be set aside by the Courts of law. I am bound by these decisions and must agree with the learned City Civil Judge in finding for the appellant on this point.

The second point now therefore arises. It must be stated at the outset that the sole reason pleaded by the Committee for the dismissal of the appellant was his disobedience of its orders in the matter of respondent 2's taking over charge and that in the arguments before me on this question it was very properly conceded by respondent's learned Advocate that the dismissal must stand or fall according to whether that reason is found sufficient or not. The question has, however, been somewhat complicated by the admission during the trial of evidence on the general conduct of the appellant as a trustee—even though that evidence was confined to the cross-examination of appellant himself and there certainly appear from appellant's own admissions plausible grounds for the view that he has been inefficient and negligent in his care of the temple property. This evidence it seems to me, is irrelevant except in so far as it bears upon appellant's motive in disobeying the Committee's orders, and it is significant that the learned City Civil Judge does not specifically accept the contention of the respondents that appellant's purpose was to remain as long as possible in sole charge of the temple. It is also unfortunate for the appellant that he should have thought fit in the circumstances of the present case to have exasperated the Committee by action which I can only characterise as misguided and unnecessary. Appellant had no personal complaint to make against the Committee's choice, and *ex-hypothesi* was willing to be associated with respondent 2 in the management of the temple for the rest of their lives. He was evidently determined to bring the question of the validity of respondent 2's appointment before the Civil Court and it could not have prejudiced that case for him to have made a dignified protest and accepted respondent 2 as his colleague for the time being. But when all this has been said I am unable to hold that mere disobedience in the circumstances of this case will justify dismissal. It does not, I think, fall within the grounds set out in S. 14 of the Act. A careful perusal of the correspondence in this case will show that appellant's principal motive was to make a formal protest against the terms of respondent 2's appointment—and he may well have thought that the interest of logic and consistency

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required the extension of that protest to the refusal to permit respondent 2 to assume charge. Nor do I think he acted from any unworthy motive to continue for his own private ends as sole trustee unhampered and unchecked by the surveillance of any collegue. Appellant filed his suit with commendable promptitude, and by asking for a temporary injunction made it certain that the Court itself would provide an urgent solution for the immediate deadlock. In these circumstances, whether appellant's objection to the terms of second respondent's appointment be one which the law will uphold or not, I hold that his action was not *mala fide*, and that it does not afford good and sufficient cause for his dismissal. Appeal No. 55 will therefore be in part allowed, and appellant given a declaration that his dismissal was wrongful and that he is entitled to continue in office. He cannot, however, have any injunction restraining the respondents in general terms from 'interference' with his possession and management.

There now remains the third question which is the subject-matter of Appeal No. 54. In support of his contention that an appointment of any trustee for only three years in the case of this temple is invalid, appellant's learned advocate is unable to point to any provision in the Act itself but he argues that that proposition must necessarily follow from a study of some of the decided cases. In this, as I shall show, I am unable to agree with him. *Seshadri Ayyangar* v. *Nataraja Ayyar*[1] is a case which is concerned with the validity of an order of suspension. It was no doubt necessary in that case to consider what powers of dismissal a Committee possessed and under what restrictions they should be exercised, but it was not necessary to consider its powers of appointment. The learned Chief Justice certainly does say on page 220 that a trustee holds his office 'permanently' but that word must, I think, be read in its context and be contrasted not with a definite limited period, but with a period which can be arbitrarily terminated by dismissal. The next case is *Ganapathi Ayyar* v. *Vedavyasa Alasinga Bhattar*[2] which deals with the appointment of two temporary additional trustees to the Srirangam temple. That appointment was held invalid on two grounds (i) because it radically altered a scheme settled by the Board of Revenue for

1. (1898) I.L.R. 21 Mad. 179.
2. (1906) 16 M.L.J 435: I.L.R. 29 Mad. 534.

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the temple in 1842, and (ii) because it was 'altogether temporary' and to permit such appointments would give the committee a control over the management inconsistent with the policy of the Act. The first ground does not apply to the present case. There is here no concrete scheme, and as the learned City Civil Judge has pointed out, no sufficient proof of a custom so rigid that it compels the appointment of a trustee for the rest of his life. Neither appellant nor respondent 2 had any vested right (such as existed in Srirangam in members of certain families) to be appointed at all, and unless the Act lays it down that an appointment must be for life I cannot see that either of them can object to a limited term. It is not without significance in this case that respondent 2 does not so object. The second ground is more to the point, but it must be remembered that the appointments in Srirangam were interim and provisional rather than for a definite term, and the distinction between the two kinds of appointment is an important one. *Seetharama Chetty* v. *Sir S. Subramania Aiyar*[1] the next case, continues the history of the Srirangam temple. It was there held that though the Committee had no power to modify the 1842 scheme, the Court had such power under S. 92, Civil Procedure Code and it is interesting to observe that in framing the new scheme the Court provided for the appointment of additional trustees to hold office for five years only. Finally, of the Madras authorities, comes *Govindaraja Mudaliar* v. *Sabapathi Mudaliar*[2]. There the validity of the appointment of temple trustees came up for consideration, though a final adjudication on that question was not necessary. Sir John Wallis, C. J., held that such appointments were legally permissible and Sadasiva Aiyar agreed to the extent that committees might make temporary appointments in certain emergencies or exceptional cases.

This analysis of the Madras cases shows (*i*) that no case is precisely in point and (*ii*) that the latest pronouncement is that a 'temporary' appointment (if that word can be held to apply to the present case) cannot be held to be void in all circumstances.

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1. (1915) 30 M.L.J. 29: I.L.R. 39 Mad. 700.
2. (1920) 13 L.W. 153.

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I do not consider therefore that the Madras authorities compel me to hold that the appointment of second respondent was invalid. On the other hand *Golam Hossain Shah* v. *Altaf Hoosain*[1], is a direct authority on this point to the contrary. Appeal No. 54 accordingly fails and is dismissed.

There will be no order for costs throughout in either appeal.

K. S. *Appeal No.* 55 *allowed in part and Appeal No.* 54 *dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE HORWILL.

V. S. Narasimha Ayyar ... *Appellant* (1st defendant)*

v.

Allu Krishna Ayyar and others .. *Respondents (Plaintiffs 2 to 5 and defendants 2, 3 and 5 to 7 and new party).*

Narasimha Ayyar v. Krishna Ayyar.

Tort—Premises used by tenant for storing combustible material—Destruction by fire—Principle of res ipsa loquitar*—Applicability—Liability of tenant to landlord for damages.*

Having regard to the nature and quantity of the material stored in the premises (chemicals and mordanted yarn) it was clearly the duty of the person in occupation to take special care and precaution against fire and where no such precautions were taken and no attempt was made to rescue anything from the fire, nor even to get the water from the well hard by, the maxim of *res ipsa loquitar* would apply to the case. In the circumstances of the case it was the negligence of the tenant which caused the fire which burnt down in part the house of the plaintiff and the plaintiff is entitled to damages for the loss.

Appeal against the decree of the Court of the Subordinate Judge of Madura in O. S. No. 133 of 1927.

S. Nagaraja Iyer and *J.R. Alwar Naidu* for Appellant.

V. Minakshisundaram and *O. V. Baluswami* for Respondents.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—The short point that arises in this appeal is whether there was negligence on the part of the appellant which caused the fire on the 12th October, 1925 which burnt down in part the house belonging to the plaintiffs and in the occupation of the defendants. There can be no doubt and

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1. (1933) I.L.R. 61 Cal. 80.

*Appeal No. 15 of 1937. 1st April, 1940.

Narasimha Ayyar v. Krishna Ayyar.

Pandrang Row, J.

the fact is indeed admitted that the house was being used as a dyeing factory and that large quantities of chemicals and mordanted yarn, that is, yarn in the process of being dyed, were being stored in different parts of the building. It is clear from the evidence that these articles are liable to spontaneous combustion, and in particular the mordanted yarn. The case of the defendants was that there were watchmen employed to guard against fire and that the usual precautions were taken. The evidence, however, adduced in support of this contention was disbelieved by the Court below and after going through the evidence we see no reason to come to a different conclusion. Only one of the two watchmen was examined as a witness, namely, Krishna Ayyar, and he admits that for some time before the fire was observed, he and his fellow-watchman were "dozing" near the gate. Secondly the evidence adduced as regards buckets of water being kept handy to extinguish fire is not worthy of credit and it has been rejected by the Court below which heard it. In fact, the learned Subordinate Judge is not satisfied at all that any watchman was at the premises during the night in question. It is also clearly established that, beyond making a belated call for a fire engine, no real steps were taken by any one interested in the premises to put out the fire. It is certainly noteworthy that while the factory had insured its own goods against fire, it made no attempt to insure the building itself against fire. It must however be said that there is no satisfactory evidence in support of the suggestion that the fire was deliberately started. We might assume for the purpose of this case that the fire was accidental, but the question is whether the accident was due to negligence on the part of the defendant and his servants. On this point, having regard to the nature and quantity of the material stored in the premises, it was clearly the duty of the person in occupation to take special care and precaution against fire and it is clear that no such precautions were taken. It is admitted in the evidence that no attempt was made to rescue anything from the fire, and apparently no attempt was made even to get water from the well hard by. This is a case to which the maxim of *res ipsa loquitur* would apply, having regard to the circumstances of the case. The duty of the person in occupation was clear, having regard to the nature and quantity of the material stored in the premises, namely, to have efficient watchman to guard against spontaneous

combustion and to have all reasonable fire equipment ready at hand. In this particular case, there is very good reason to doubt whether any watchmen were actually guarding the premises that night; and even if they did, they were admittedly negligent in the sense that they were sleeping when they ought to have been awake. As regards fire extinguishing appliances, there is no satisfactory evidence that any of them were supplied or were at hand. Even the telephone which could have been used for summoning the fire brigade in time was in a room which was locked and the key was not with the watchmen. On the whole, therefore, we see no reason to differ from the finding of the Court below that the fire in question was due to negligence on the part of the person in occupation. There is no objection taken to the quantum of damages awarded by the Court below.

An attempt was made to argue that the amount of damages for use and occupation awarded for the period subsequent to the fire ought to be reduced. But no such plea appears to have been raised in the Court below or in the grounds of appeal. We are, therefore, unable to allow it to be raised for the first time in appeal.

It follows that this appeal must fail and it is hereby dismissed with costs of respondents 1 to 4. The appellant must pay the court fee payable on the memorandum of appeal.

K. S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Secretary of State for India in Council v. Hussain Saheb.

The Secretary of State for India in Council represented by the Collector, Chittoor .. *Appellant* (1st Defendant).*

v.

Reddipalle Hussain Saheb (died) and others .. *Respondents (Plaintiff and Defendants 2 to 6 and L. Rs. of plaintiff).*

Tree patta granted in respect of trees on unoccupied land—Right of Government to resume them and grant them to another with the land—Pattas—Evidentiary value of.

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*S.A. No. 658 of 1936. 27th February, 1940.

Secretary of State for India in Council v. Hussain Saheb.

The tree patta gives the person to whom it is issued a right to enjoy the usufruct of the trees, the patta being liable to cancellation at the end of the year or at three months' notice. The Government have a right to resume them and grant them to others along with the land.

Evidentiary value of pattas discussed.

Appeal against the decree of the District Court of Chittoor in A. S. No. 89 of 1935 preferred against the decree of the Court of the District Munsif, Chittoor in O. S. No. 307 of 1933.

The Government Pleader (*B. Sitarama Rao*) for Appellant.

N. Visvanatha Aiyar and *N. V. Nagaraja Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff held a tree *patta* from the Government for five tamarind trees standing on a house site, S. No. 848. That site had admittedly been vacant for some years; but five or six years ago defendants 2 to 6 came and settled there. S. No. 848 was a site reserved for the houses of Madigas. In accordance with the policy of the Government, set out in Board's Standing Order No. 18, the tree *patta* to the plaintiff was cancelled when defendants 2 to 6 came to settle on the site and the trees were offered to them. As they could not afford to purchase them, the tree *patta* was granted to them. The plaintiff was aggrieved at losing his tree *patta* and has brought this suit for a declaration of his right to enjoy the tamarind trees on his paying tree tax as usual and for recovery of possession and for mesne profits. The Government, as the first defendant, contended that the trees belonged to them and that they had a perfect right to grant the trees to whomsoever they pleased. The respective rights of Government and the tree *pattadars* were dealt with at great length by the Munsiff, who decreed the suit as prayed for.

In appeal, the learned District Judge disposed of the matter briefly by saying that a *patta* was not a document of title but was a mere bill for rent or tax which, being of little or no value, proved nothing. As that was the only evidence on which the Government could rely, the plaintiff was entitled to succeed.

With due deference to the opinion of the learned District Judge, I do not consider that a *patta* is quite such a valueless document as he thinks. As was pointed out by Srinivasa

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Ayyangar, J. in *The Official Assignee of Madras* v. *Badri Narayan Doss*[1], although a *patta* is not a title deed, it is a document of title, to which great weight is generally given both by the possessor and by the Government. It is true that a *patta* is not a title deed in the sense of a document, the grant of which conclusively passes title from the Government to the *pattadar*; but with regard to a first grant, at any rate, a *patta* is granted as a matter of course to the person to whom the Government has granted the land. The value of a *patta* generally comes up for consideration in proceedings between the *pattadar* and a third party; but as between the Government and the *pattadar*, a *patta* clearly has a greater value. The Government cannot say that the *pattadar* is not entitled to the land or the trees granted under the *patta* nor can the *pattadar* say that he is not holding title from the Government. A tree *patta*, moreover, differs from an ordinary ryotwari *patta* in being more in the nature of a lease, which was the original meaning of the word *patta*.

The case on which the plaintiff placed the most reliance in this Court (as in the trial Court) is *Chinnappa Naidu* v. *Raju Goundan*,[2] in which Ramesam, J. dealt with the question of the nature of a *patta* given to a tree *pattadar* in a case where the land on which the trees were standing was afterwards granted to another person. It is the policy of the Government in such circumstances to offer the tree *pattadar* the *patta* for the land also. If he is not willing to take it or if, for any other reason, a grant to that person is not desirable, then the land may be given to another; but in any event the tree *patta* is cancelled. The trees are then included in the *patta* of the land *pattadar* and his rent is fixed according to the value of the land and the trees. Ramesam, J. did not however dispose of the appeal on the ground that the tree *pattadar* has retained his title; for he finds that the trees were not actually standing on the land in question. I think the wording of Board's Standing Order 18 (2) indicates that the Government assert their ownership in the trees. If they do not, it is difficult to see how they can charge the *pattadar* of the land rent for the trees. In *Sengoda Goundan* v. *Varadappan*,[3] two learned Judges of this Court were inclined to think that when the Government cancelled the

1. (1924) 48 M.L.J. 423: I.L.R. 48 Mad. 454.
2. (1927) 53 M.L.J. 104.
3. (1911) 22 M.L.J. 201: 36 Mad. 148.

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tree *patta*, they did not intend to resume their rights in the trees; but to that case the Government were not parties; and the appeal was decided on the ground that even if the Government had intended to cancel the *patta* and to take away the rights of the former tree *pattadar*, they did not in fact grant these rights to the pattadar of the land. So the latter acquired no title to the trees at all and the enjoyment of the former tree *pattadar* could be protected against the land *pattadars*.

In the present instance the tree *patta* was issued under Board's Standing Order, 18 (2), which relates to unoccupied lands. The evidence of P. Ws. 1 to 3 is to the effect that the lands remained occupied until a few years before defendants 2 to 6 came into occupation; but the evidence of these three witnesses is interested, as they themselves attempted to pass title, under sale deeds, of these trees. The plaintiff in paragraph 8 of his claim says:

"The said Madigapalli became abandoned several years ago as the Madigas shifted to a different locality. Thereupon, the Government were collecting tree tax at the rate of 12 annas per tree from the persons who owned the said trees from time to time including the plaintiff."

I think this must be true, or a *patta* under Board's Standing Order 18 (2) would not have been issued. The relevant date is the 13th November, 1909, the date on which a tree *patta* was first granted to Babu Sahib. Appendix 20 of Board's Standing Orders says that

"if a building........is erected and is subsequently abandoned, that is, left unoccupied and is in disrepair for a period of one year, the Government shall have the right to re-enter forthwith and take possession of the said site or the site and building and shall not be liable to pay any compensation for any buildings or other improvements then existing on the land".

Although the Government do not ordinarily charge any tax for trees that are raised on unoccupied sites by the occupiers, there is nothing in Board's Standing Order 18 which suggests that the Government do not regard the trees as their property. They may not wish to discourage the occupiers from making improvements; but they do not thereby give up their rights to these improvements; and it is clear from Appendix 20 just quoted that where a site is abandoned, the Government are entitled to take over anything that remains standing on it, including the building and trees. If, therefore, on the 13th November, 1909, this land was unoccupied, the Government had a perfect right to the trees that were standing on that land and

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had therefore a right to issue a tree *patta* for them. The Government are certainly not bound by the various sales that took place from 1885 onwards.

Moreover, the plaintiff seems estopped from asserting that the trees do not belong to Government, because he and his predecessors-in-title accepted *pattas* from the Government which, as I have pointed out, is tantamount to an admission that they held title to the trees from the Government. Even if the payment of tree tax under Ex. 5 does not estop the plaintiff from denying that the land was unoccupied in 1909, it at any rate affords very strong evidence that the land was unoccupied in 1909 and that the Government therefore had a right to take over the land and all that stood thereon. The *pattas* issued to the plaintiff and his predecessor gave them a right to enjoy the usufruct of the trees, the *patta* being liable to cancellation at the end of the year or at three months' notice.

I am therefore of opinion that the plaintiff had no title to the trees at all and that the Government had a right to resume them and to grant them to defendants 2 to 6.

The appeal is allowed with the costs throughout of the 1st defendant and the suit dismissed.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNASWAMI AIYANGAR.

Sait Sogmull Lachiram Firm of Tenali .. *Petitioner* (Plaintiff)*

v.

Vallabhaneni Parandhamayya and others .. *Respondents (Defendants).*

Sait Sogmull Lachiram Firm v. Parandhamayya.

Provincial Insolvency Act (V of 1920), S. 78 (2)—Annulment of adjudication—Suit on debt beyond period of limitation—Debt provable but not proved in insolvency—If saved from the bar of limitation—"Proof of debt"—Meaning.

A promissory note was executed on 10th April, 1930, by the first respondent in favour of the plaintiff. The first respondent had been adjudicated an insolvent on 14th January, 1933, by an order which fixed 14th January, 1934, for applying for discharge. The adjudication was annulled under S. 43 on 16th August, 1934, as the insolvent defaulted in applying for discharge within time. A suit on the pronote was filed on 12th November, 1934. The plaintiff was the petitioning creditor in the insolvency proceedings and proof of his

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* C. R. P. No. 49 of 1937. 5th April, 1940.

Sait Sogmull Lachiram Firm v. Parandhamayya.

debt was given before adjudication under S. 24 but no proof as required by S. 49 was made. The plaintiff claimed an exclusion of the time during which the insolvency remained pending to save the suit from the bar of limitation.

Held, proof of debt in insolvency means that kind of proof only which entitles a creditor to have his name entered in the schedule and none other and unless a creditor tenders proof of his debt in the manner indicated by S. 49 his name cannot be entered in the schedule and however true his debt may be he cannot be allowed to come in for a dividend. Nor can he be permitted to claim in a suit for the recovery of the debt after annulment of the insolvency an exclusion of the time during which the insolvency remained pending.

Krishna Chandra Das v. *Jotindra Nath Porial*, A.I.R. 1929 Cal. 159 (2) not followed.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Tenali in S. C. S. No. 600 of 1934.

V. Subramanyam for Petitioner.

K. Kameswara Rao and *B. S. Ramachandra Rao* for Respondents.

The Court delivered the following

JUDGMENT.—A somewhat interesting question relating to the construction of the proviso to S. 78 (2) of the Provincial Insolvency Act, 1920 arises for consideration in this revision petition. The petitioner was the plaintiff in a small cause suit in which he sued to recover a sum of Rs. 1,000 on foot of a promissory note executed on 10th April, 1930, by the first respondent. The other respondents are the undivided sons of the first respondent. The suit was filed on 12th November, 1934, that is to say, one year seven months and two days after the period of limitation and is therefore *prima facie* time barred unless the plaintiff could claim the benefit of an exemption. To this end he relies on S. 78 (2) of the Provincial Insolvency Act which runs as follows:—

"Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree (other than a suit or application in respect of which the leave of the Court was obtained under sub-S. (2) of S. 28) which might have been brought or made but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded:

Provided that nothing in this section shall apply to a suit or application in respect of a debt provable but not proved under this Act."

The first respondent had been adjudicated an insolvent on 14th January, 1933, by an order which fixed 14th January, 1934, as the last day for applying for discharge. The insolvent defaulted to make the application within time with the result,

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that the adjudication was annulled under S. 43 on 16th August, 1934. It will be seen that, if the period which elapsed from the date of the order of adjudication to the date of the order of annulment, namely, one year seven months and two days is excluded, the suit would just be in time. The question is whether the petitioner is entitled to have this period excluded. It may be mentioned that he would be entitled to have one more day excluded as the 11th November, 1934, the day previous to the institution of the suit happened to be a Sunday. If the section is applicable, there can be no doubt that the suit is in time.

The District Munsif dismissed the suit on the ground that S. 78 is not applicable and that the suit is barred by limitation, as the petitioner's debt though one provable under the Act had not been proved in the manner directed by the Act. It is clear on a consideration of the provisions of Ss. 28 and 78 of the Act, that two conditions have to be satisfied, before a party can claim the benefit of the exclusion enacted by the latter section. The suit or application in which limitation is pleaded must be in respect of a debt provable under the Act, and it must also have been proved under the Act. There can be no doubt that the debt in suit is one provable under the Act. The question is whether the second requisite has been satisfied in this case; in other words whether the debt had been proved under the Act.

The petitioner here was the petitioning creditor on whose petition the first respondent had been adjudicated insolvent. It is common ground that the promissory note in suit was the debt on which the petitioner successfully founded his right to present the insolvency petition. It may therefore be presumed that proof of the debt was given under S. 24 of the Act, before the adjudication order came to be made. It is also common ground that no proof as required by S. 49 had been made. Mr. Subramaniam appearing for the petitioner has urged that the word 'proved' in S. 78 should receive a liberal interpretation, that S. 49 merely indicates one method of proof, which should not be regarded as the only method of proof recognised by the Act. He has relied on a ruling of the Calcutta High Court in *Krishna Chandra Das* v. *Jotindra Nath Porial*[1], where Ghose and Bose, JJ., have expressed the opinion that S. 49 only specifies a simple mode of proof but does not exclude any

1. A.I.R. 1929 Cal. 159 (2).

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other mode of proof, and that a debt should be held proved under S. 78, if it had been proved in the course of the proceedings leading to the adjudication of an insolvent. With respect, I find myself wholly unable to accept this interpretation as correct, whether we look at the meaning of the word itself, or the object behind the proviso to S. 78.

Proof of a debt in insolvency is an expression well known to courts and lawyers, and there can be little doubt that it is the kind of proof that a creditor is called upon to give in order to enable him to obtain a dividend in the rateable distribution of the assets of the insolvent. 'Proof' in this connection has almost become a word of technical import, and is not to be understood as meaning any kind of proof at any stage of a proceeding without reference to the purpose for, and the manner in which it is given. Proof given and accepted in a Civil Court, and not open to challenge there is still open to question when its validity is impugned in an insolvency Court. Proof of a debt for the purposes of Ss. 11 and 24 is merely proof that a person is insolvent and is in the nature of a preliminary step which leads to the Court taking up the administration of an insolvent's estate, but proof in insolvency is proof adduced after the Court has taken up the administration and in order to enable it to make a proper distribution. Proof under S. 11 is ordinarily in a proceeding between the petitioning creditor and the insolvent, but proof under S. 49, which is proof proper in insolvency, is one to which objection can be taken by the Official Receiver or any of the creditors.

S. 34 defines debts provable under the Act, and includes all debts and demands except demands in the nature of unliquidated damages arising otherwise than by a contract or a breach of trust. S. 33 calls upon all persons alleging themselves to be creditors in respect of debts provable under the Act to tender proof of their respective debts by producing evidence of the amount and particulars thereof, and then the Court is directed by order to determine the persons who have proved themselves to be creditors, and the amount of their debts, so that it may be enabled to frame the all important schedule which is to form the basis of the distribution of the realized assets in dividends, subject, of course, to the provisions of Ss. 56, 62, 63 and 64. To no person whose name is not included in the schedule can a divi-

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dend be paid. S. 61 (5) provides that subject to the provisions of the Act, all debts entered in the schedule shall be paid rateably, and S. 64 relating to the final dividend makes it clear that the property of the insolvent is to be divided among the creditors entered in the schedule only, and without regard to the claims of any other persons. I feel no doubt whatever that proof of debt in insolvency means that kind of proof only which entitles a creditor to have his name entered in the schedule and none other. The opposite construction is in my judgment entirely opposed to the fundamental scheme of the Act. It follows that evidence given to make out that a petitioning creditor is qualified to apply to have the debtor adjudicated insolvent, is not proof in insolvency, and unless he tenders proof of his debt in the manner indicated by S. 49, his name cannot be entered in the schedule; and however true his debt may be, he cannot be allowed to come in for a dividend. Nor can he be permitted to claim in a suit for the recovery of the debt after annulment of the insolvency, an exclusion of the time during which the insolvency remained pending if he had not *proved* the debt in the sense explained above. The decision of this Court in *Ramalinga Iyer Firm* v. *Rayalu Ayyar Nagasami Iyer Firm*[1] proceeded on the special circumstances that a decree for the debt had been obtained, after adjudication against the insolvent and the Official Receiver, and the learned judges while holding that the debt must be taken to have been proved within S. 78 by the decree being obtained, expressly guarded themselves against being understood as laying down a general rule as regards the meaning of the word "proved".

It is to be observed that S. 78 was newly introduced into the present Act, in view of the Full Bench decision of this Court in *Lingayya* v. *Chinna Narayana*[2] that the general provisions of the Limitation Act could not be held applicable to proceedings under the old Act, *viz.*, III of 1907. In *Ramaswami Pillai* v. *Govindasami Naicker*[3] a Division Bench of this Court held that the provisions of S. 15 of the Limitation Act could not be invoked so as to secure an exclusion of the time during which an insolvency might be pending, inasmuch as an order of adjudication did not amount to an absolute injunction or stay, but

1. (1929) 58 M.L.J. 170: I.L.R. 53 Mad. 243.
2. (1917) 33 M.L.J. 566: I.L.R. 41 Mad. 169 (F.B.).
3. (1918) 36 M.L.J. 104: I.L.R. 42 Mad. 319.

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only made it necessary that leave of Court should be obtained before a suit could be filed. The position would be different if leave had been asked for and refused as in that case the creditor would be precluded from pursuing his remedy by suit against the debtor until the adjudication is annulled. It was to meet this situation, that S. 78 was inserted in the new Act. This section and the amended S. 29 of the Limitation Act have tended to remedy the hardship arising out of the Full Bench decision to which reference has been made.

The question which arises for consideration here is somewhat different from the question of the applicability of the general provisions of the Limitation Act to a special Act such as the Insolvency Act is, though it does appear to me that the intention behind S. 78 was not to extend the Limitation Act but rather to exclude it. In my judgment, S. 78 (2) was intended to incorporate the principle of S. 14 of the Limitation Act, so as to meet the situation which is likely to arise frequently in insolvencies. That principle operates to enable a person who was prosecuting with due diligence another proceeding founded upon the same cause of action, in another Court, to exclude the time during which he was so prosecuting that proceeding. The section withholds help to a person who has not shown due diligence, as where he obtains leave of Court under S. 28 (2) but omits to take action. Similarly it insists that the creditor should so far as the Act permits, prosecute his claim to recover the whole or portion of the debt, by tendering a proof under S. 49, by which he will be deemed to have proved the debt as held in *Lakshmi Bai* v. *Rukmaji Rao*[1]. Want of diligence, and failure to do what could be done to recover the debt in spite of the insolvency, that is to say, a failure to prove for the debt, would deprive a party of the benefit of the section.

From what has been said, the petition fails as neither S. 78 (2) of the Provincial Insolvency Act nor S. 14 of the Limitation Act can avail a party in respect of a debt provable but not proved under the Act. The Civil Revision Petition is accordingly dismissed with costs.

K.S. *Petition dismissed.*

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1 (1934) 67 M.L.J. 45: I.L.R. 57 Mad. 767.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

V.S.A.R.M. Annamalai Chettiar .. *Petitioner** (*Petitioner—Decree-holder*)

v.

Vellayan Chettiar and others .. *Respondents* (*Respondents—Decree-holders and judgment-debtor*).

Annamalai Chettiar *v.* Vellayan Chettiar.

Civil Procedure Code (V of 1908), S. 73—Official Receiver authorised to sell non-insolvent son's share also within three months—Sale after that time when Court had decided to withdraw the power—Receipt of amount by receiver and payment into the Court executing against son's share after confirmation of sale—Application for execution by other creditors between date of receipt of amount and date of deposit into Court—Right to rateable distribution.

The Official Receiver was authorised to sell in the father's insolvency the non-insolvent son's share also within three months and pay the money into execution Court. The sale did not take place within the time and pending proceedings to withdraw the sale from the Official Receiver and for sale through Court, the Official Receiver actually sold the property on 28th October, 1935, the price being received by the Official Receiver in two instalments on 29th October, 1935, and 7th November, 1935. Two other creditors filed execution petitions on 30th November, 1935, and 20th December, 1935, respectively. Sale deed was drawn up on 30th March, 1936, and son's share of sale proceeds paid into Court by the Official Receiver. The sale was finally ratified by the Court on 8th April, 1936.

Held, the date of the receipt of the assets by the Court must be the date on which the money was actually paid by the Official Receiver into the Court. The two creditors who filed the subsequent execution petitions will be entitled to share rateably in the sale proceeds.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Devakottai dated 14th April, 1936, and made in E. P. No. 381 of 1935 in O. S. No. 165 of 1934.

R. Rangaswami Aiyangar for Petitioner.

K. Rajah Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—This petition raises a question relating to rateable distribution which is not, so far as I am aware, covered by any precise authority. The petitioner, the first respondent and the second respondent, all had decrees against the third respondent and his father, who became an insolvent. The first respondent executed his decree on 15th October, 1934, and on

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*C.R.P. No. 197 of 1937. 29th March, 1940.

5th January, 1935, the Court ordered sale of the entire properties of the father and the son. This order was modified by a later order restricting the sale only to the second defendant's half share and after this order, the Official Receiver was impleaded and when he did not appear, the order was again revised directing that the entire properties should be sold. At this stage, the Official Receiver wrote to the Court pointing out that if he were permitted to sell the entire property as the agent of the Court and deposit into Court the share of the non-insolvent son, this procedure would be for the benefit of the attaching decree-holder. The Court on 13th February, 1935, passed an order permitting the Official Receiver to sell the entire property as desired by him and directing him to hold the sale within three months. The Official Receiver did not hold the sale within the time allowed and the executing Court was approached to withdraw the sale from the Official Receiver and sell through the Court. While correspondence between the Court and the Official Receiver was proceeding with reference to this proposal, the Official Receiver actually sold the property on 28th October, 1935, the price being received by the Official Receiver in two instalments on 29th October, 1935, and 7th November, 1935. It is common ground that on the latter date the execution petitions of the petitioner and the second respondent had not yet been filed. The petitioner's execution petition was filed on 30th November, 1935, and that of the second respondent on 20th December, 1935. After the Official Receiver's sale was concluded, there was further correspondence and no sale deed was drawn up until on 30th March, 1936, the Official Receiver paid the son's share of the sale proceeds into Court and on 8th April, 1936, the sale was finally ratified by the Court.

Quite clearly, if the date of the payment of the sale proceeds to the Official Receiver is the date of the receipt of the assets by the Court, for the purpose of S. 73 of the Civil Procedure Code, the petitioner and the second respondent have no right to share rateably in these assets. If, on the other hand, the date of the receipt is the date when the money was actually paid by the Official Receiver into Court, then both the petitioner and the second respondent are entitled to rateable distribution. The learned Subordinate Judge has taken the view that the date of the receipt of the assets is the

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date of the receipt by the Official Receiver acting as the agent of the Court. He rests his view largely on the decision in *Galstaun* v. *Woomes Chandra Bonnerjee*,[1] which can hardly be said to be a case exactly covering the facts with which we now have to deal. That was a case of the sale of movable property by the Court and with reference to movable property the rules prescribe that the price of each lot shall be paid at the time of the sale, presumably to the officer who holds the sale. The learned Judges, distinguishing a case relating to immovable property, point out that if the entire purchase money was paid by the purchasers into the hands of the auctioneers in one instalment, it was immaterial for the purpose of S. 73 whether the purchase money was actually paid into the treasury or into the hands of the person employed by the Court to hold the sale.

The present case, however, presents certain special features. At the time when the Official Receiver held this sale, he was not authorised to hold it. He had failed to hold it within the time allowed and when he actually held the sale, the Court had apparently decided to withdraw from him the power to hold the sale. Presumably he must be regarded as having been appointed in the first instance as the selling officer under O. 21, r. 65. But it does not appear that there was any regular proclamation by the Court, though the value for the purpose of the proclamation had been settled at an earlier stage. Assuming that the Official Receiver was the selling officer appointed by the Court under r. 65, his proceedings would necessarily be governed by the provisions of O. 21. In accordance with those provisions he would have authority to receive a deposit of 25 per cent. of the purchase price, but the balance would under r. 85 be payable into Court. Assuming that the lack of authority of the Official Receiver to sell at the time of the sale and the lack of regularity in the manner of the sale have been condoned by the subsequent ratification of the Court and by the absence of any objection to the irregularities of the procedure, it seems to me difficult to hold that the Official Receiver was the agent of the Court to receive this money when, in the case of sales of immovable property, the rules under which the Official Receiver was authorised contemplate only the power of the officer to receive 25 per cent. of the purchase price, the balance being payable into Court. When there is clearly no authority given

1. (1916) I.L.R. 44 Cal. 789.

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to the agent to receive the full amount of the purchase price, I find difficulty in holding that the receipt by the agent in contravention of the rules under which he should have been operating, can, by virtue of subsequent ratification of his irregular sale, be deemed to have been a receipt by the Court; and there is the further difficulty that the adoption of such a view would deprive the other decree-holders of their accrued rights of sharing in any assets which might be received by the Court after the date on which their execution petitions were filed. It cannot, in my opinion, be said that there had been, at the time when these two execution petitions were filed, any receipt of these sale proceeds by the Court. All that had then happened was an unauthorised and irregular sale by the Official Receiver and an unauthorised receipt by the Official Receiver of the proceeds of that sale. There was nothing in the hands of the Court resulting from this sale and there was at the time when these execution petitions were filed no subsisting authority to the Official Receiver to sell. We are not now concerned with the final validity of the sale. That has been accepted by the Court and no one has objected. But it does seem to me apparent that this subsequent ratification by the Court cannot transmute the unauthorised receipt of this money by the Official Receiver into a receipt by the Court. My attention has been drawn to numerous cases relating to the receipt of assets by Collectors executing decrees under the third schedule to the Civil Procedure Code. I do not propose to discuss those cases, for it seems to me that they depend upon the special statutory provisions which give to the Collector functions to some extent analogous to those of executing Courts and have no real bearing on the facts of the present case. It is clear that the Official Receiver in this case must have been either the officer appointed by the Court to sell under R. 65, or a party selling with the permission of the Court under R. 83, if the sale is to have any validity so far as the son's share was concerned. In the Court below it was not suggested that he acted under r. 83 and it seems to me unnecessary to consider the case from this aspect. . .

In the result therefore I am of opinion that the date of the receipt of the assets by the Court must be the date on which the money was actually paid by the Official Receiver into the Court. The petition is therefore allowed with costs here and

in the Court below. The petitioner and the second respondent will be entitled to share rateably in the proceeds of the sale of the third respondent's share in the property.

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K.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

Alapati Bulli Venkanna.. *Appellant* (8th Defendant)*

v.

Kantamani Ramanna and others .. *Respondents (Plaintiff and Defendants 1 to 7 and 10 to 14).*

Marshalling—Right of—Transfer of Property Act (IV of 1882), S. 56—Amending Act (XX of 1929)—Civil Procedure Code (V of 1908), O. 34, rr. 4 and 5—Whether to be relied upon in the circumstances.

Venkanna v. Ramanna.

After the amending Act of 1929 to the Transfer of Property Act, the right of marshalling in equity and in law is co-extensive and there is no justification to extend the legal right of marshalling by relying on the provisions of O. 34, rr. 4 and 5 in a way which cannot be justified by any well established principle.

Where the appellant, the purchaser of one of several items mortgaged in favour of the plaintiff in the suit, wanted that his property should be sold after exhausting all the properties covered not only by suit mortgages but also the properties covered by another mortgage,

Held, that the appellant's claim so far as the properties covered by another mortgage should be negatived. As regards the properties covered by suit mortgages the right of marshalling obviously existed under S 56 of the Transfer of Property Act, and in ordering sale of properties, the Court was bound to give protection to the appellant in such a way so as not to prejudice the rights of the mortgagee.

Appeal against the decree of the Court of the Subordinate Judge (Additional) of Ellore dated 10th October, 1935 and passed in O. S. No. 2 of 1933.

V. Suryanarayana for Appellant.

P. V. Vallabhacharyulu, D. Suryaprakasa Rao, Tatavarty Satyanarayana, C. Buvanika Row Chowdhary and *V. G. Row* for Respondents.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—This appeal raises a question of marshalling. The appellant is the purchaser of one of several items mortgaged in favour of the plaintiff in the suit, namely

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* Appeal No. 158 of 1936. 2nd May, 1939

Venkanna v. Ramanna.

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item 3, under the suit mortgage, Ex. A, dated 24th August, 1921. This item was purchased by the eighth defendant in 1925 for a sum of Rs. 13,000. The appellant wanted that his property, namely, item 3, should be sold last after exhausting all the properties covered not only by the suit mortgage, Ex. A, but also the suit mortgage Ex. B of April, 1926, and even the properties in another District namely, Vizag mortgaged under Ex. C in 1930. This claim was disallowed by the Court below and the eighth defendant appeals.

So far as the properties covered by Ex. C are concerned, the appellant's property, item 3 of A Schedule, is not included in it, and it is conceded before us that the appellant will not be entitled under S. 56 of the Transfer of Property Act to claim the right of marshalling as against Ex. C properties. This concession was obviously unavoidable because the words of the section themselves are very clear that the right of marshalling can be claimed only where "the owner of two or more properties mortgages them to one person and then sells one or more of the properties to another person". So far as the Ex. C properties are concerned, it is obvious that this condition is not satisfied. It is satisfied only so far as Ex. A properties are concerned. It follows therefore that the appellant is not entitled to ask that Ex. C properties should be sold before the item in which he has an interest, namely, item 3 of A Schedule, is sold.

Some argument was addressed to us with a view to make out a case apart from S. 56 as if there was some other rule of law or equity, which entitled the appellant to marshal as against Ex. C properties even when the section defining the right of marshalling does not recognise such a right. He relied on the words "sufficient part" found in O. 34, rr. 4 and 5, Code of Civil Procedure, which give the Court the power to order the sale of the whole of the mortgaged property or a sufficient part thereof, as conferring upon the Court a power, apart from rules of law relating to marshalling contained in the Transfer of Property Act, to give relief in respect of marshalling to a wider extent than is recognised by the substantive law. Even assuming that this contention is right, without deciding it, it does not follow that the Court would be justified in using that power unless some recognised principle of law or equity justified the exercise of the power in favour of the appellant. It is not shown that there is any special equity in favour of the appellant

so far as the Ex. C Schedule properties are concerned. The resort made to the provisions of O. 34, rr. 4 and 5 in certain decisions that were quoted to us was necessitated by the fact that those cases had to be decided under the old Act, before it was amended in 1929, which did not in so many words declare that the right of marshalling to the same extent as the doctrine of equity did, and it was therefore open to the Court in exercising its powers under the provisions of O. 34, rr. 4 and 5 to exercise its discretionary power so as to give effect to the full right of marshalling as recognised by equity.

At present the position is different in the sense that the right of marshalling in equity and in law is co-extensive and there is no justification, in our opinion, to extend the legal rights of marshalling by relying on the provisions of O. 34, rr. 4 and 5 in a way which cannot be justified by any well established principle.

The appellant's claim, therefore, so far as Ex. C properties are concerned, must be negatived. As regards the other properties covered by Ex. A the right of marshalling obviously exists under S. 56 of the Transfer of Property Act, and in ordering these properties to be sold in execution of the mortgage decree, the Court is bound to give protection to the appellant in such a way so as not to prejudice the rights of the mortgagee. It follows from this principle that the properties covered by Ex. A have to be sold in the following order, item one of course not being liable to sale as found by the Court below as it has been exonerated from the mortgage. The order in which the items are to be sold will be as follows: item 4, item 2, items 5 to 7 subject to the prior mortgage in favour of Alapati Gurayya, item 3 and item 8. To this extent the decree of the Court below will be modified. In the circumstances, the appellant will bear his own costs and pay half the costs of the plaintiff-respondent in the appeal.

K. C. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Nagi Reddi .. *Appellant** (*1st Defendant*)

v.

Nanjundappa .. *Respondent* (*Plaintiff*).

Nagi Reddi *v.* Nanjundappa

Illatom *son-in-law—Arrangement—Agreement to be inferred in the absence of specific evidence.*

It has never been held that a mere arrangement to take a boy as an *illatom* son-in-law followed by living in the prospective father-in-law's household, but not followed by marriage to the proposed bride, will complete an *illatom* affiliation to the family.

But where in the absence of specific evidence the existing evidence postulated the assumption that at the time when the plaintiff was a major, the deceased man authorised the completion of an arrangement for *illatom* affiliation by the marriage of the plaintiff to his daughter and he was thereafter treated as an *illatom* son-in-law, it must be inferred that there was an agreement on the basis of which the *illatom* affiliation was carried out.

Appeal against the decree of the Court of the Subordinate Judge of Salem dated 1st February, 1935, and made in A. S. No. 148 of 1934 (A. S. No. 103 of 1934, District Court, Salem), preferred against the decree of the Court of the District Munsif of Krishnagiri dated 31st January, 1934, and made in O. S. No. 121 of 1931.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellant.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit in which the plaintiff claimed properties on the basis of an alleged *illatom* affiliation.

The plaintiff married the daughter of one Konda Reddi who died about the year 1909. The facts found are that Konda Reddi at a time when he had no children took the plaintiff into his family apparently with the idea of a regular adoption. Subsequently there were born to Konda Reddi first a son, then a daughter and then another son. After the birth of the son it is found that Konda Reddi, no longer being able to adopt the plaintiff, formed the idea that, in due course, he would marry his daughter to the plaintiff and take the plaintiff as an *illatom* son-in-law. On this understanding the plaintiff continued to live in the family. But an epidemic of plague

* Second Appeal No. 560 of 1935. 19th April, 1939.

intervened, the eldest son being the first victim, followed by Konda Reddi himself about a week later. It is found as a fact that on his deathbed Konda Reddi instructed his wife to complete the *illatom* affiliation by marrying the daughter to the plaintiff. It would appear that the plaintiff was a major at the time of Konda Reddi's death. After his death the marriage of the plaintiff to Konda Reddi's daughter was duly carried out by the widow and it is found as a fact by the Courts below that thereafter the plaintiff was treated as the *illatom* son-in-law of the deceased Konda Reddi, that he lived in the family and managed the properties for his mother-in-law. It is not open in Second Appeal to attack the findings of fact on the essential questions of the authorisation by Konda Reddi to his wife to complete the application and of the subsequent marriage and the status recognised in favour of the plaintiff as an *illatom* son-in-law. It is, however, contended that there is no finding nor proof of such an agreement as is necessary to form the basis of an *illatom* adoption.

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The case has certain peculiarities. In the first place it comes from the Salem District which is not one of the Districts in which the *illatom* custom is widely recognised. Another peculiarity is that, according to the Subordinate Judge, the parties belong to the *Kammala* caste. But I am constrained to conclude that this must be a mistake due to the unfamiliarity of the learned Judge with the Telugu caste name, for the learned Judge, after stating that the parties are *Kammala Reddis*, states that this is one of the castes in respect of which Mayne's Hindu Law recognises that the *illatom* practice prevails. Actually the learned author recognises the existence of the custom in the Kamma and Reddi castes, not in the Kammala caste which is quite a different community and one in which, so far as I am aware, it has never been suggested that this practice peculiar to the various castes which call themselves Reddis can apply. The *Kammala* caste is essentially a Tamil caste of artisans, not to be confused with the Telugu *Kamma* caste, which not infrequently adopts the title of Reddi and has strong affinities with the numerous *Kapu* castes, the members of which are normally known as Reddis. But I am unable to find any basis in the record for the Subordinate Judge's description of this community as Kammala Reddi. The witnesses describe themselves as Reddis simply. Presumably, they must

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be Kamma Reddis wrongly described by the Subordinate Judge as Kammala Reddis.

It was not disputed in the Courts below that the community to which the parties belonged was one which recognises the custom of *illatom* affiliation. I do not think that the Subordinate Judge is quite right in saying that the validity of the particular affiliation alleged was not denied; for it is in fact put in issue. The incidents of the very widespread practice of illatom affiliation have not been completely established by judicial decisions and it was recognised by a Bench of this Court in *Subba Rao* v. *Mahalakshmamma*[1], that these incidents should ordinarily be settled by evidence in the particular case. There are, however, certain incidents of the custom which have been established by decisions. It is well recognised that an *illatom* affiliation is a creature of agreement. *Narayadu* v. *Venkamma*[2]. But I do not think that this means that in every case of an *illatom* affiliation there must be a detailed contract embodying all the incidents of the arrangement in the particular case. Normally there would be an agreement between the father of the boy, if he was a minor and the prospective father-in-law or, if the prospective son-in-law was a major, between the son-in-law himself and the prospective father-in-law, that the proposed *illatom* son-in-law should be taken into the family by his prospective father-in-law with a view to his marriage with a daughter of the house and the conferment upon him of the *illatom* status, with its customary incidents. These customary incidents being well known would not ordinarily be the subject of specific agreement. It is settled by the Privy Council's decision reported in *Krishnamma* v. *Venkatasubbayya*[3], that the practice of *illatom* affiliation is frequently followed even when the family into which the son-in-law had been taken has a natural born son living. There is also authority in *Venkayalapatti Venkatachalam* v. *Negaudla Butchanna*[4], for the proposition that, when a boy has been taken into a family on the understanding that he would be married to a daughter and given the status of an *illatom* son-in-law, the arrangement may be completed by the solemnisation of the

1. (1930) 59 M.L.J. 558: I.L.R. 54 Mad. 27.
2. (1890) 22 M.L.J. 265.
3. (1919) 37 M.L.J. 1: L.R. 46 I.A. 168: I.L.R. 42 Mad. 805 (P.C.).
4. (1911) 11 I.C. 25.

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marriage even after the death of the prospective father-in-law. So far as I am aware, it has never been held that a mere arrangement to take a boy as an *illatom* son-in-law, followed by living in the prospective father-in-law's household, but not followed by marriage to the proposed bride, will complete an *illatom* affiliation. In the present case it has been found that the plaintiff was taken into the household of Konda Reddi originally with a view to a regular adoption but, after the birth of a son to Konda Reddi, he continued there under a proposal that he should be married to the daughter and treated as an *illatom* son-in-law. It has been found that on his death-bed Konda Reddi asked his wife to complete this arrangement by marrying the daughter to the plaintiff, giving him a share in the property as an *illatom* son-in-law. It has also been found that the arrangement was completed and the marriage performed and that the plaintiff did live in his mother-in-law's household as an *illatom* son-in-law. These findings of fact are in my opinion sufficient to warrant a legal inference that the plaintiff was an *illatom* son-in-law. It is true that there is no specific evidence of any actual agreement for an *illatom* affiliation but the whole of the evidence postulates the assumption that, at the time when the plaintiff was a major, Konda Reddi authorised the completion of an arrangement for *illatom* affiliation by the marriage of the plaintiff to his daughter. The plaintiff performed his part by marrying the daughter and was thereafter treated as an *illatom* son-in-law. From these facts it must, I think, be inferred that there was an agreement on the basis of which the *illatom* affiliation was carried out.

In this view, therefore, I dismiss the appeal with costs.

Leave refused.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT—MR. JUSTICE LAKSHMANA RAO.

Manonmani Ammal and another .. *Petitioners** (*Accused 1 and 2*).

Manonmani Ammal, *In re.*

Madras Suppression of Immoral Traffic Act (V of 1930), S. 5 (1) and S. 8-A (1)—Sister of a person who was lessee of a brothel—Whether punishable—Conviction not sustainable.

* Crl. R. C. No. 956 of 1938 (Crl. R. P. No. 906 of 1938). 21st July, 1939.

Manonmani Ammal, *In re.*

Where the first petitioner was not found jointly keeping or managing or assisting the second petitioner in the management of a brothel,

Held, she was not therefore to be convicted under S. 5 (1) of the Suppression of Immoral Traffic Act, as she could not be said to have been living on the earnings of the prostitution of another person. Her conviction under S. 8-A (1) of the Act was also unsustainable.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Third Presidency Magistrate of the Court of the Presidency Magistrates, Egmore, Madras, dated 7th December, 1938 and passed in C. C. No. 1169 of 1938.

V. T. Rangaswami Aiyangar and *A. B. Viswanathan* for Petitioners.

K. V. Rameseshan for *The Crown Prosecutor* for the Crown.

The Court made the following

ORDER.—There is no ground for dissent from the conclusion of the Magisitrate that the house in question was a brothel and it is clear from the evidence of P.W. 2 that the second petitioner the lessee was keeping the brothel and living on the prostitution of the women found there on the night of the raid. He would therefore be guilty under Ss. 5 (1) and 8-A (1) of the Suppression of Immoral Traffic Act but the first petitioner who is his sister was being used for prostitution and there is no evidence that she was jointly keeping or managing or acting or assisting in the management of the brothel. She cannot therefore be convicted under S. 5 (1) of the Act and as rightly conceded it cannot be said that she was living on the earnings of the prostitution of another person. Her conviction under S. 8-A (1) of the Act is also unsustainable and she is entitled to an acquittal. The conviction and sentence of the first petitioner are therefore set aside and she is acquitted.

The conviction of the second petitioner is confirmed but this is his first offence, and the sentence is rather excessive. The sentence is therefore reduced to rigorous imprisonment for three months under each section to run concurrently, and otherwise his petition is dismissed.

K. C. *Order modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

Kataru Chinna Papiah .. *Prisoner** (*Accused*).

Chinna Papiah, *In re.*

Evidence Act (I of 1872), S. 24—Statement of accused made to Superintendent of Police—Continuous questioning by Police Officer before obtaining statement—Production of material object—Admissibility of statement in evidence.

The Police may, while endeavouring to discover the author of a crime, make enquiries of, or put questions to, any person from whom they think they can obtain useful information. But when once an accused person has been arrested, while they may and indeed should, listen to any statement which he may voluntarily make, they are strictly forbidden to interrogate him or press him to make a statement.

Held, that a statement made by the accused to the Superintendent of Police after six hours' questioning by the latter could not be taken to be a voluntary statement, and that the same should be excluded from consideration by reason of S. 24 of the Evidence Act.

Held however, that so much of the statement made to the Police Officer as related to the production of a material object by the accused could be looked into.

Madras Police Executive Orders Vol. I, R. 303, referred to.

Trial referred by the Court of Session of the Cuddapah Division for confirmation of the sentence of death passed upon the said Prisoner in Case No. 19 of the Calendar for 1939, on 24th July, 1939, and appeal by the said prisoner against the said sentence.

K. S. Jayarama Aiyar and *C. K. Venkatanarasimhan* for Appellant.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Judgment of the Court was delivered by

Burn, J.

Burn, J.—The appellant has been convicted by the learned Sessions Judge of Cuddapah of three offences of murder and has been sentenced to death.

This is a somewhat unusual case; the appellant single-handed is supposed to have killed a Forest Guard and a Forest Watcher and another man. The prosecution case was that the appellant and a little boy examined as P. W. 2 trespassed into the Forest Reserve near Thimmayagaripalli before daylight on the 16th March, 1939, and that they cut wood in the forest and were making their way to the village when they were caught by the Forest Guard, Kesavalu, Forest

* R. T. No. 91 of 1939. (Crl. A. No. 411 of 1939). 25th September, 1939.

Chinna Papiah, *In re.*

Burn, J.

Watcher Somayya and another man Penchulagadu a relation of Kesavalu. These three are supposed to have stopped the appellant and P. W. 2 and the appellant is supposed to have killed them one after the other: Kesavalu first, Penchulagadu second and Somayya third. Kesavalu and Penchulagadu are supposed to have been unarmed but Somayya was armed with a bill-hook which by the looks of it is quite as efficient a weapon as M. O. 5 which is said to be the appellant's weapon. The appellant escaped with nothing worse than a slight cut on his left forearm.

The prosecution story was spoken to in the Court of the committing magistrate by the little boy P. W. 2 who is a child of 13 and he described how on the morning of the 16th March, the appellant took him to cut fuel and how on the way back they were intercepted and the appellant cut all the three men. His deposition before the sub-Magistrate was filed in the Sessions Court as Ex. G. The learned Sessions Judge has not expressly stated so, but it is clear that he meant to do this under the power conferred upon him by S. 288, Code of Criminal Procedure because the boy in the Sessions Court stated that he knew nothing whatever about the matter and obstinately refused to answer any questions except " I do not know". P. W. 2 is supposed to have been the only eye-witness and the only other item of evidence of any importance against the appellant is that on the morning of the 19th of March, he made a statement to the Superintendent of Police which led to the discovery of a bill-hook (M. O. 5) which the appellant said was the weapon used by him to kill all the three deceased. The appellant thereupon is said to have taken the Police and certain respectable persons to a place in the forest 25 or 30 yards from the place where the corpses were found and there to have produced from under a bush this *aruval* (M.O. 5). Supposing for the moment that the evidence is admissible under S. 27 of the Evidence Act, there is no corroboration of the truth of the statements made by the appellant because the *aruval* when sent to the Chemical Examiner was not found to be stained with blood. Mr. Jayarama Aiyar who has appeared for the appellant in this Court has contended that evidence regarding the statements made by the appellant before the production of (M. O. 5) ought not to have been admitted. We think that this contention is well-founded. The appellant is said to have made a statement to the Superin-

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tendent of Police P. W. 8 on the morning of the 19th March, but the Superintendent of Police was obliged to admit that for four hours on the night before, that is, from 7-15 to 11-15 and for two hours on the morning of the 19th he was questioning the appellant. This was a flagrant violation of R. 303 in Vol. I of the Madras Police Executive Orders. It is there laid down that:-

> "The practice of resorting to persuasion, trickery or oppression to induce any accused person to confess is prohibited. It is right that the Police, when they are endeavouring to discover the author of a Crime, should make inquiries of, or put questions to, any person from whom they think they can obtain useful information. But when once an accused person has been arrested, while they may, and indeed should, listen to any statement which he may voluntarily make, they are strictly forbidden to interrogate him or press him to make a statement."

It would be absurd to suppose that the statement made by the appellant to the Superintendent of Police after six hours' questioning was a voluntary statement. The learned Public Prosecutor has raised the question whether even if the statements were not voluntary, the evidence regarding the production of the *aruval* would nevertheless be inadmissible. We think that there is no difficulty about admitting the evidence in so far as the production of the *aruval* alone is concerned, but we agree with Mr. Jayarama Aiyar that evidence regarding the statement made by the appellant in connection with it could not be admitted; it would be ruled out by S. 24 of the Evidence Act.

The case is wholly unsatisfactory. It is not at all clear how the Superintendent of Police came into contact with P. W. 2 and consequently the appellant. The evidence of the Police officers on this point is discrepant. There were engaged in the case the sub-Inspector of Police, the Circle Inspector P. W. 18 and the District Superintendent of Police P. W. 8, not to mention the Head Constable P. W. 16 who held an inquest for four hours on the 17th March, at which he examined only one witness P. W. 7 who could give nothing but hearsay evidence about the discovery of the corpses. Now the boy P. W. 2 is supposed to have told what he had seen to P. W. 10 on the morning of the 17th March, but P. W. 10 did not disclose anything of what he had learnt at the inquest held on that day. The sub-Inspector says that P. W. 10 was not examined by him or by the Circle Inspector before the District Superintendent of Police came, which was on the evening of the

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18th March. The Circle Inspector also says that he did not examine P. W. 10 but he says that the Superintendent of Police examined him in his presence on the 18th March, before P. W. 2 was examined. P. W. 10 however says that he was examined by both the Inspector and the sub-Inspector on the morning of the day on which the District Superintendent arrived, that is, the 18th. The District Superintendent does not say anything about having examined P. W. 10 and it does not appear from his evidence how he came into contact with P.W. 2.

In so far as the evidence of P. W. 2 is concerned, it is clear that his deposition in the Magistrate's Court could be used as substantive evidence under S. 288, Criminal Procedure Code, if the learned Sessions Judge had recorded his opinion that the witness was speaking the truth before the Committing Magistrate and had resorted to falsehood before him. But it is clear that the evidence of such a witness as this is not to be safely relied upon in the absence of corroboration. Now, so far as the statement made by the appellant to the Superintendent of Police is concerned, it is clear that it is not consistent with the evidence given by the boy P. W. 2. According to P. W. 2 when he and the appellant were coming away from the forest, they were first stopped by Penchulagadu whom the witness calls Mokatigadu. He says that it was Penchulagadu who first caught hold of the appellant. But the appellant when he was describing the occurrence to the Superintendent of Police said that it was Kesavalu who caught hold of the bundle of fuel which he was carrying on his head. It is singular also that the appellant spoke to the Superintendent of Police about a bundle of fuel whereas P. W. 2 said that he and the appellant had cut logs of wood. The fuel which the appellant and P. W. 2 are supposed to have cut in the forest and which must have been dropped at the place where the murders took place was not apparently found by the police and has not been exhibited in the case. Nor is there any evidence regarding the trees from which the fuel was supposed to have been cut.

The evidence of the doctor who made the post mortem examination of the bodies is quite inconsistent with the story told by P. W. 2 in the lower Court. The doctor found nothing but clean cut wounds on all the bodies; P. W. 2 says that the appellant used the back of the aruval against all the three men.

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The back of the aruval is nearly a quarter of an inch thick and could not produce clean cut wounds.

We find the evidence in this case wholly insufficient to sustain the conviction of the appellant. We therefore set aside the conviction and the sentence of death and direct that the appellant be set at liberty forthwith.

B. V. V. *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE MOCKETT.

Annamalai Mudali .. *Prisoner* (Accused).*

Annamalai Mudali, *In re.*

Criminal Procedure Code (V of 1898), S. 342—Accused directly addressed points for answers by Sessions Judge—Opportunity for explanation given—Omission in putting questions whether could cause failure of justice—Other circumstances in evidence favouring inference of murder—Conviction not to be set aside without grounds for suspecting failure of justice.

It is clear that when an accused in answer to a general question or even one or two questions gives a reply or replies which show that he is well aware of all the circumstances appearing in evidence against him and their implications and attempts to explain them, the Sessions Judge may be going beyond his province if he questions him further in detail. It is not possible to lay down a more general rule than that it is the duty of the Court to be satisfied either by his statements or his answers to questions or both that the accused explains or has an opportunity to explain circumstances from which hostile inferences may be drawn against him.

Where a person was accused of murdering his wife and the evidence of the prosecution witnesses was to the effect that the accused took his wife away from the house on the morning of the murder, that he took her by train to a place and afterwards was seen with her near the time of sunset on the same day and at the place where her dead body was found next morning and it was proved that the accused on being questioned about his dead wife's jewels produced M. Os. which she was wearing according to the evidence, and the only possible inference that could be drawn was that the accused was responsible for the murder of his wife,

Held, that in the absence of any suggestion from the accused's counsel that the omission of the Sessions Judge to put every point to the accused in the form of questions had led to a failure of justice, the conviction of the accused based on evidence before the assessors and the Sessions Judge could not be set aside. No omission to comply strictly with S. 342, Criminal Procedure Code, can render a conviction liable to be set aside, unless in fact it has occasioned failure of justice.

Dwarakanath Varma v. *The King-Emperor,* (1933) 64 M.L.J. 466 (P.C.) and In re *Sangama Naicker,* (1936) 71 M.L.J. 138: I.L.R. 59 Mad. 622, referred to and distinguished.

Trial referred by the Court of Session of the South Arcot Division for confirmation of the sentence of death passed upon

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* R. T. No. 140 of 1939. 15th December, 1939.

Annamalai Mudali, *In re.*

the said prisoner in Case No. 34 of the Calendar for 1939 on 9th October, 1939.

Nugent Grant for *K. S. Jayarama Aiyar* and *G. Gopalaswami* for the Accused.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

The Court delivered the following

JUDGMENT.—The accused, Annamalai Mudali, has been convicted of murder by the learned Sessions Judge of South Arcot, and has been sentenced to death. The case against him was that he murdered his wife Danabagiam on the 12th February, 1939.

With the exception of an extra judicial confession which the accused is said to have made to his father-in law's brother (P. W. 20) the evidence against the accused was entirely circumstantial. The body of Dhanabagiam (wife of the accused) was found on the morning of the 13th February, in a field within the limits of the village of Eriyur in Kallakurichi Taluk. It was about one mile from the railway station of Pukkiravari on the Salem Virdhachalam line. Information was given at first to the Village Munsif of Ulagianallur who was dead before the trial took place. He apparently discovered that the corpse was not lying within the limits of the village, and therefore he sent a yadast (Ex. F) to P.W. 19, the V.M. of Eriyur. P.W. 19 received Ex. F at about 2-30 P.M. and sent reports Exs. G and G-1 to the Police at Varanjaram and the Sub-Magistrate of Kallakurichi. The Inspector of Police (P. W. 22) heard of this case when he went to the police station at Varanjaram at 8 P.M. The Inspector went to Kallakurichi the same night and next morning proceeded partly by road and partly by rail to Pukkiravari, taking with him the Assistant Surgeon from the Hospital at Kallakurichi and also a photographer. The Inspector reached Pukkiravari at 9-45 and proceeded on foot to the place where the body lay one mile south of the railway station. He held an inquest during the forenoon and it was concluded by 2 P.M. The body was photographed, and then the Assistant Surgeon made the post-mortem examination. This disclosed that the woman had been strangled to death. There is no dispute about the manner of her death, and the case is clearly one of murder.

At the inquest it was not known who the deceased was. Enquiries were set on foot and the accused was arrested at Sathanur

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at 2-30 A.M. on the 18th February. After he had been arrested he made a statement to the police and produced from the house of one Periasami Mudali where he was staying, three jewels (M. Os. 1, 2 and 4) which according to the prosecution belonged to the deceased Dhanabhagiam, and which she was wearing when she was last seen alive.

A large number of witnesses were examined to prove that the accused was with his wife on the 12th February, from about morning meal time until shortly before sunset. P. W. 4 who was a farm servant in the house of the father of the accused at Naduvalur, said that on the morning of the 12th February, the accused took his wife away from his father's house. Naduvalur is to the south of the Salem-Vridhachalam railway line and according to the prosecution the accused took his wife to Kattukottai the nearest railway station. He was seen at the station at 1 P.M. on the 12th February, in company with a woman. The station-master (P. W. 5) said that the accused bought two tickets for himself and the woman from Kattukottai to Pukkiravari, and got into the 2-30 P.M. train with the woman. That he got into the train was spoken to by 3 other witnesses P. Ws. 6, 7 and 8, and they also said that at Pukkiravari the accused and the woman alighted. This was the evidence also of the station-master of Pukkirivari P. W. 9 and the pointsman (P. W. 10). P. W. 11 is a man who keeps a little shop for light refreshments just outside the railway station at Pukkiravari. He said that on the afternoon of the 12th February, the accused and a woman passed near his shop, and that the woman sat down under a tamarind tree quite close to his house while the accused went into the toddy shop also close by. P.W. 12 was a witness who said that he saw the accused in the toddy shop. Finally P. W. 13 a man of Ulagianallur said that at about 2 naligais before sunset he saw the accused and a woman sitting close to each other very near to the place where the body of Dhanabagiam was found strangled next morning. The evidence of P. Ws. 9, 10, 11 and 13 is important because they were all examined at the inquest on the 14th February. They saw the body of Dhanabagiam and they say that that was the body of the woman with whom they had seen the accused on the afternoon of the 12th.

Finally there was the evidence of P. W. 20 a brother of Dhanabagiam's father. He said that on Friday the 17th

February when he met the accused at 11 A.M. the accused made a statement as follows:

"I got on the train with her at Kattukottai on Sunday. We got down at Pukkirivari. I took her beyond the river and told her to go to her aunt's house at Ammanathur, which is half a mile from Ulagiannallur. I went back on Wednesday. There was a crowd there and a corpse. I got afraid and ran away. On Wednesday night I came to Mangalur. On Thursday morning with a companion I went to Ariyalur and caught a bus and went to Athur. I took a bullock cart that night at Athur and have now come here to Sathanur."

P.W. 20 then says that he confronted the accused with some information which he had received from his own sister, and accused him of having murdered his wife, and he says the accused then confessed in these words:—

"It is true. I did it. If you are going to inform the police, I and my son will go now and die".

P.W. 20 says that he was moved by this appeal and this threat, and that he said that he would not give information to the authorities about the murder. Later on he alleges that he did go to the police lines at Perambalur and told a constable about it, but the constable directed him to make a complaint at the Chinnasalem police station. Curiously enough, the Inspector of Police says that he did not attempt to check this statement of P. W. 20. P.W. 20 however addressed a letter to the police at Chinnasalem which he says is Ex. K. Ex. K-1 is the envelope in which it was sent. He says he posted this letter on the morning of the 18th in the railway train at Ariyalur. His statement appears to be to some extent confirmed by the fact that the postal cover bears a stamp indicating that it was held back because late-fee had not been paid.

All this evidence has been criticised on behalf of the appellant, but after carefully examining it, we find ourselves in agreement with the Assessors and the learned Sessions Judge that it must be accepted. The story of P.W. 4 was confirmed by an item of circumstantial evidence. He said that when the accused took his wife away from his mother's house, the mother of the Accused told him (P.W. 4) to run after them with their child aged 4, and a bundle of saries which Dhanabagiam has left behind. P.W. 4 says that he did so and caught up with the accused and his wife and gave them the mother's message. Thereupon he says that Dhanabagiam told her husband to tear up and burn these old clothes, and the accused accordingly set

fire to the clothes with a match and burnt them. He says that they also told him to take the little boy back and he did so. In confirmation of this story the sub-inspector of Athur (P. W. 18) says that P.W. 4 took him to the place where he said the clothes had been burnt, and the sub-inspector picked up there some ashes (M. O. 10) which are clearly the ashes of burnt clothing. The evidence of the witnesses who say that they saw the accused on the railway between Kattukottai and Pukkaravari and from the railway station at Pukkaravari to the place where the body was found, it was suggested was not evidence that the Court could rely upon. The witnesses admitted that they had never seen the accused before, and the suggestion was that it would be very unsafe in such circumstances to rely upon their identification of him. Reference was made to the *case of Adolph Beck.* It is however to be borne in mind that all these witnesses picked out the accused at identification parades held by the Sub-Magistrate at Kallakurichi on the 19th February, and subsequent dates. It has not been suggested that any of them has any motive to give false evidence against the accused.

Mr. Nugent Grant in criticising the evidence of P. W. 4 laid special stress upon that part of his evidence in which he describes the jewels of the deceased woman. The witness said:

"The sari in Court (M. O. 8) is the one which Dhanabagiam was wearing when she left home. She wore gold bangles on her hand (M. O. 4) silver bangles on her feet (M. O. 3), an adigai or saradu (M. O. 2). These are the jewels now in Court. I did not notice M. O. 1 the ruby ear ornaments nor the nose screw (M. O. 5)".

From the difference in tense which the learned Judge has used in referring to wearing of the saree and the wearing of the jewels, learned counsel wishes us to say that this boy was not testifying that Dhanabagiam on the morning of the 12th February, was wearing the gold bangles (M. O. 4) or the saradu (M.O. 2) which her husband produced from Periasami Mudali's cowshed on the 18th February. We do not think there is any justification for this distinction. We think the boy in his reference to the jewels was referring as far as he could remember to the jewels which she was wearing at that time. P. Ws. 9, 10, 11 and 13 were examined, as already mentioned, at the inquest; P.Ws. 6, 7 and 8 were examined by the Inspector on the 15th February, and P.Ws. 7 and 8 identified the accused on the 19th February, the day after he had been arrested. If

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this evidence of identification stood alone, it might be difficult to rely upon it but it does not stand alone. Taken in conjunction with the other evidence we think that it is reliable evidence.

Learned Counsel for the accused is not able to contend that if this evidence is accepted as true the conviction of the accused is wrong. There was some evidence with regard to motive but we do not think it necessary to discuss it any further than to say that Dhanabagiam was not looked upon with favour by the accused's mother, and that her presence in the family as his wife was inconvenient. That, we think, is clearly established, to say the least. But evidence regarding the motive is not important. When it is shown that the accused took his wife away from his home on the morning of the 12th February, that he took her by train from Kattukottai to Pukkiravari and afterwards was seen with her near the time of sunset on the 12th at the place where her strangled body was found next morning, when it is proved that the accused on being questioned about his dead wife's jewels produced M. Os. 1, 2 and 4 which Dhanabagiam was wearing according to the evidence of P. W. 4 when she left Naduvalur with the accused, the only possible inference that can be drawn is that the accused is responsible for the murder of his wife.

Learned Counsel has addressed to us a legal argument suggesting that the case must be sent back for re-trial. Learned Counsel points out that practically the whole of the evidence is circumstantial and that the learned Sessions Judge did not explicity put to the accused, when questioning him under S. 342, Criminal Procedure Code, all the items of evidence leading up to the inference that he murdered his wife, and did not ask him to explain them. Learned Counsel has drawn our attention to the case of *In re Sangama Naicker*[1], and the Privy Council case of *Dwarakanath Varma* v. *The King-Emperor.*[2] In the case in *In re Sangama Naicker*[1], reference was made to three other cases in which re-trial was ordered because the Sessions Judge had not put to the accused under S. 342, Criminal Procedure Code, the items of circumstantial evidence from which he had drawn the inference that the accused was guilty of murder. We think it is necessary to say that their

1. (1936) 71 M.L.J. 138: I.L.R. 59 Mad. 622.
2. (1933) 64 M.L.J. 466 (P.C.).

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Lordships of the Privy Council in the case of *Dwarakanath Varma* v. *The King-Emperor*[1], were dealing with very exceptional facts. The passage in the judgment of Lord Atkin in which S. 342, Criminal Procedure Code, is referred to is as follows:—

"The learned Chief Justice told the jury that the absence of blood in the body cavity was a vital point. If so, it is plain that under S. 342 of the Code it was the duty of the examining judge to call the accused's attention to this point and ask for an explanation."

There was no reference in the statement of the accused to the absence of blood in the abdominal cavity and Lord Atkin was pointing out that S. 342 of the Code ought to be observed not only in the letter but also in the spirit. It is clearly very unfair to draw an inference of guilt from a fact which an accused person has not had an opportunity of explaining. There is however nothing in the judgment of their Lordships of the Privy Council to indicate that every failure to comply strictly with the letter of S. 342 renders the conviction of an accused person illegal. S. 537, Criminal Procedure Code, has a bearing upon this point. No omission to comply strictly with S. 342 can render a conviction liable to be set aside, unless it has in fact occasioned a failure of justice. In the present case learned Counsel for the appellant has not attempted to suggest that the omission of the learned Sessions Judge to put every point to the accused in the form of questions, has led in the case to the failure of justice. He has not for instance suggested that the accused, if he had been questioned specifically on every point, would have been able to offer a satisfactory explanation, and the reason why learned Counsel has not been able to make any suggestion of this kind is found in the statements made by the accused in answer to questions put to him by the learned Sessions Judge. In the Magistrate's Court he was simply asked the question "You now heard it said that you murdered your wife Dhanabagiam. What do you say?" and his reply was "I have not committed any crime". When asked by the learned Sessions Judge "Have you anything further to say?", he replied with a very long and detailed statement in which he denied the facts alleged on behalf of the prosecution that were supposed to show his motive for murdering Dhanabagiam. With regard to the jewels he said that when the police asked him for his wife's jewels, he thought that they were referring

2. (1933) 64 M.L.J. 466 (P.C.).

Annamalai Mudali, *In re.*

to jewels belonging to a second wife from whom he had been divorced. He went on to say:

"Kolandavelu (P. W. 20) is enjoying my father-in-law's property. I asked him for a share on behalf of my wife. Hence his enmity to me. I did not meet him nor did he come to Sathanur. I did not tell him anything."

He continues:

"I did not see Doraisami Padayachi (P. W. 4). On my father's instigation he is giving evidence against me. I was in Sathanur on Sunday. I did not come here. I did not burn the saree"

The learned Sessions Judge then questioned him about Ex. J., a letter which he had written to P. W. 20 and which the learned Judge thought indicated that he was displeased with or had some grievance against his wife. He answered that by saying that he had no dissatisfaction with his wife. The learned Judge then questioned him about the jewels of his first wife (M. Os. 1, 2 and 4) and he again said:

"I thought that they were referring to my second wife's jewels, and informed them it was with Periasami Mudali. I did not produce it myself. Periasami Mudali produced it."

And finally when the learned Judge asked him "do you want to say anything more?," the accused said:

"The witnesses had opportunities of observing me at Kallakurichi jail. My younger brother resembles me much. Possibly they saw him and are mistaking me for him."

It is clear therefore that either in answer to the general question put by the learned Judge, or in answer to specific questions, the accused has dealt in his statement with all the points appearing in evidence against him and has offered such explanation as he had to offer. This case therefore has no resemblance to the case of *Dwarakanath Varma* v. *King-Emperor*[1] or the case reported in In re *Sangama Naicker*[2] (the record in which we have examined and which reveals that the accused gave no explanation of the circumstances hostile to them, nor were given an opportunity to do so), or the other cases mentioned in that judgment. In the case reported in In re *Sangama Naicker*[2] and in all the cases referred to in that judgment, it was particularly noticed that the facts unexplained by the accused were *vital* facts, that is, facts from which an inference of guilt almost necessarily followed. We think it is clear that when an accused person in answer to a general

1. (1933) 64 M.L.J. 466 (P.C.).
2. (1936) 71 M.L.J. 138: I.L.R. 59 Mad. 622.

question or even one or two questions gives a reply or replies which show that he is well aware of all the circumstances appearing in evidence against him and their implications, and attempts to explain them, the Sessions Judge may be going beyond his province if he questions him further in detail. He may be open to the criticism of cross-examining the accused, and attempting to elicit contradictory answers. This is more particularly the case when the accused is represented by his own counsel, and in this case the accused was represented by two experienced advocates. It is not possible to lay down a more general rule than that it is the duty of the Court to be satisfied either by his statements or by his answers to questions or by both, that the accused explains or has an opportunity to explain circumstances from which hostile inferences may be drawn against him. We can find no ground whatever for sending back this case for a retrial. There was no defect of any kind in the proceedings before the learned Sessions Judge.

Agreeing with the assessors and the learned Judge we confirm the conviction of the accused for the murder of his wife. There is no question of the appropriateness of the sentence. We confirm the sentence of death also.

K. C.

Conviction confirmed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

(On a difference of opinion between Mr. Justice Burn and Mr. Justice Stodart.†)

Sri Sri Sri Nandakishore Ananga Bhima Dev Kesari Gajapathi, Zamindar of Sannokhemedi represented by power-of-attorney holder Sriman Viswanadha Das Mahasayo .. *Appellant** (*Petitioner*)

v.

Susi Iamala Patta Mahadevi and others .. *Respondents* (*Respondents*).

Civil Procedure Code (V of 1908), S. 144—Reversal of decree for possession of immoveable property—Amounts received as profits by party who got

* C. M. A. No. 275 of 1936. 15th September, 1939.

† 20th April, 1939.

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into possession under erroneous decree—Right of successful appellant to restitution—Proper procedure, whether by suit or by application under S. 144—Extent of restitution—Failure to get in trial Court decree for future mesne profits—If bar to claim for future profits of estate.

Plaintiff's suit to recover an estate as the son of the last holder was decreed by the Subordinate Judge. But plaintiff's claim for mesne profits both before and after suit till the date of delivery was disallowed. Both plaintiff and defendant appealed to the High Court. Pending disposal of the appeal a receiver was appointed and he took possession The defendant having died, his widow carried on the appeal. (The widow is referred to as defendant.) The High Court allowed the defendant's appeal and dismissed the suit. Pending an appeal to Privy Council the defendant was handed over possession on furnishing security. Plaintiff's appeal to the Privy Council was successful and the judgment of the Subordinate Judge was restored. Plaintiff executed the decree and got possession of the estate. Then the plaintiff put in a petition for restitution and impleaded the defendant's widow and legal representative and also the sureties who had executed the security bonds in the High Court and claimed (1) the restoration of the amounts drawn as allowances by the widow, (2) restoration of the amounts wrongly appropriated by the defendants while in possession, (3) return of records and accounts from the receiver to the plaintiff, and (4) that the sureties might be ordered to pay the plaintiff the sums covered by their security bonds. Prayers 1 and 3 were not pressed and it was conceded that in proceedings under S. 144 no order for restitution can be made against sureties.

As to the restoration of amounts drawn and the mesne profits.

Held, Burn, J., differing from *Stodart, J.*, (*i*) that the proper remedy lay in a suit for accounts and not in an application by way of restitution on the ground that delivery of possession was only an indirect consequence of the High Court reversing the decree for possession in favour of the plaintiff; (*ii*) that even if S. 144 applied the most that could be claimed was restoration on the basis of the continuance of the position immediately before the passing of the wrong decree and (*iii*) that refusal of future mesne profits by the trial Court restored by the Privy Council barred the claim for profits of the estate.

Held Wadsworth, J., agreeing with *Stodart, J.*, (*i*) that S. 144, Civil Procedure Code was in terms applicable and the case is covered by the decision in *Bisheshwar Pratap Narayan Sahi* v. *Chandreshwar Prasad Narayan Singh*, (1928) I.L.R. 7 Pat. 319, and that the plaintiff is entitled to claim restitution of any profits realised by the legal representatives which can be called properly consequential upon the wrong decree unless the defendant's legal representative is entitled to resist the claim either by showing that she has a superior claim to those profits or by showing that the plaintiff's claim is barred by reason of the failure to establish his right to future profits in the trial Court;

(*ii*) that the parties are to be put in the position which they would have occupied had it not been that a wrong decree had been passed. The correct procedure is to award the successful party restitution in the shape of any profits wrongly received under the erroneous decree or as a direct consequence thereof and

(*iii*) that the profits accrued to the defendant's legal representative as a result of the erroneous decree are not profits which could be claimed in the original suit. So there is no bar to the plaintiff's claim by reason of his failure to get a decree for future mesne profits before the trial Court.

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Appeal against the order of the Court of the Subordinate Judge of Berhampore dated 24th February, 1936, and made in E. A. No. 292 of 1933 in O. S. No. 10 of 1922.

This appeal coming on for hearing before Burn and Stodart, JJ., the Court (Burn and Stodart, JJ.) delivered the following judgments.

B. Jagannadha Das for Appellant.

B. V. Ramanarasu for Respondent.

Burn, J.

Burn J.—This is an appeal from an order passed by the learned Subordinate Judge of Berhampore in an application for restitution under S. 144, Civil Procedure Code. The applicant before the learned Subordinate Judge was the plaintiff in O. S. No. 46 of 1920 in the Court of the Subordinate Judge of Ganjam, Berhampore. He sued to recover the estate of Chinnakimedi alleging that he was the son of the last holder of the estate, Brojo Kishoro Deo. The defendant Kunja Bihari Deo was the grandson of the plaintiff's grandfather's younger brother. The suit was subsequently transferred to the Additional Subordinate Judge of Ganjam and tried as O. S. No. 10 of 1922. On the 20th of December, 1922, the suit was decreed in favour of the plaintiff in so far as possession of the estate and certain movable properties was concerned. But the plaintiff's claim for mesne profits both before and after suit till date of delivery was disallowed, the learned Subordinate Judge stating in his judgment that

"No issues were framed in the matter of past and future profits and the question relating to the profits must therefore be deemed to have been given up."

Both the plaintiff and the defendant appealed to the High Court, the defendant from the Subordinate Judge's decree awarding possession to the plaintiff, and the plaintiff from the Subordinate Judge's decree refusing him mesne profits. These appeals were numbered 25 and 261 of 1923. Pending disposal of the appeals, a receiver was appointed in 1923. He took possession on some date in 1923, (the date does not appear from the papers printed on behalf of either party in this appeal and it is not important for the purposes of this appeal). The judgment of the High Court was pronounced on the 30th of March 1928 allowing the defendant's appeal No. 25 of 1923, and dismissing the plaintiff's suit with costs in both Courts. Consequently, the plaintiff's Appeal No. 261 of 1923 for mesne profits was dismissed with costs. The plaintiff applied for leave to appeal to the Privy Council against both these decrees, and pending disposal of his appeal, he prayed that the receiver who had been appointed in 1923 might be continued until the appeal to the Privy Council should be disposed of. The main ground upon which that application was based was that the respondent was a woman incapable of managing the estate, that she was in the hands of one Raghunatha Padhi, and

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that if she was put in possession, she would alienate and wrongfully dispose of the income. It is to be noticed here that during the pendency of the appeals in the High Court, the defendant Kunja Bihari Deo died in December 1925, and his widow had been brought on record as his legal representative. The High Court in its order of the 17th of August 1928 held that the plaintiff would be amply protected if the respondent was prevented by an injunction from alienating any of the properties of the estate without the consent or sanction of the Subordinate Judge of Berhampore, and if she were also required to give security to the extent of Rs. 60,000/- for any loss that she might cause to the estate and might be accountable for if eventually the petitioner should succeed in his appeals to the Privy Council. This amount of security was subsequently reduced to Rs. 41,000/-. Security for that amount was furnished by April 1929, and in that month the receiver handed over possession of the estate with the small balance of cash then in his hands, and with all the records pertaining to the estate to the Respondent.

The appellant was successful in his appeal from the decree of the High Court in A. S. No. 25 of 1923. The judgment of the Privy Council was pronounced on the 1st of November, 1932, and is reported at page 1 of Volume 64, Madras Law Journal.[1] The Judgment of the Privy Council shows that the decree of the High Court dated the 30th of March 1928 was set aside, and the decree of the Subordinate Judge dated the 20th December 1922 restored. The respondent, *i.e.*, the defendant, was ordered to pay costs of the appellant both in the High Court and before the Privy Council. The actual order in Council has not been printed in these proceedings by either party. It would appear that the plaintiff did not pursue his appeal to the Privy Council from the decree of the High Court in A. S. No. 261 of 1923 in which his claim for mesne profits was disallowed.

The plaintiff executed the decree of the Sub-Court, restored by the order in Council, and got possession of the estate in execution proceedings on the 10th of March 1933.

On the 10th of August 1933, the plaintiff put in his application for restitution quoting Ss. 144, 145 and 151 of the Code of Civil Procedure. He named as respondents in his application not only Kunja Bihari Deo's widow and legal representative, but also one Raghunatha Padhi Mahasayo alleged to be her agent, and 9 other persons, sureties who had executed the security bonds in pursuance of the orders of the High Court in 1929. The plaintiff claimed that the 1st counter-petitioner, (whom it will be convenient to call the defendant), should be ordered to restore one lakh of rupees or such sum as the Court might find due from her on account of the moneys drawn by her as allowances from the estate funds between 1922 and 1928. His

1. *Nandamani Ananga Bhima Deo* v. *Susela Mala Patta Mahadevi.*

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second prayer was that both the defendant and her agent the second counter-petitioner should be ordered to restore the sum of Rs. 1,50,000 representing the amount wrongly appropriated by them during the period commencing with the 2nd of April 1929 and ending with the 13th of December 1932. A further prayer was that all the records and accounts taken from the receiver might be directed to be delivered to the plaintiff, and a fourth prayer was that the sureties, counter-petitioners 2 to 11 might be ordered to pay the plaintiff the sums covered by their security bonds. In this appeal, we are not concerned with the 1st and the 3rd prayers, since they were not pressed on behalf of the plaintiff before the learned Subordinate Judge, and learned counsel for the plaintiff has not attempted to press them before us. With regard to the 4th prayer, it is quite clear that in proceedings under S. 144, no order for restitution can be made against sureties—Vide *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh*,[1] There is of course no objection to the sureties being made parties in such proceedings, as they are vitally interested in the amount that may be found due by way of restitution. In the present appeal, as my learned brother has said, we have been invited to say whether the security bonds can be enforced against the sureties in respect of mesne profits. In my opinion, this question does not arise, and although learned counsel for the sureties had addressed us on this point, I, with respect, decline to deal with it. If the defendant is found liable to pay anything to the plaintiff by way of restitution, it will be for the plaintiff to enforce that order against the sureties by proceedings under S. 145 of the Code of Civil Procedure, and the liability of the sureties can only be determined in such proceedings.

In my view therefore, we are only concerned in this appeal with the second of the prayers put forward by the plaintiff. Now with regard to this, the grounds of the plaintiff's claim were somewhat obscurely stated in the affidavit sworn to by the plaintiff's agent. He alleged that during the time when the estate was in the hands of the receiver, the defendant had drawn several amounts out of the estate funds from the receiver under the orders of the High Court, as allowances for maintenance and other purposes. He said that these sums amounted to about one lakh of rupees. He also alleged that the second counter-petitioner (defendant's agent) had collected "during the period," (but what period is not indicated), not less than 5¼ lakhs of rupees, and that there ought to have been a net surplus of at least 1¼ lakhs of rupees, after meeting all reasonable charges such as establishment etc. The second counter-petitioner, he said, had drawn Rs. 12,000/- from the estate funds as a gratuity for managing the estate in addition to his monthly salary of Rs. 500/-. He alleged

1. (1919) 38 M.L.J. 302 : 46 I.A. 228 : I.L.R. 42 All. 158 (P.C.).

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also that the sureties had drawn from the estate a substantial portion of the amounts for which they had given security. His claim therefore was that he was entitled by way of restitution to the amount of at least 2½ lakhs of rupees, out of which more than 1½ lakhs was to be made good by the second counter-petitioner jointly with the first counter-petitioner. The learned Subordinate Judge overruled the objection made on behalf of the defendant and the other respondents, that no restitution could be awarded under S. 144 of the Code of Civil Procedure in this case. He held that S. 144 would authorise him to direct the defendant to restore the surplus profits of the estate for the period from the 2nd of April 1929 to the 13th of December 1932. But he considered that in so far as the defendant was concerned, she had not drawn from the funds of the estate for herself more than she was authorised to draw by orders of this High Court. But the learned Subordinate Judge held that the payment of Rs. 12,000/- made by the defendant to the second counter-petitioner, her agent, as compensation for the loss of his practice at the bar during the period of his service under her, was not justifiable. He held therefore that the defendant and the second counter-petitioner were liable to make good that amount to the plaintiff. The rest of the plaintiff's claim, the learned Subordinate Judge dismissed. The plaintiff has preferred this appeal from the order dismissing his claim. The defendant and the second counter-petitioner have appealed from the order directing them to restore Rs. 12,000/-, but we are not concerned with that appeal, since it was preferred after the District of Ganjam was transferred to the Province of Orissa and it is now pending we understand, before the High Court of Patna.

Before us, learned counsel for the appellant has argued two items together amounting to about Rs. 1,30,000/-. The first item is Rs. 65,577-1-5 appropriated by the defendant out of the profits of the estate after she received possession of it from the receiver. The defendant's claim to this was based upon an order of the High Court passed by Mr. Justice Krishnan on 11th of April, 1923 by which the receiver was directed to pay Rs. 1,500 per mensem each to the plaintiff and the defendant. There were subsequent changes in the orders passed by this Court but they do not seem to be material. At the time in April, 1929 when the defendant took possession from the receiver, this allowance was in arrears to the extent of Rs. 65,577-1-5, and the defendant's claim is that she was entitled to pay herself this sum out of the profits of the estate as they accrued during the period she was in possession. The other item is Rs. 64,500/-, the amount taken by the defendant out of the profits of the estate during the period between the 1st of April, 1929 and the beginning of November, 1932, at the rate of Rs. 1,500 per mensem. The learned Subordinate

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Judge has held that the defendant's action in paying herself Rs. 64,500 on account of arrears cannot be said to be wrongful, and that she was justified in paying herself at the rate of Rs. 1,500 per mensem during the period this estate was in her possession. The contention of the learned counsel for the plaintiff is that the learned Subordinate Judge is wrong on both these points.

In my opinion, the learned Subordinate Judge was partly right and partly wrong. He was wrong, I consider, in holding that S. 144 of the Code of Civil Procedure had any application to this case, but he was right, I think, in holding that even if it had, the plaintiff could not recover any portion of either of the two sums now in dispute. The plaintiff, I think, entirely misconceived his remedy. After the judgment of the Privy Council declaring him to be entitled to possession of the estate, he had, in my view, cause of action for a suit for mesne profits for any period within the bar of limitation. But he had no ground for applying for mesne profits in the guise of restitution. The doctrine of restitution under S. 144 is simple. I may quote from Sir Dinshaw Mulla's commentary on S. 144 (considering the matter from the point of view of the party to whom restitution is due):

"The word 'restitution' in this section means restoring to a party, on the variation or reversal of a decree, what has been lost to him in execution of the decree or directly in consequence of that decree. The section does not apply unless the property was lost in execution of the decree or directly in consequence of that decree."

and again, (looking at the matter from the point of view of the party who has to make restitution)

"The doctrine of restitution contemplates the case where property has been received by a decree-holder in execution of a decree, and the decree or part thereof is subsequently varied or reversed on appeal by the judgment-debtor."

In the present case, the decree, the reversal of which has given rise to the plaintiff's claim, is the decree passed by the High Court in A. S. No. 25 of 1923. As I have already said, neither party has filed the decree before us, but from the judgment, it would seem that it was merely a decree dismissing the plaintiff's suit with costs in both the Courts. If so, there is nothing in the decree affecting the question of possession of the estate. It cannot be said that the decree of the High Court directed that possession of the estate should be taken from the pliantiff and given to the defendant. The plaintiff never had possession of the estate until he got it in execution of the Order in Council in 1933. The reversal of the High Court's decree by the judgment of the Privy Council therefore has nothing, in my opinion, to do with the question of possession of this estate and nothing to do consequently with mesne profits. The Privy Council's judgment, as I have already said, was that the decree of the Subordinate Judge should be restored, the decree of the High Court being set aside. It seems to me that learned counsel for the defendant is on firm

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ground when he says that in so far as the High Court's decree is concerned all the restitution that could be made to the plaintiff upon its reversal was effected by the Order in Council. Before the High Court's decree was passed, the position was that the plaintiff had in his favour a decree of the Subordinate Judge that he should be put in possession. That decree was set aside by the High Court, and the position then was that the plaintiff had no decree in his favour. When the High Court's decree was set aside by the Privy Council and the Subordinate Judge's decree restored, the plaintiff thereby came back to the position in which he had been before the High Court's decree was passed. The contention of learned counsel for the plaintiff is that when the estate was put in possession of a receiver in 1923, the Court was taking possession of this estate for the benefit of the true owner, and that therefore the possession of the receiver must be deemed to have been the possession of the true owner. The true owner has now been declared by the Privy Council to be the plaintiff. Therefore, when the receiver was in possession, he was in possession on behalf of the plaintiff; this is equivalent to saying that plaintiff was in possession and when the defendant took possession in 1929, she was dispossessing the plaintiff. Learned Counsel for the plaintiff relies upon the case reported in *Bisheshwar Pratap Narain Sahi* v. *Chandreshwar Prasad Narain Singh*[1]. There the learned Chief justice has said,

> "Where disputes arise between claimants as to possession of immovable property and the property is placed in the hands of a receiver by the Court before the determination of the question of title, the Court takes possession through its receiver on behalf of the party who may ultimately establish his title and from the moment the title is determined the possession must be deemed to have been the possession of the lawful owner whose title has been established."

The learned Judge goes on to refer to the judgment of Mr. Justice Mukerjee in *Dwijendra* v. *Joges*[2], In considering that case, it is, I think, necessary to bear in mind that that was a case in which a dispute under S 145 of the Code of Criminal Procedure arose with regard to possession of certain properties. The Magistrate held that nobody was in actual possession and attached the properties under S. 146, Criminal Procedure Code and a receiver was then appointed by the Criminal Court pending decision of dispute between the parties. In the trial Court, the plaintiffs got a decree for possession in their favour and *in execution of the decree were put in possession.* When that decree, passed by a Sub-Judge, was reversed by the High Court, it was held that the defendants could apply for possession by way of restitution under S. 144. I can see no difficulty in applying the principle of restitution in that case, but I do not see that it has any

1. (1928) I.L.R. 7 Pat. 319. 2. (1923) 39 Cal.L.J. 40.

bearing on the facts of this case. The important point about that case is that the plaintiffs in the suit got *a decree for possession, which they executed*, and which was afterwards reversed on appeal. It is therefore fully in accord with what I conceive to be the doctrine of restitution, that on the reversal of the decree in their favour, they should be compelled under S. 144 to give up what they had got in execution of that decree. Nothing of that kind is to be found in the case with which we are now dealing as I have already said. The defendant in this case did not get from the High Court a decree for possession. What she got from the High Court was a decree setting aside the Subordinate Judges' decree for possession in favour of the plaintiff. As soon as the Subordinate Judge's decree was set aside, it followed that the receiver who had been appointed during the pendency of the appeal, could no longer be left in charge of the property. The High Court had decided that the defendant was the proper owner, and consequently the receiver's appointment had to come to an end. When it came to an end, the only person to whom he could be directed to hand over possession was the person declared by the High Court to be the rightful owner, namely, the defendant. It is quite impossible, in my opinion, to say that delivery of possession was made to the defendant in pursuance of, or in execution of, or directly in consequence of the decree of the High Court. It is quite impossible, I think, to argue that the decree of the High Court was in any manner fulfilled or carried out or obeyed by the delivery of the property to the defendant. The only executable part of the High Court's decree, as I imagine, must have been a direction that the plaintiff must pay the defendant's costs. The portion of the decree which said that the Subordinate Judge's decree was set aside was not a provision which could be put in execution at all. It is therefore not, in my opinion, possible to say that the defendant got possession from the receiver in pursuance of or in execution of or directly in consequence of the High Court's decree. Delivery of possession by the Receiver to the defendant was a consequence of the High Court's decree, no doubt, but it was an *indirect* consequence and not a direct consequence. I have not been able to find—and learned counsel for the appellant has not cited—any case in which restitution in the shape of possession or mesne profits has been ordered where the decree reversed had not given possession.

For these reasons, I think the plaintiff entirely misconceived his remedy, that his remedy lay in a suit for accounts and mesne profits and not in an application by way of restitution.

Further, if I am wrong with regard to this point, I nevertheless think that the learned Subordinate Judge was right in holding that the plaintiff could not recover from the defendant any portion of the

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Rs. 1,30,000/- which has been the subject of argument before us. Supposing that S. 144 can be applied, then the duty of the Court as set out in S. 144 is to

> "cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed."

Now, that, in my opinion, means that the plaintiff is entitled to ask the Court to put him and the defendant back into the positions which they occupied immediately before the High Court's decree was passed. That position was a position in which the receiver was in possession and under orders of the High Court was making payments of Rs. 1,500/- per mensem both to the plaintiff and to the defendant so far as the funds available allowed. What would have been the position, but for the decree of the High Court? It seems clear to me that but for the decree of the High Court, the position would have continued to be the same. The High Court's decree was passed, as I have already said, on 30th of March 1928. If the High Court's decree had not been passed on the 30th March, 1928, the appeal would still have been pending, and it would have continued to be pending until the High Court passed some decree or other. The plaintiff's claim, in my opinion, amounts to this: that he is entitled to be "restored" to the position which he would have occupied *if the High Court's decree passed on the 30th March, 1928 had been in his favour.* Now no doubt, if the High Court on the 30th March, 1928 had dismissed the defendant's appeal and confirmed the Subordinate Judge's decree, the receiver would then have been directed to deliver possession to the plaintiff, and the plaintiff would thereafter have enjoyed the profits of the estate. But it seems to me there is a great difference between the claim to be put in the position which the plaintiff would have occupied if the High Court's decree had been in his favour, and the claim to be put in the same position that he would have occupied if the High Court's decree had never been passed. S. 144, Civil Procedure Code authorises the latter proceeding but not the former. If the High Court's decree had not been passed and if the appeal had gone on pending, the receiver would have gone on making payments both to the plaintiff and the defendant, and it would have been quite within his authority to pay out to the defendant, when the funds of the estate allowed, the arrears due to her to the extent of Rs. 65,500/- and the periodical payments of Rs. 1,500/- per mensem during the whole period of his receivership.

I therefore consider that the learned Subordinate Judge is right in holding that the plaintiff cannot recover *by way of restitution* any portion of the sum of Rs. 1,30,000/-.

We heard a long argument on the question whether the defendant is entitled to maintenance out of the estate. Learned counsel for

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the appellant contends—and I think rightly—that this question was not properly raised in the pleadings before the learned Subordinate Judge. It is an interesting question but it is one on which any remarks that we can make must be *obiter*, and I therefore respectfully excuse myself from making any pronouncement on the question whether defendant is or is not entitled to maintenance out of this estate. That question, in my view, can only be properly tried in other proceedings.

The plaintiff could have recovered from the defendant by way of restitution the amount of the costs awarded to her by the High Court's decree in A. S. No. 25 of 1923, if she had executed against him the High Court's decree for costs, but there was no allegation on this point in the affidavit of the plaintiff's agent, and as I have already noticed, the decree of the High Court has not been produced before us. No argument was addressed to us on this subject by learned Counsel for the appellant.

I agree with my learned brother that the allowances ordered to be paid to the defendant during the pendency of the appeal cannot be considered as giving the defendant an absolute right to those sums irrespective of the result of the litigation. They were explicitly orders of a temporary nature, and the sums drawn by the defendant would in my opinion be sums for which the defendant would be accountable in the event of the plaintiff's success in his appeal to the Privy Council.

In my view the appeal should be dismissed with costs.

Stodart, J.

Stodart, J.—This appeal arises on an application made under S. 144 of the Civil Procedure Code to the Subordinate Judge, Ganjam by the plaintiff in O. S. No. 10 of 1922 on the file of the Additional Subordinate Judge, Ganjam.

Plaintiff filed that suit in 1920 in the Subordinate Judge's Court for the possession of the Zemandari of Chinnakimmedi against the then Zemindar Kunji Bihari Deo. In December 1922 the learned Subordinate Judge decreed the suit in plaintiff's favour. Kunji Bihari filed an appeal in this Court and obtained stay of execution. But he was not allowed to remain in possession. A Receiver appointed by the Court was placed in the possession of the Estate by an order made by Mr. Justice Krishnan (as he then was) on the 11th April 1923.

Kunji Behari Deo died in December 1925 before his appeal came on for hearing, and his widow the present defendant was brought on the record as his representative in interest and she continued the appeal. The appeal was decided on 30th March 1928 in the defendant's favour. Plaintiff filed a further appeal to the Judicial Committee of the Privy Council and applied for stay of execution in this

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Court. Stay was refused, but defendant was directed to furnish security for Rs. 60,000/- (afterwards reduced to Rs. 41,000/-) before taking possession of the Estate.

She was not able to find the required security till the 2nd April 1929, when the Estate was delivered to her by the Receiver.

Plaintiff's appeal in the Privy Council was decided on the 1st November 1932. The appellate decree of this Court was reversed and the decree of the Subordinate Judge was restored. Plaintiff was given possession of the Estate on 10th March 1933.

In the application now under appeal plaintiff prayed that the defendant be made to restore to him the profits of the Estate which she had received from 2nd April 1929, when the Receiver handed over possession to her up to 13th December 1932. He also prayed for the restitution of certain sums which the defendant, and before her, her husband, had been paid, during the time when the Receiver was in charge and which were made payable to the defendant by the aforesaid order of this Court. Plaintiff did not press his claim under the latter head however: so that the only amount with which we are now concerned is the amount of the profits enjoyed by the defendant during the time she was actually in possession of the Estate under the appellate decree of this Court, namely from 2nd April 1929 to 13th December 1932, on which latter date she was appointed Receiver under the Court pending delivery to the plaintiff.

The other respondents to this Appeal are the persons who in 1929 furnished security on behalf of the defendant. It is conceded now by the plaintiff that sureties cannot be made liable under S. 144. It is only when the principal is adjudged liable to pay an ascertained sum that proceedings can be taken against the sureties under S. 145.

One of the sureties, the 2nd respondent, has in the order now under appeal been declared liable on his bond for Rs. 12,000/- and directed to pay that amount to the plaintiff. But that order is not before us in this appeal since the 2nd respondent has appealed against it in the High Court of Judicature at Patna to which Court jurisdiction over the subject matter of the suit was transferred on the 1st April 1936.

The sureties all of whom have been impleaded in this appeal have invited us to determine once for all whether their bonds make them liable for the profits of the estate enjoyed by the defendant while she was in possession of it. Agreeing with my learned brother I do not think that question is properly before us.

The amount of the profits is not now in dispute. The defendant has filed an abstract statement which I would like to be read as part of this judgment showing the aggregates of expenditure under different heads during her tenure of the estate. The balance is Rs. 1,30,476/-.

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This includes a sum of Rs. 11,212/- shown by the defendant as expenditure which sum was not actually spent and to which I shall have occasion to refer later. It is now agreed that the sum claimed by the plaintiff is Rs. 1,30,476/- as found in this statement of account. This is the actual surplus remaining after all expenditure had been incurred.

The learned Subordinate Judge held that under S. 144 the plaintiff in the circumstances of this case could not recover these profits. Hence this appeal.

In the course of the appeal, the defendant has claimed that even if she is liable under S. 144 to restore the profits of the estate nevertheless out of those profits she is entitled to retain the major portion on two separate and distinct grounds : namely

(*a*) As the aggregate of sums directed to be paid to her by certain orders of this Court,

(*b*) As the amount which she would otherwise be entitled to receive as maintenance from the revenues of the Estate as the widow of an undivided co-parcener of the Zemindar.

The amount claimed by the defendant is very nearly Rs. 1,30,476 on either computation.

Thus there are three questions for our decision in this appeal namely

I. Is the lower Court wrong in holding that the profits enjoyed by the defendant are not in the circumstances of this case liable to be restored to the plaintiff under S. 144 ;

II. Even if they are, is the defendant entitled to retain the major portion of them under the orders passed by this Court ;

III. Or as maintenance.

In order to understand the finding of the learned Subordinate Judge it is necessary to explain what the orders of this Court were. The first is the order passed by Mr. Justice Krishnan (as he then was) on 11th April 1923 when he placed the Estate in the custody of a Receiver. That order has not been printed and we have to gather its import from references made to it in subsequent orders of this Court. The matter then before Mr. Justice Krishnan was the motion of the defendant for stay of delivery of possession to the plaintiff pending defendant's appeal in this Court. It is sufficient for the present purpose to state that Mr. Justice Krishnan directed that the Estate be put in the hands of a Receiver—which was forthwith done—and that out of the surplus revenues of the Estate the Receiver should pay to each party for their maintenance and for the expenses of the litigation a sum of Rs. 1,500/- a month. Subsequently, at some date in 1924 on the Receiver reporting that the surplus revenues of the Estate were not sufficient to enable him to pay those allowances,

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Mr. Justice Krishnan directed that whatever surplus there was after meeting the necessary expenditure, should be divided equally between the parties. This second order is not now before us either.

Now in April 1929 when the Receiver handed over the estate to the defendant there were very substantial arrears of this allowance due to both parties. I shall have occasion later to refer to the arrears due to the plaintiff and how they were dealt with. The arrears due to the defendant were about Rs. 65,000/-. The Receiver had less than Rs. 11,000/- in his hands and of this he paid Rs. 10,000/- to the plaintiff a few days before handing over the estate to the defendant. Learned Counsel are agreed that that was the state of affairs in April 1929.

The finding of the learned Subordinate Judge is to the following effect. In proceedings in restitution under S. 144, what the Court has to do is to put the parties in the position they occupied at the time of the decree which has been reversed, in the present case, at the time of the appellate decree of this Court. At that time a Receiver was in possession of the Estate. The position of the parties if the Receiver is regarded as being in possession, and if there had been no appellate decree of this Court, was, that he owed the defendant Rs. 65,000/- as arrears of allowance and that he had to go on paying her further allowance up to the date of the Privy Council decree. These sums, both the arrears and the current allowance would have to be paid to defendant out of the revenues of the Estate realised by the Receiver after the date of the appellate decree and up to the date of the Prviy Council decree. And it so happens that the aggregate of the sums which would have been payable to the defendant on this hypothesis is very nearly equal to Rs. 1,30,476 the amount of the surplus profits which defendant actually enjoyed. To take this money away from her would be to change her position for the worse, a thing which in the opinion of the learned Subordinate Judge cannot be done under S. 144.

In my opinion the learned Subordinate Judge's finding cannot be supported on the grounds stated by him. His reasoning is fallacious. S. 144 is

"Where and in so far as a decree is varied or reversed, the Court of First Instance shall on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed, and for this purpose the Court may make any orders, including orders for the refund of costs and for the payment of.........and mesne profits which are properly consequential on such variation or reversal..."

The position of the parties according to the learned Subordinate Judge but for the appellate decree of this Court would be that a

Receiver would be in possession of the Estate and would continue in possession. But clearly if the appellate decree had not been passed on the date it was passed, the Receiver could in no imaginable circumstances have been continued in possession. If that decree had not been passed there was nothing whatever to prevent the plaintiff entering on the Estate. It would have been the plaintiff therefore who would have enjoyed the surplus profits of the estate from the date of the appellate decree and he was under no liability—so far as the subject matter of the suit was concerned—to pay defendant anything whether by way of arrears of allowances or as current allowances. The fact remains that during her tenure of the estate the defendant received and enjoyed the profits which but for the appellate decree of this Court the plaintiff would have enjoyed.

A digression must be made here to correct a mistake made by the learned Subordinate Judge which may have influenced his mind in arriving at the above conclusion. Interpreting a certain order dated 20-11-1928 made by this Court (exhibit VI) after the appellate decree was passed but before the Estate was handed over to the defendant, he construed it as containing a direction by this Court, to the Receiver to pay to the defendant the arrears of allowance due to her under Mr. Justice Krishnan's order of April 1923 and which according to the learned Subordinate Judge amounted to Rs. 65,577. But Exhibit VI has nothing to do with the arrears of allowance due to the defendant or the payment of those arrears. On the contrary, it relates to the arrears due to the plaintiff. It was passed on C. M. P. No. 4146 presented by the plaintiff and C. M. P. No. 4834 presented by the defendant. Plaintiff prayed amongst other things that the Receiver be directed to pay him the arrears of allowance computed at Rs. 1,500/- a month as ordered by Mr. Justice Krishnan in 1923 instead of at Rs. 1,000/- which was the rate adopted in a previous order of this Court dated 17th August 1928. Defendant prayed that on the contrary arrears due to the plaintiff should be computed at Rs. 500/- a month only. The order of this Court was that there were no grounds to vary the original order of 1923, awarding an allowance to the plaintiff at the rate of Rs. 1,500/- a month. No question arose then or could arise on those petitions, of the arrears payable to the defendant, who by that time had become entitled to be in possession of the estate and so entitled to the revenues out of which such arrears could be paid.

I now come to the grounds on which the learned Subordinate Judge's finding is sought to be supported by learned counsel for the defendant. His first argument is that if the plaintiff is put back in the position he would have occupied but for the decree which has been reversed, he would be merely in the position of a successful

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plaintiff who has still to execute his decree. His second argument is that under S. 144 a party cannot be put in possession of that of which he was never dispossessed. These arguments are both based on the fact that plaintiff was not actually in possession on the date of the appellate decree but a Receiver was in possession. But in my opinion, and in this my learned brother differs from me, a complete answer to these arguments is furnished by the principle that the possession of a Receiver *pendente lite* must be deemed to be the possession of the party who is ultimately declared successful. Here the plaintiff had succeeded in the Court of First Instance. He was then declared to be entitled to immediate possession of the estate. He applied to the Court to be put into possession. That application was stayed. Nevertheless the defendant was not allowed to remain in possession. A Receiver was appointed and put in charge of the estate. But the estate is a profit yielding concern and the Receiver had strictly to account for the profits. On whose behalf did he hold these profits? The answer must be, in my opinion, on behalf of the party ultimately declared successful. And if he had to account for the profits to that person he should be deemed to have held the estate on behalf of that person. Virtually therefore when the defendant took over the estate from the Receiver she dispossessed the plaintiff. And if the appellate decree had not been passed then at the date of that decree the order of the Court dated 11-4-1923 staying plaintiff's application for delivery of possession would have become automatically discharged and the Receiver would forthwith have put the plaintiff into possession. In my view, the effect of the decree which has been reversed was to dispossess the plaintiff. On the reversal of that decree plaintiff is entitled under S. 144 to restitution of the estate and of the profits which accrued during the time he was out of possession.

The rule that the possession by a Receiver must be deemed to be the possession of the person who is ultimately declared entitled, is illustrated by the procedure adopted in suits for immovable property which at the time of filing the suit is in the custody of a Receiver—for example a Receiver put in possession by a Magistrate under S. 146 of the Criminal Procedure Code. In such a case it is sufficient for the plaintiff to sue for a declaration of his title. He need not pray for delivery of possession and what is more important he need not pay the very much greater stamp duty leviable on a suit for possession. If he succeeds the Receiver delivers the estate to him. That the same is the case when the estate is in the custody of a Receiver appointed by the Court is explained in the case of *Bisheshwar Pratap Narayan Sahi* v. *Chandreshwar Prasad Narayan Singh*[1]. That case arose on an application for restitution under S. 144 of the Civil Procedure Code and is, I think, very much in point here. The property there in

1. (1928) I.L.R. 7 Pat. 319.

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question was called the Sarsund Estate. It consisted of four separate items. The last undisputed owner died in 1908 and on his death there was a scramble for possession. The Magistrate apprehending a breach of the peace over items 2 and 3 and not being able to decide who was in possession attached these two items and put a Receiver in charge of them. In 1911 one of the claimants Asharfi Singh who had possession of item 4 sued the other claimants for possession of items 1 and 2 and the Court in 1915 put item 1 also in custody of a Receiver. Asharfi's suit was dismissed in 1919. But the Receiver remained in possession until the 13th December 1920. He was discharged on that day but re-appointed on the following day in a suit which had been filed by another set of claimants numbered as 112 of 1920. Thus, up to the date of the filing of O. S. No. 112 of 1920 Asharfi Singh had not been in possession of items 1, 2 and 3 and they were in the possession of Receivers and remained in such possession till the suit was decided. The defendants in O. S. No. 112 of 1920 were Asharfi Singh and a certain rival claimant Chandreshwar who had agreed to adjust their claims *inter se*, one giving up his claim to items 1 and 2, the other giving up his claim to items 3 and 4. The position at the time that suit was filed was that items 1, 2 and 3 were in the possession of Receivers and item 4 was in the possession of Asharfi. The plaintiffs, being a third set of claimants, succeeded in the suit and were given a decree for possession and on the 27th February 1923 possession of items 1, 2 and 3 was taken on their behalf by the Court of Wards, to whom the Receiver handed over items 1, 2 and 3. Asharfi and Chandreshwar the unsuccessful defendants filed appeals to the High Court which reversed the decree of the Court of First Instance and declared the title of Asharfi and Chandreshwar in priority to the plaintiffs. The High Court did not however make any decree for delivery of possession to the defendants. At the time of the High Court decree the defendants were, in respect of items 1, 2 and 3 persons who had never had actual possession but who had been declared to be entitled : a position similar to that occupied by the plaintiff in this case at the time of the decree of the Privy Council.

The defendants Asharfi and Chandreshwar not having a decree for delivery of possession applied in the Court of First Instance for restitution of the property under S. 144. The Subordinate Judge held

I. That as the trial Court's decree had been set aside by the High Court the applicants were entitled to be restored to the position they would have occupied but for such decree.

II. That strictly speaking restitution in such a case would mean replacing the property in the hands of the Receivers.

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III. But that as the possession of the Receivers was the possession of the Court for the benefit of the person entitled, the applicants were entitled to possession by way of restitution.

The plaintiffs then appealed to the High Court whose decision is contained in the case cited. It was urged in the High Court as it is urged here that restitution could not be made to a party who was not in possession before. The Court held (per Dawson Miller, C.J.)

"Where disputes arise between claimants as to possession of immovable property and the property is placed in the hands of a Receiver by the Court pending the determination of the question of title, the Court takes possession through its Receiver on behalf of the party who may ultimately establish his title and from the moment the title is determined the possession must be deemed to have been the possession of the lawful owner whose title has been established. Nor do I think it makes any difference whether the property is attached by the Magistrate under the provisions of the Code of Criminal Procedure, or placed in the possession of a Receiver appointed by the Civil Court."

Pausing here for a moment I observe, that the position of the plaintiff in this case at the time the Receiver was appointed was more than that of a mere claimant. He was in a better position than Asharfi and Chandreshwar were, in the Patna case. For he was a successful claimant with a decree for possession already made in his favour. Continuing, Dawson Miller C. J. said that in his opinion the law in the subject had been correctly stated by Mookerjee, J. in two cases in the Calcutta High Court in 1924 and 1919 respectively: and he quotes from those two cases certain observations of Mookerjee, J. as follows:

"When the Court has appointed a Receiver and the Receiver is in possession, his possession is the possession of the Court, and the possession of the Court by its Receiver is the possession of all parties to the action according to their titles. The property passes into legal custody as the Receiver is in the position of stake-holder and such custody is for the benefit of the true owner. *Brojendra Kishore* v. *Abdul Razak*[1], is an authority for the proposition that when property is attached under S. 146 of the Criminal Procedure Code it passes into legal custody and during the continuance of the attachment such custody is for the benefit of the true owner. If the true owner was in fact in possession when the attachment was effected, his possession in the eye of the law, is not interrupted. If, on the other hand, the wrong doer was in possession at the time the attachment took place, the effect of the attachment is to interrupt his possession and from the moment of attachment the possession of the rightful owner is revived in the eye of the law......If during the attachment the seisin or legal possession is in the true owner the attachment does not amount to either dispossession of the owner or the discontinuance of his possession."

If the facts of the present case are interpreted in the light of the rule laid down in the foregoing judgment of Mookerjee, J., namely, that the effect of the attachment interrupts the possession of the wrongdoer and in the eye of the law revives the possession of the rightful owner

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1. (1915) 22 Cal. L.J. 283.

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then the position is as follows: Brojo Kishore father of the plaintiff was the Zemindar till his death in 1906. Plaintiff should have succeeded him, but his title remained in abeyance for reasons which need not now be stated. Brojo Kishore was succeeded by Purushottama, elder son of his first cousin and senior representative of the junior line, and on Purushottama's death, in 1915 he was succeeded by Kunji Bihari Deo the original defendant in this suit. And Kunji Bihari Deo was the person in possession in April 1923 when the estate was placed in the possession of the Receiver. As has now been settled by the decision of the Judicial Committee the possession of the Estate from 1907 to 1923 first by Purushottama and afterwards by Kunji Bihari Deo, was wrongful. The effect of the appointment of the receiver therefore was to interrupt that possession; and at the same time, in the eye of the law to revive the possession of Brojo Kishore's representative in interest, namely the plaintiff.

Again in *Bisseshwar Pratap Narain Sahi* v. *Chandreshwar Prasad Narain Singh*[1], a question of limitation was raised by the appellants. Their argument was based on the following propositions. The last male owner died in 1908. Chandreshwar had never been in possession —which was true—and had never filed a suit to substantiate his title. On the other hand Bisheshwar one of the appellants claimed to have entered into possession in 1908: and adding on to the period of his possession the possession of the Receivers appointed in 1908 and 1915 he had prescribed for title. Dawson Miller, C.J. on this part of the case said

"It is clear that they (the appellants) cannot set up a title by adverse possession over 12 years, for whatever possession they may have had in the beginning, assuming it can be proved, came to an end when the Receiver was appointed of the properties in Schedules 2 and 3 in 1908 and of those in Schedule 1 in 1915...... And if I am right in holding that the possession of the Receiver in a case like the present is to be deemed the possession of the rightful owner then Chandreshwar has not lost his title by omitting to bring a suit within 12 years of the death of Mulukrani Kuer"

and in the same case on this point Mullick J. said

"Even if Bisheshwar can prove that he got possession in 1908, the subsequent entry of Mr. Stevens the Receiver appointed in 1908 by the Magistrate and of Mr. Moore the Receiver appointed by the Civil Court in 1911 put an end to the illegal possession of Bisheshwar and restored the possession of the true owner Chandreshwar."

Following the authority of this case and, with respect, adopting the reasoning of the learned Judges who decided it I hold that the effect of the appellate decree of this Court, by which the Receiver's possession of the estate was determined, was to dispossess the plaintiff; since in the eye of the law the possession of the Receiver was the possession of the plaintiff. The contention of learned Counsel for the defendant that under S. 144 the plaintiff can only be put back

1. (1928) I.L.R. 7 Pat 319.

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to the position of a successful plaintiff who has obtained a decree but has not executed it is not in my opinion sound. Nor is there substance in his contention that the plaintiff cannot be put in possession of that of which he has never been dispossessed. For plaintiff was in the eye of the law dispossessed when the Receiver handed over the estate to the defendant. Asharfi and Chandreshwar in the Patna case had never actually been in possession.

That case it will be observed was a stronger case than the present case: for, the subject-matter of the application there was the corpus of the estate actual possession of which had not been decreed to the applicants. Here the subject-matter of the application is the surplus profits of the estate which accrued during the time when the plaintiff was out of possession. If it had been necessary, the plaintiff could have recovered the corpus of the estate under S. 144. And the Court while making an order for its restoration could have made an order for the payment to him of the profits appropriated by the wrongful owner during the latter's possession of the estate under the decree which has been reversed. An order for the payment of mesne profits to the person who would have been in possession but for the decree which has been reversed is in my opinion in the words of S. 144

"an order which is properly consequential on such reversal."

I do not think that the cases are in point, which have been cited by learned Counsel for the respondent in support of his position that under S. 144 a person cannot be restored to possession of that of which he was never dispossessed. The property now in question, consists of mesne profits which *prima facie* could never have been in plaintiff's possession. The cases cited refer to specific items of property. In *Baikuntha Nath Chattoraj* v. *Prosannamoyi Debi*[1], the property claimed consisted of cash and ornaments contained in an iron safe and in the possession of Prosannamoyi Debi sister of one Mondakini deceased. Baikuntha applied for letters of administration to the estate of the deceased and was opposed in the Court of the District Judge by Prosannamoyi who set up a will in her favour. The District Judge granted the letters, but on appeal to the High Court they were revoked and probate of the will was granted to Prosonnamoyi. Baikuntha preferred an appeal to the Judicial Committee which succeeded. When the matter was pending in the District Court a Commissioner had been appointed to take an inventory of the property and Prosannamoyi prevented him from opening the safe, contending that some of its contents were her own, apart from the effect of the will. The District Judge ordered the safe to be kept under seal in a separate room and the key retained by the Commissioner. When the appeal of Prosannamoyi succeeded in the High Court, the Commissioner removed the seals. After the Privy Council

1. (1923) L.I.R. 51 Cal. 324.

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decree Baikuntha applied to the District Judge under S. 144 for an order against Prosannamoyi to restore to him the contents of the iron safe. The District Judge held that by his order that the safe be sealed and kept in a separate room he did not intend that it should be taken out of Prosannamoyi's possession and that as a Probate Court he had no power to take property out of a person's possession. Further he held that his order, passed after the appellate decree, directing that the seals be removed did not amount to an order restoring possession of the safe and its contents to Prosannamoyi. In other words he held that Prosannamoyi's possession of the safe and its contents had not been interrupted and he rejected the claim of the administrator that she had got possession of the safe from the Court in consequence of the High Court's decree and so must be made to return it when that decree was reversed. It is clear that in that case the proper remedy of the Administrator was to sue for possession of the property in question if he thought he could prove that it was part of the estate of the deceased. In confirming the District Judge's order the Court (Chatterjea and Panton, JJ.) observed

"The Probate Court could not direct the properties to be made over to the appellant by way of restitution, because they had never been in his possession nor taken out of his possession."

That observation clearly relates to the facts of that particular case. The Administrator under his letters of administration did not become entitled to possession of any property but only to bring in such property as he could prove to have been the property of the deceased. He had never got possession of the iron safe and its contents. The Commissioner had never got possession of it as the property of the deceased. Restitution could only be made in such a case of property which the Administrator had reduced to possession under his letters as belonging to the estate of the deceased and which had been taken from him as a result of the decree which had been reversed.

In *Niddar Mal* v. *Rattan Lal*,[1] the property was a debt due by two partners to the custodian of enemy property who was no party to the suit. The suit was for dissolution of partnership. In the Court of First Instance it was decreed that the debt aforesaid was payable by one partner only. He paid the whole debt to the custodian. On an appeal filed by him it was declared that the debt was payable by both partners in equal shares. The appellant then claimed under S. 144 from his ex-partner half of the amount of the debt. It was held that S. 144 did not apply to the facts of the case. Appellant had not paid his partner's share of the debt to the custodian in execution of the decree which had been reversed nor in consequence of that decree. Nor was his partner in possession of any property

1. (1927) I.L.R. 8 Lah. 356.

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which had been taken out of appellant's possession by any decree or order of a Court. That was a clear case where the appellant's proper remedy was by a suit for contribution.

In *Banarsiprasad* v. *Firm Hari Kishun Radhey Kishun*,[1] the property was five bales of cotton. These were part of a larger quantity namely 18 Bales which plaintiff sued to recover from the defendant on the ground that they belonged to himself. Plaintiff's suit was dismissed and he appealed. Pending his appeal eight bales were attached by one of defendant's creditors who by way of compromise accepted and took away five bales. Plaintiff's appeal succeeded. He then applied for restitution of the five bales aforesaid which had legally passed into the hands of a third party. The Court (per Fazl Ali J.) held that S. 144 did not apply to the facts of the case. It was observed that

> "S. 144 is meant to apply ordinarily to the class of cases where a person having obtained a decree executes it and recovers some money or property from the judgment-debtor and then the decree is reversed which necessitates the restitution of the property or money which the judgment-debtor had to part with at the instance of the Court.."

The last argument of learned Counsel for the respondent on this part of the case is that the plaintiff having in this suit asked for and failed to obtain a decree for future mesne profits cannot now claim them by way of restitution under S. 144. It is true that the plaintiff in his suit prayed for future mesne profits. In the court of First Instance this prayer was refused. And when defendants appealed against the substantive part of the decree plaintiff filed a cross appeal A. S. No. 261 against the trial Court's order denying his future mesne profits. This cross appeal naturally failed. And it does not appear that in his appeal to the Judicial Committee the plaintiff renewed his prayer for future mesne profits. But the answer to this contention of the learned Counsel for the defendant is in my opinion that the profits which the plaintiff claims now in this application under S. 144 are not the same as the profits which he would have got if he had been given a decree for future mesne profits. Future mesne profits could have been awarded for the period extending from the date of the plaint to the date when the plaintiff recovered possession of the estate. But as a result of my finding on the first part of learned Counsel's argument, plaintiff's possession in the eye of the law began when the Receiver was put in possession which was on or about 11th April 1923. The profits accruing during the Receiver's tenure of the estate would be the plaintiff's apart from any decree that he might have obtained for future mesne profits. The profits now claimed are for a period long after the plaintiff in this sense obtained possession. They are for the period subsequent to the appellate decree

2. (1932) I.L.R. 11 Pat. 553.

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of this Court which caused the plaintiff to be dispossessed. In my opinion a plaintiff who has been refused a decree for mesne profits but who subsequently gets into possession is not debarred from claiming under S. 144 profits which accrued to his opponent after the latter had as the result of a successful appeal dispossessed the plaintiff. That in my view is the position of the plaintiff in this case. It will not be right to say that he is merely in the position of one who has got a decree for possession without future mesne profits. His position is better than that. He has got a decree for possession and has reduced the estate to possession. His present claim for profits is based on his deprival of the estate by the force of the appellate decree. The decree of the Court of First Instance worked itself out when the Receiver was placed in possession of the estate. The plaintiff acquired new rights when under the appellate decree the Receiver's possession which was plaintiff's possession was determined and the defendant was placed in possession of the estate.

Lastly on the question of restitution generally and the meaning of S. 144 there is a passage in a recent case decided by a Bench of the Allahabad High Court (Harries and Misra, JJ.) in which with respect I concur and which I think may with advantage be quoted, see *Badruddin Khan* v. *Mahyar Khan*,[1]

"The doctrine of restitution contemplates a case where property has been recovered by the decree-holder under his decree and the decree is subsequently reversed wholly or partly in other proceedings. In such cases the law raises an obligation on the party who has received the benefit of the erroneous judgment to make restitution to the other party for what he has lost. The use of the words "damages, compensation and mesne profits" in the section indicates that the possession obtained under an erroneous decree, subsequently reversed, is wrongful possession and on the reversal of the decree the judgment-debtor would be entitled not only to the possession of the property taken from him but also to mesne profits during the period he was kept out of possession."

Two more points only remain for our decision. It is contended now on behalf of the defendant that even if the plaintiff is entitled to recover this Rs. 1,30,476/- from her as the surplus profits of the Estate, nevertheless she is entitled to retain for herself a sum which is very nearly equal to Rs. 1,30, 476/- either

I. As allowance payable to her under Orders of this Court, *or*

II. As maintenance at the rate of Rs. 1,500 a month which, she claims, would be payable to her as the widow of an undivided co-parcener of the Zamindar.

First as to the allowances. The orders of this Court on which the defendant relies are first the orders made by Mr. Justice Krishnan in 1923 and 1924; and secondly the orders made in 1928 and 1929 after the defendant had succeeded on appeal and before the Estate

1. I.L.R. 1939 All. 103 at 108.

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was handed over to her. It will be remembered that when Mr. Justice Krishnan placed the Estate in the custody of the Receiver he directed that each of the parties should be paid for maintenance and for the expenses of the litigation, a sum of Rs. 1,500/- a month; and that Rs. 65,577 (as found by the lower Court) out of the allowances due to the defendant remained unpaid at the time (2nd April, 1929) the Receiver handed over the estate to her. Defendant's case is that out of the revenues of the Estate accruing to her after she came into possession of it, she paid herself this sum, and is now entitled to retain it. Further she claims that for the 43 months during which she was in possession under the appellate decree she was entitled to appropriate to herself a monthly allowance at the same rate and this amounts to Rs. 64,500: these two amounts being added together come to Rs. 1,30,077/- which is very nearly equal to the amount of Rs. 1,30,476/- of the surplus profits of the estate.

In considering this part of the defendant's case we have to ascertain what the orders of this Court are relating to these allowances. And we have to decide what the effect of those orders is. Do they mean that the parties were to keep whatever was paid to them as allowances irrespective of the ultimate result of the litigation? Or do they mean that the allowances were only provisional payments and were bound to be refunded by that one of the parties who was finally unsuccessful?

As regards the Rs. 64,500 which the defendant claims to be entitled to appropriate as allowances accruing due, during the period she was in possession of the estate, there are of course no orders of this Court sanctioning any such appropriation. The allowance was payable under Mr. Justice Krishnan's order during the pendency of the defendant's appeal to this Court and the effect of that order was spent when the appeal was decided. Then when this Court directed the defendant to be put in possession in 1929 she was put in possession as rightful owner entitled to all the revenue of the estate and there would have been no point in making an order that she was entitled to take so much a month out of those revenues as an allowance for herself. We are left therefore with the Rs. 65,577 (accepting the lower Court's figure) which represented arrears of the allowance accruing due to the defendant during the pendency of her appeal and remaining unpaid when she entered on the estate. Was the defendant entitled to appropriate this sum out of the revenues of the estate which accrued to her after she entered into possession and even if she was, is she not now bound to refund it to the plaintiff? Learned Counsel for the plaintiff contends that no *interim* order of the Court could operate to give away the revenues of the estate absolutely to one of the contesting parties but that allowances paid *pendente lite*

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must be deemed to have been paid on condition that they should be refunded by the party who ultimately proves unsuccessful. He contends that even if this sum of Rs. 65,577 had been paid to defendant by the Receiver before he handed over charge to the defendant, the plaintiff would be entitled to recover it. I think that he is right.

In the *Challapalle Zemindari Case*[1], there is an observation of the Judicial Committee referring to allowances paid to a claimant *pendente lite*. That was a suit for maintenance by a younger brother against the Zamindar in possession. It was urged on behalf of the defendant before the Judicial Committee that the plaintiff could not recover arrears of maintenance accruing prior to suit because he had never demanded maintenance. As against this it was pointed out that he was, prior to the maintenance suit, prosecuting another suit against the Zamindar for partition of the Estate. The Privy Council observed by way of explaining the absence of a demand for maintenance, that "so long as that action, *i.e.*, the partition suit, was pending the plaintiff could not well claim maintenance except as a provisional means of support pending the appeal to Her Majesty in Council." This observation appears to support the contention put forward by plaintiff's counsel that sums awarded to a litigant as maintenance *pendente lite* are awarded on the implied understanding that they are to be refunded if the party is ultimately unsuccessful. It would be anomalous in my opinion if a Court could award to a suitor money to be paid out of the revenues of the very property which he is suing to recover, otherwise than on condition that the money would have to be refunded if he fails in his suit. That would be to give him part of the very relief which he claims before there is any judicial decision that he is entitled to that relief. I think therefore that Mr. Justice Krishnan's order of 1923 did not operate to give defendant an absolute title to the sums directed to be paid to her for maintenance and for the expenses of the litigation.

We have next to see whether in any of the orders of this Court authority was in fact given to the defendant to appropriate Rs. 65,577 out of the revenues of the Estate which accrued to her after she entered into possession, and to retain it as her own property on account of arrears of allowance due to her for the period when, pending her Appeal to this Court, she was out of possession.

Mr. Justice Krishnan's orders of 1923 and 1924 are as I have said not before us. Learned Counsel on both sides have been content to rely, for the import of those orders, on references made to them in the orders passed by this Court after defendant's appeal was decided on 30th March, 1928 and before defendant entered into possession of the estate on 2nd April, 1929. It is necessary therefore to explain what these latter orders were. After the appellate decree was made,

1. (1900) 10 M.L.J. 294 : L.R. 27 I.A. 511 : I.L.R. 24 Mad. 147 (P.C.).

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the plaintiff applied for stay of execution pending his appeal to the Judicial Committee and for a continuance of the Receiver appointed by Mr. Justice Krishnan in 1923. That application was dismissed in the Order Ex. A dated 17th August, 1928. In Ex. A no reference is made to the arrears of allowances due to the defendant. The plaintiff's arrears of allowance amounting to Rs. 45,000/- were dealt with, however. The receiver was directed to pay them up to the date of his handing over possession. The Receiver was still in possession pending defendant's taking delivery and pending disposal of plaintiff's petition that defendant be not given delivery but that the Receiver should be continued. The next order is Ex. VI, dated 20th November 1928 to which we have already referred, in which the rate at which the arrears payable to plaintiff were to be computed was directed to be Rs. 1,500 a month not Rs. 1,000 a month as had been inadvertently stated in the previous order Ex. A. On that occasion no motion was made by the defendant regarding her own arrears. The last order is Ex. B dated 20-3-1929. In this order the question of allowances and arrear allowances is discussed in full. There were three petitions before the Court. One was by the plaintiff praying for a direction to the Receiver to pay him the arrears of allowance, as already ordered, and that the Receiver be not discharged until he did so—which was obviously only a device to prevent the defendant from getting into possession, since the Receiver had not nearly enough funds in hand to pay plaintiff's arrears—they amounted to Rs. 45,000/- and would have had to continue in possession in order to realise the necessary sum from the rents of the estate. The second motion was by the defendant praying that the Receiver be directed to disburse to her the arrears of allowance due to her as he had already been directed to do in the case of the plaintiff: and in the alternative if he had not enough funds—which everybody knew to be the case, for he had less than Rs. 11,000/- in his hands—then to direct him to divide whatever he had, equally between the parties. The third petition was by the defendant praying that the order of the Court passed on 20th November, 1928 (Ex. VI) should be reviewed and amended by reducing the rate at which the arrears due to plaintiff were directed by that order to be calculated. The order of the Court Ex. B was, that the arrears due to the plaintiff under Mr. Krishnan's order were Rs. 45,000/- as on the 1st September, 1928: that he was to be paid Rs. 500/- per month as from that date; that the arrears of Rs. 45,000/- were to be paid to him in annual instalments on the 1st July of every year: that the Receiver however might pay him the instalment for 1929 namely Rs. 10,000/- out of the money in his hands, and if he did not, then the respondent (who was about to take possession of the estate and did take possession a fortnight later) must pay it, and if the money was not paid as directed that this

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order could be executed and also the parties would be at liberty to apply for directions. No definite direction was made on the petition of this respondent praying that the arrears of allowance due to her should be paid by the Receiver or that he should divide the funds in his hands between herself and the plaintiff. The relevant portions of Ex. B in which these directions were made are as follows : "These applications relate to the arrears of maintenance at Rs. 1,500 a month ordered to be paid both to the plaintiff and defendant by Krishnan, J. on the 11th April, 1923. An appeal by the defendant was then pending in the High Court and a Receiver was in possession of the estate. On the 11th February, 1924 the Subordinate Judge reported that the allowances could not be paid having regard to the collections of the estate, the payment of peishcush and other necessary charges. On the 22nd February, 1924, Krishnan, J. varied his order by saying that whatever net amount remained available after paying peishcush, the establishment charges and the Receiver's remuneration should be divided equally between the plaintiff and the defendant, subject I take it, to the maximum of Rs. 1,500/- allowed to each......... On 17th August, 1928 we directed that the defendant do take possession of the estate on giving security for Rs. 60,000/- and we also directed Rs. 500/- a month to be given to the plaintiff for maintenance, Rs. 250/- without security and the remaining Rs. 250/- on his giving security to return the amount if called upon after the disposal of the Privy Council appeal............As we were under the impression that security would be given by the defendant within a short period, we said that till the security was given and the Receiver discharged, the position was to be treated as if the old order of things continued, and Rs. 1,500/- a month should be given to the plaintiff for maintenance. (Then after dealing with the question of the arrears of allowance): The plaintiff wants to treat the income for this year and the money in the Imperial Bank as the assets out of which his arrears should be paid : and he wants payment. For the defendant it is contended by the learned Advocate-General that, so far as the arrears of maintenance are concerned both his client and the plaintiff are entitled equally to Rs. 1,500/- a month, and that any sum in Court would not be available entirely to the plaintiff to discharge his arrears. Another contention is put forward, that there can be no question of arrears in this case, for all that the plaintiff is entitled to is a half of the available net income till the Receiver is discharged, and if on any account there is no possibility of being paid.........he must suffer the consequences, and cannot claim any payment..........we are unable to accede to the argument of the learned Advocate-General that no arrears of maintenance are really payable at all and that the plaintiff must take the consequences if the Receiver is discharged. If that view had been pressed we would not have discharged the

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Receiver. We think Krishnan, J.'s order is clear that each party was to get Rs. 1,500/- a month but as it was reported that the Receiver had not sufficient funds to pay this amount, the net income after meeting the necessary expenses was directed to be divided between the parties. We think that, if in any year assets had been available to pay the maintenance due and a balance remained, such balance should have been claimed by the parties to pay the arrears. Mr. T. Rangachariar says that while Krishnan, J.'s order limited the necessary expenses to the payment of peishcush, Receiver's remuneration and the establishment charges, the Receiver paid off debts due by the estate to the extent of Rs, 1,00,000/- the benefit of which amount the plaintiff would have got if it had not been paid and that now the defendant gets it. We have no doubt that the order of Krishnan, J. must be so construed that Rs. 1,500 is payable to each party and that as there were not sufficient funds they should share the balance after payment of kist etc., and that when funds were available they could enforce the claim for Rs. 1,500/- and get paid. We think that so far as the defendant is concerned she is also entitled to payment of these sums and we cannot treat the amount in Court or the assets as entirely attributable to the plaintiff........

"We expected that security would be furnished within about two months from the date of our order (the 17th August, 1928). We now find that matters are still pending. If matters are thus pending it is difficult to make any order as regards the arrears. We think in view of the circumstances that the best solution will be to direct that the security now tendered, Rs. 41,000/-, to be accepted as sufficient and to reduce the security already ordered to this amount so that there shall be no difficulty in the defendant taking possession of the estate. (I note that defendant actually took possession a fortnight after this order).

"As regards the payment of arrears due to the plaintiff the sum due to him is Rs. 45,000/-. The same consideration which guided Krishnan, J., in directing the available assets to be divided between the parties will govern us also in making any provision for the payment of arrears; and we think that, if Rs. 10,000/-, is paid every year to the plaintiff out of the income, it would be sufficient protection. It will on the one hand give the plaintiff funds to carry on the litigation and maintain himself.........and on the other it will not unduly cripple the estate which the defendant will have to manage. Our order therefore is etc. The Receiver is at liberty to pay the Rs. 10,000/- to be paid this year. If he does not pay, the defendant will have to pay."

Now in this order there is no direction as I have said that defendant should irrespective of the result of the plaintiff's appeal take absolutely out of the future profits of the estate a sum equal to the arrears due to her as allowance for the period prior to her entry on the Estate. And there is no direction that during her occupation of the estate and pending plaintiff's appeal any part of the profits should be earmarked as a personal allowance of the defendant. The learned Judges knew that if plaintiff succeeded the defendant would have to account for the profits. In fact they directed that

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defendant should file accounts annually of income and expenditure. If they had thought that defendant was entitled to any part of the profits, other than in her character of rightful owner, they would have said so.

Learned Counsel relies on one sentence in this order

"We think that so far as the defendant is concerned she is also entitled to payment of these sums and we cannot treat the amount in Court, or the assets, as entirely attributable to the plaintiff."

But this sentence must I think be construed with reference to the facts. There was between Rs. 10,000/- and Rs. 11000,/- in Court. Plaintiff to whom Rs. 45,000/- was due on account of arrears of allowance had prayed that the whole of this sum and the income for the current year should be treated as the assets out of which his arrears should be paid. This was another way of praying that the Receiver should be continued, a prayer which the Judges had already refused in their order Ex. A. The Advocate-General appearing for the defendant had pointed out that under Mr. Justice Krishnan's order the money in Court though it fell far short of the arrears of allowance due to the parties should be divided between the parties. The sentence just quoted appears to relate to this argument.

"We cannot treat the amount in Court or the assets as entirely attributable to the plaintiff."

And the order of the Judges about this amount was that out of it Rs. 10,000/- might be paid to plaintiff by the Receiver before he handed over the estate to the defendant. If not it would have been handed over to the defendant who would then have had to pay the plaintiff Rs. 10,000/- on or before the 1st July 1929.

Learned Counsel also wishes us to construe this order as meaning that since out of the future profits of the estate plaintiff was to be paid the arrears due to him, therefore the defendant was similarly to pay herself the arrears of allowance due to her. This I think is far-fetched. Defendant took the estate absolutely. The whole of the profits belonged to her. If it had been intended that she was not to be accountable for the whole of those profits but could in any case appropriate Rs. 65,577/- we think there would have been a definite direction to that effect.

We observe also that defendant is in effect claiming this sum of Rs. 65,577/- as a first charge on the revenues of the estate. She is putting it before the payments she was directed to make to the plaintiff. Those payments consisted of Rs. 30,000/- arrears of allowance and Rs. 500/- per month for 50 months or Rs. 55,000/- in all. Defendant paid the plaintiff in fact only Rs. 29,000/-. See item 21 in the Abstract Statement. She owes him under this head Rs. 26,000/-.

My conclusion therefore is that as regards the Rs. 65,577/- arrears of allowance there is no warrant in the orders of this Court to

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justify the defendant in appropriating it; and that even if there was, such an appropriation would be provisional, and in the event that has happened, the money would have to be refunded to the plaintiff. And secondly that as regards the Rs. 64,500/- claimed as allowance for the period during which defendant was in possession of the estate there is no shadow of a justification for that claim in any of the orders of this Court.

The second of the grounds on which the defendant claims to be entitled to retain almost the whole of the amount now claimed by the plaintiff as mesne profits is that as the widow of an undivided co-parcener of the Zemindar she has the right to be maintained out of the revenues of the estate: that Rs. 1,500/- a month is a reasonable rate of maintenance and that therefore she is entitled to retain Rs. 1,30,077/- which amount is calculated in the manner we have already explained namely Rs. 65,577/- due up to her taking possession of the estate and Rs. 64,500/- due for the subsequent period up to the date of the Privy Council decree. To this claim learned counsel for the plaintiff answers

I. That the defendant is not a person who is entitled to maintenance;

II. That in these proceedings a counter-claim like the present cannot be adjudicated on as it raises complicated questions of law and fact;

III. That this counter-claim was not pleaded in the lower Court.

On the point of law whether defendant is entitled to maintenance as of right, learned counsel for the plaintiff relies on what is known as the *Second Pittapur Case*[1], in which the Privy Council ruled that in an impartible Zamindari belonging to a person governed by the Mitakshara Law there is no co-parcenary between the Zamindar and his agnates; and therefore the grandson of a deceased Zamindar was held to be not entitled to maintenance out of the impartible estate in the hands of his successor. In this decision the view taken by this Court in certain cases decided prior to 1899 that there was joint property in an impartible estate which only fell short of co-parcenary because by custom there was no right to partition was held to be no longer tenable. On the other side learned Counsel for defendant contends that the decision in the *Second Pittapur Case*[1], has been overruled in subsequent decisions of the Judicial Committee notably in *Baijnath Prasad Singh* v. *Tej Bali Singh*[2], and in *Collector of Gorakhpur* v. *Ram Sundar Mal*[3]. It is unnecessary for me to refer in detail to the decisions which have been cited to us now in support of the rival

1. (1918) 35 M.L.J. 392 : 45 I.A. 148 : I.L.R. 41 Mad. 778 (P.C.).
2. (1921) 40 M.L.J. 387 : L.R. 48 I.A. 195 : I.L.R. 43 All. 228 (P.C.).
3. (1934) 67 M.L.J. 274 : L.R. 61 I.A. 286 : I.L.R. 56 All. 468.

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theories, since very recently a Bench of this Court has decided, following the *Collector of Gorakhpur* v. *Ram Sundar Mal*[1], that the undivided members of the family of a Zemindar have a right to maintenance out of the estate as if it were joint family property and that the decisions of this Court to that effect made prior to the *Second Pittapur Case*[2], and overruled by it may now be followed. See *Maharajah of Venkatagiri* v. *Raja Rajeswara Rao*[3]. We quote from that decision with respect to a passage in the judgment of my Lord, the Chief Justice.

> "Impartibility arises out of custom, but with the greatest respect to what has been said to the contrary I do not regard a custom of impartibility as in itself destroying the right of the junior members of the family to maintenance out of the family estate while it remains in the family. The fact that a family has allowed a custom of impartibility to arise does not in itself imply the abandonment by the junior members of their right to maintenance out of the estate........To deprive junior members of a joint Hindu family whether partible or impartible of the right to maintenance there must, it seems to me, be a custom to that effect."

On this part of the defendant's case if the point directly arose for decision I would on the materials furnished in this case hold that as widow of an undivided co-parcener defendant is *prima facie* entitled to maintenance out of the estate. There is I think very little reason to doubt that Kunji Behari Deo, her late husband, was an undivided member of the family to which the Zamindar belongs. Both were descended from a common great grandfather who was the holder of the estate.

Audiconda, grandfather of the plaintiff and Raghunath, grandfather of Kunji Behari, husband of this defendant, were brothers. There was a younger brother but he died without leaving male issue and the family thereafter has been represented solely by Audiconda and Raghunath and their descendants. Audiconda, the elder brother, was Zamindar from 1840 till 1868. Dying without male issue, he was succeeded by Raghunath who was ousted in 1876 by plaintiff's father Brojo Kishore who had in 1870 been adopted by Audiconda's widow. Brojo Kishore was Zamindar till his death in 1906. Raghunath's son—Raghunath had died in 1883—Vaishna Deo, claimed the estate but died before his claim could be recognised. In 1907 Vaishna Deo's elder son Purushottama Deo was registered in the Collector's books as proprietor of the Estate and entered on possession and remained in possession till his death in 1915 when he was succeeded by his younger brother, defendant's husband Kunji Behari Deo. Kunji Behari Deo was Zamindar till the 20th December 1922 when the title of the plaintiff was declared by the decree of the

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1. (1934) 67 M.L.J. 274: L.R. 61 I.A. 286: I.L.R. 56 All. 468.
2. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).
3. (1939) 1 M.L.J. 831: I.L.R. 1939 Mad. 622 at 658.

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Court of First Instance in the present suit, in which the plaintiff's claim as the legitimate son of Brojo Kishore was confirmed. It will be seen therefore that the estate has been in the possession of the junior line for twenty-three years during the period from 1868 to this suit, while the senior line has held it for 27 years. In the judgments of this Court and of the Privy Council in which the title to this estate has been in question namely *Sri Varada Pratapa Raghunatha Deo* v. *Sri Brojo Kishore Patta Deo*[1], and *Madana Mohan Deo* v. *Purushothama Deo*[2], and the present suit *Nandamani Ananga Bhima Deo* v. *Suseela Bala Patta Mahadevi*[3], there is no indication that the two branches of the family had ever become divided. Besides these cases there is an unreported case dated 1896 of this Court, not referred to in the arguments before us in which Brojo Kishore, Zamindar from 1876 to 1908 and father of this plaintiff, appealed to this Court against a decree of the District Judge, Ganjam, awarding maintenance to Brojo Kishore's cousin Vaishna Deo, father of defendant's husband, Kunji Behari Deo. See A. S. No. 111 of 1895, decided on appeal against O. S. 14 of 1893 of the District Court, Ganjam. The decision of this Court was that Vaishna Deo was clearly entitled to maintenance as a matter of right. The amount awarded was Rs. 500/- a month, stated to be about one-ninth of the admitted income.

Learned Counsel for the plaintiff contends however that the defendant in her answer to the plaintiff's claim did not explicitly put forward her own claim to maintenance as a set-off against the amount which plaintiff sought to recover from her as profits of the estate enjoyed by her while she was in possession. This I think is true. In defendant's pleading there is no positive assertion of a claim against the plaintiff for money due to the defendant by way of maintenance. The relevant portions of that pleading are as follows :

> " The abstract herewith filed shows an expenditure of Rs. 1,19,264 towards arrears of allowances and the current allowance of this respondent. This expenditure is also binding on the Estate. The order of Mr. Justice Krishnan fixing an allowance of Rs. 1,500/- a month to each party........ is not modified or set aside so far as this respondent is concerned and hence the expenditure of Rs 1,500/- a month as allowance of this respondent is binding on the Estate and on the petitioner. Moreover, this respondent was representing and managing the estate during the period in question and had to maintain the status and expenditure incidental to the said position and hence the expenditure of Rs. 1,500/- a month as the allowance of the respondent is reasonable and binding on the Estate."

It is clear I think that respondent's counter-claim was put forward entirely on the strength of Mr. Justice Krishnan's order and not on the ground that it represented the amount of maintenance due to her

1. (1876) 1 Mad. 69 (P.C.).
2. (1918) 35 M.L.J. 138 : L.R. 45 I.A. 156 : I.L.R. 41 Mad. 855 (P.C.).
3. (1932) 64 M.L.J. 1 (P.C.).

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as of right. At the stage of argument in the lower Court apparently defendant's counsel raised for the first time this alternative basis for the counter-claim. For the learned Subordinate Judge observes in paragraph 4 of his judgment

"It is contended that the first counter-petitioner (that is, this defendant) is entitled to maintenance out of the estate as the widow of a member of the plaintiff's family."

And the learned Subordinate Judge disposing of this contention held that in accordance with the ruling in the *Second Pittapur Case*[1], that the defendant was not entitled to maintenance out of the estate as of right or by custom. The question therefore arises whether this counter-claim by way of maintenance can be canvassed on appeal.

The first point that would have to be decided, if the question was directly in issue before us is whether such a claim can be advanced in answer to an application for mesne profits under S. 144 of the Civil Procedure Code. That I think is an arguable point. The decision of it would depend on whether the defendant's claim arises from the same transaction as the plaintiff's claim. And the crucial point would be, what is the transaction in the circumstances of the present case? Plaintiff claims the profits which accrued to the defendant while she was in possession of the estate. Defendant's counter-claim would presumably be that some of those profits would be payable to her even if she had not been in possession. We think there would be a reasonable ground for argument, in defendant's behalf, that her counter-claim arises in the same transaction as the plaintiff's claim. It might possibly be held that the transaction consisted in the enjoyment by the defendant of the whole profits of the estate during a period when she was, independent of her position as owner in possession, entitled to part of those profits.

I do not think it necessary however to record a finding on this question as the set-off by way of maintenance was not properly raised and adjudicated upon in the lower Court and is not properly before us in appeal. Assuming that the defendant is entitled to maintenance, the question, how much she is entitled to under that head remains to be tried and decided.

In the result therefore I find that none of the objections raised on behalf of the defendant either in the lower Court, or newly in this appeal can validly affect the plaintiff's right to recover from the defendant by way of restitution, under S. 144 of the Civil Procedure Code, the sum of Rs. 1,30,476/- which the defendant received as profits of the estate during the time she was in possession under the decree which has been reversed.

1. (1918) 35 M.L.J. 392: I.L.R. 41 Mad. 778.

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In this judgment throughout I have referred to the amount of profits as Rs. 1,30,476/-. That is the actual amount. I should explain that in her abstract of accounts the defendant put it at Rs. 1,19,264. See item 23 of that statement, in which she calls it her "allowance." That is a fallacious figure. Defendant arrives at it by debiting herself with Rs. 11,212/- (see item 22) which she sets down as having been paid by her to the plaintiff. But she never paid this sum to the plaintiff. The debit entry is sought to be explained in the following manner: At the date of the appellate decree plaintiff owed to defendant a certain sum for money which he had recovered from her as costs awarded to him by the Court of First Instance. And he also became liable by the appellate decree to pay to the defendant a certain sum as costs. These two sums added together come to Rs. 11,212/-. Defendant on the other hand had as already explained to pay to the plaintiff large sums under the order of this Court Ex. B as well as an allowance of Rs. 500/- a month. By entering on the debit side Rs. 11,212,/- defendant professes to have adjusted the money due to her by the plaintiff *pro tanto* against the money she had to pay the plaintiff. But she has done nothing of the sort. In order to effect that adjustment she would have to enter Rs. 11,212/- also on the credit side of the account as having been received from the plaintiff. This she has not done. In fact therefore she did not pay the plaintiff this sum of Rs. 11,212/-. She put it in her pocket. The true figure of profits received by her is therefore Rs. 1,30,476/-.

I would also observe before leaving this part of the case that if defendant's counter-claim for the profits of the estate or part of them whether on the ground that she is entitled to them as allowances under the orders of this Court or as maintenance due to her as a co-parcener's widow is to be entertained, the money which the defendant owes the plaintiff as arrears of allowances and as allowances directed to be paid by her to the plaintiff—which is Rs. 26,000/- should be taken into account. He who seeks equity should do equity.

In accordance with the opinions expressed above I think this appeal should succeed and that the plaintiff is entitled to recover Rs. 1,30,476/- from the defendant.

ORDER.—Since we are at variance on the questions of the applicability of S. 144, Civil Procedure Code, and of the liability of the defendant to make restitution, the case must be laid before another Judge.

This case came on for hearing on the 4th and 5th days of September, 1939, in pursuance of the above order before Mr. Justice Wadsworth and the case having stood over for

consideration till Monday, the 11th day of September, 1939, and the case having been set down to be spoken to

The Court delivered the following Judgment

WADSWORTH, J.—This appeal raises a question of restitution and has been referred to me on a difference of opinion between Burn and Stodart, JJ., on two points.

(1) The question of the applicability of S. 144, Civil Procedure Code, and (2) the question of the liability of the defendant's legal representative (first respondent herein) to make a restitution, if S. 144, Civil Procedure Code, applies.

The facts of the case have been fully set forth in the judgments of my learned brothers and it is unnecessary to repeat them at length. The essential points are that the plaintiff sued for possession of his estate from the husband of the present first respondent and in the Subordinate Judge's Court, he succeeded, the decree being dated 20th December, 1922. The defendant appealed to the High Court and in that appeal, a Receiver was appointed who took charge of the estate in April, 1923, the plaintiff not having got possession meanwhile. The defendant died in 1925 and his widow (the present first respondent) carried on the appeal. On 30th March, 1928, the High Court reversed the trial Court's decree. The plaintiff preferred an appeal to the Privy Council and asked that the receiver should continue in possession of the estate. But this prayer was refused and the widow obtained possession from the receiver. On 1st November, 1932, the Privy Council set aside the decree of the High Court and restored the decree of the Subordinate Judge. Immediately after this decree was passed, the first respondent was herself appointed receiver pending receipt of the formal order in Council and the appellant got possession in March, 1933. The appellant claims restitution in the shape of profits of the estate for the period from April, 1929, when the first respondent took possession from the receiver, to December, 1932, when she was herself appointed receiver. The profits of the estate, after allowing ordinary charges, amount to approximately Rs. 1,30,000 for this period.

The first respondent contended, firstly, that there could be no order for restitution in the circumstances of the case, and, secondly that she was entitled to appropriate the profits to the amount due to her under the High Court's orders whereby the

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receiver was directed to pay to each party a monthly maintenance of Rs. 1,500 and she claims that she is entitled to set-off, against the surplus, the arrears of this maintenance for the period during which the receiver was in charge and a monthly allowance of Rs. 1,500 for the period during which she herself had possession of the estate. It has to be observed that pending the appeal to the Privy Council, the first respondent was required to pay a reduced maintenance of Rs 500 per mensem to the plaintiff and she was directed to pay the arrears due to him under the previous order as the balances in her hands permitted and she did in fact pay certain sums towards the arrears.

The learned Judges who referred this appeal, are agreed on certain points. They agree that the order of Krishnan, J., fixing for each party a monthly maintenance allowance of Rs. 1,500 cannot be regarded as anything more than a provisional arrangement to be in force during the pendency of the appeal. They are also agreed that the respondent cannot claim in these proceedings a right to appropriate maintenance under any common law right which she may have, so that she must stand or fall by the order of the High Court fixing her maintenance. There is a further fact which has to be stated. The suit originally included a claim for past and future mesne profits, but no issue was framed in this respect and the trial Judge held that the claim for mesne profits had been given up. Before the High Court there was cross-appeal by the plaintiff on the subject of mesne profits which was dismissed. The judgment of the Privy Council does not deal expressly with the claim for mesne profits, but since the decree of the trial Court is restored, it must be taken that no mesne profits were awarded in the suit.

The view taken by Burn, J., is, firstly, that S. 144, Civil Procedure Code, does not apply because the possession which the first respondent got after the High Court's decree was neither under that decree nor properly consequential upon that decree; secondly, that even if S. 144 does apply, the most that could be claimed would be the restoration of any benefit accruing to the first respondent on the basis of the continuance of the position which obtained immediately before the wrong decree was passed; therefore one must postulate the continuance of the provisional orders which would justify the appropriation by the first respondent of the amounts to which she

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was entitled under the orders, so that nothing would be left which could be called a benefit returnable; and thirdly that the refusal of future mesne profits in the decree of the trial Court which the Privy Council has restored, bars the claim by way of restitution for any sum out of the profits of the estate during the first respondent's possession. Stodart, J., has taken a contrary view on all these points.

I will deal firstly with the question of the applicability of S. 144, a matter which seems to be covered by the decision in *Bishweshwar Pratap Narayan Sahi* v. *Chandreshwar Prasad Narayan Singh*[1], discussed by both the learned referring Judges. In that case, a receiver was appointed pending a suit for possession of land. After the decree, the successful party obtained possession from the receiver. The decree was reversed in appeal. The appellant applied for restitution. Objection was taken that the appellant was not entitled to get the property back by way of restitution because it was the receiver who had been dispossessed and not the appellant. It was held that the appellant could get the property back, since the possession of the receiver was for the benefit of the person entitled to the property. Burn, J., distinguishes this case on the ground that the wrong decree was actually executed and the receiver was therefore dispossessed under that decree and he points out that there can be no doubt that the order for restoration of possession was one properly consequential on the variation of the erroneous decree. He points out that in order to justify restitution, it must be shown that property has been received by the decree-holder in execution of a wrongful decree or directly in consequence of that decree. My learned brother holds the view that the possession obtained by the first respondent in the present case was not possession in execution of the decree, nor under any explicit direction contained in the wrong decree and that it must therefore be held to be only indirectly consequential on wrong decree, so that it cannot form the basis for an order for restitution. With the greatest respect, I find myself unable to agree with this conclusion and I am of opinion that Stodart, J., is right in holding that not only was the possession of the Receiver the possession of the plaintiff who is ultimately found entitled to the property, but also that the dispossession of the receiver was directly consequential on the wrong decree. It

1. (1928) I.L.R. 7 Pat. 319.

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is true that the High Court's decree merely reverses the decree for possession given by the Subordinate Judge and it is true that the 1st respondent got possession after some little delay as a result of the refusal of the appellant's application to continue the receiver pending the appeal to the Privy Council. But I am unable to subscribe to the view that restitution should not be ordered unless the possession is got as a result of either the execution of the decree or an explicit order contained in the wrong decree. When, as in this case, the property in dispute is held by the Court's receiver, it is unnecessary for the decree to contain a direction to the receiver to hand over the property to the successful party. The receiver will automatically transfer possession to the party who succeeds in the suit and the fact that the transfer is made without the execution of the decree and without any explicit order in the decree, will not, to my mind, alter the fact that possession is, in fact, given under the decree. The surrender of possession by the receiver on the termination of the appeal is the inevitable consequence of the decree passed in the appeal. It seems to me therefore, with great respect, that the distinction which my learned brother Burn, J. seeks to apply in dealing with the case in *Bishweshwar Pratap Narayan Sahi* v. *Chandreshwar Prasad Narayan Singh*,[1] is fallacious.

An attempt has been made before me to make a further distinction based on the ground that in the Patna case, the party who got possession under the wrongful decree could trace that possession to no other source than the decree which was set aside, whereas in the present case the 1st respondent who succeeded in the High Court was the widow of the party originally in possession before the litigation started who had continued in possession right up to the time when the receiver was appointed It is argued, therefore, that the 1st respondent's possession, obtained from the receiver, was nothing more than the restoration of the possession which her husband had before the appointment of a receiver. It seems to me that this argument is specious. The point of time for determining a right to restitution is not the inception of the proceedings resulting in the wrong decree, but the point of time immediately before the wrong decree. This is clear from the words "place the parties in the position which they would have occupied but for such

1. (1928) I.L.R. 7 Pat. 319.

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decree". They are not to be placed in the position which they occupied at the beginning of the litigation, but in the position which they occupied just before the wrong decree was passed. When once it is conceded, as I think it must be, that the possession of the receiver at the time when the High Court's decree was passed, was the possession of the plaintiff who ultimately succeeded before the Privy Council, it does not seem to me to matter that the plaintiff did not get possession after the trial Court's decree or that the defendant continued in possession up to the time of the appointment of the receiver. The important question is, who was in possession before the wrong decree was passed. The answer to that question is that the receiver was in possession on behalf of the person who would ultimately be found entitled, that is to say, on behalf of the plaintiff. The receiver surrendered possession to the 1st respondent, not because he had taken possession from the original defendant but because the 1st respondent had been declared entitled by the erroneous decree. It follows therefore, that his possession, which was constructively the possession of the plaintiff, terminated and the defendant got possession directly in consequence of the erroneous decree of the High Court, reversing the trial Court's decree. It seems to me, therefore, that S. 144 applies in terms and that the plaintiff is entitled to claim restitution of any profits realised by the defendant's legal representative which can be called properly consequential upon the wrong decree, unless the defendant's legal representative is entitled to resist the claim either by showing that she has a superior claim to those profits or by showing that the plaintiff's claim is barred by reason of the failure to establish his right to future profits in the trial Court.

This leads to the next question as to the extent of the defendant's legal representative's liability by way of restitution and involves a consideration of the precise meaning of the words "place the parties in the position which they would have occupied but for such a decree", occurring in S. 144, Civil Procedure Code. It seems to me that there are three possible ways of interpreting these words. The words might mean that the parties are to be put in the position they would have occupied had the right decree been passed instead of the wrong decree; or, secondly, they may mean that the parties are to be put in the position that they would have occupied had no decree

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at all been passed; or the words may mean simply that the parties are to be put in the position which they would have occupied had it not been that a wrong decree had been passed. It seems to me that the last interpretation is the correct one. There is nothing in the words of S. 144 to justify the conclusion that it was the intention of the Code to give to the person claiming restitution any better position than that which he occupied at the time when the wrong decree was passed and this is what has to be inferred if we are to take it that he has to be put in the position which he would have occupied had the right decree been passed. Similarly I do not think that it can be said that the person claiming restitution must base his claim on the theory that he is entitled only to what he would have got had there been no decree at all and had the proceedings been pending right up to the time when the final decision set the matter at rest. It seems to me to be going too far to postulate, for purposes of restitution, the continuation of the proceedings until terminated by the right decree, more especially if we are to postulate also the continuation of all incidental orders passed during the pendency of those proceedings. The correct procedure seems to me to be to take the position as it stood immediately before the wrong decree, to find out what would be the position of the ultimately successful party as on that date, having regard to the fact that the proceedings terminated and to award to the successful party restitution in the shape of any profits wrongfully received under the erroneous decree or as a direct consequence thereof.

In any view it seems to me that it is impossible to hold on the facts of the present case that the defendant's legal representative would be entitled to appropriate the whole of the amounts due to her both for arrears and for future maintenance on the basis of the continuation of the provisional orders passed pending the High Court appeal, without regard to the fact that those orders recognised similar rights in the plaintiff. But I am of opinion that the correct view is that which has been taken by my learned brother Stodart, J. namely that one must regard the possession of the receiver immediately before the erroneous decree as the possession of the plaintiff who is found ultimately to be entitled. One must treat these provisional orders passed purely for the purpose of appeal before the High Court as having terminated on the termination

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of that appeal and one must award to the plaintiff the profits wrongfully received by the defendant's legal representative as a result of dispossession of the receiver, as representing the plaintiff, without any adjustment in respect of payments which could only be made on the assumption of the continuance of the provisional orders, which automatically came to an end on the termination of the appeal before the High Court. That is to say, the plaintiff is entitled to restitution on the basis of the position immediately before the wrong decree and on the assumption that orders made with reference to the pending appeal came to an end on the termination of that appeal.

There remains the question whether the plaintiff's claim to restitution is barred by reason of his failure to get a decree for future mesne profits in the original Court. On this part of the case, the respondent relies on the decision in *Bhimana Gowd* v. *Siddalinga Gowd*[1], which was to the effect that when in a suit for partition and possession, there was no prayer for mesne profits, mesne profits could not be claimed by way of restitution when the original order, dispossessing the claimants, was set aside. This decision would be authority for the view that the plaintiff would not claim by way of restitution mesne profits for the period anterior to the date on which the receiver got possession constructively for the plaintiff. But when the receiver got possession, there was really no scope for any execution by the plaintiff either in respect of possession or in respect of profits. Thereafter the possession of the receiver was the possession of the plaintiff and no question of future mesne profits could arise. The High Court having passed an erroneous decree as a result of which the receiver was dispossessed and the first respondent was put into possession, the profits which accrued to the defendant's legal representative as a result of this erroneous decree are not, in my opinion, profits which could have been claimed in the original suit. They were profits flowing directly from the erroneous appellate decree, recoverable only by restitution and not such as could have been foreseen in drafting the original plaint. The position is just the same as it would have been had the plaintiff executed his decree and got possession during the pendency of the High Court appeal and being dispossessed as a consequence of his failure in that appeal. After such dispossession, profits accruing to defendant's legal repre-

1. (1927) 27 L.W. 188.

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sentative would not be recoverable as future mesne profits claimed in the suit, but by way of restitution owing to the wrongful decree. It seems to me, therefore, that there is no bar to the plaintiff's claim by reason of his failure to get a decree for future mesne profits before the trial Court.

In the result therefore, I find, agreeing with my learned brother Stodart, J., that the appeal must be allowed and the plaintiff be given a decree for restitution of a sum of Rs. 1,30,476 from the defendant's legal representative with costs throughout. No relief is granted against the sureties in this application. Advocate's fee Rs. 500.

K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

P. Gopalachari .. *Petitioner** (*Accused*)

v.

The Corporation of Madras .. *Respondent* (*Complainant*).

Gopalachari. v. Corporation of Madras.

Madras City Municipal Act (IV of 1919), Ss. 218 and 357 (1)—Notice under S. 218—Particulars of work not specified—Time for doing work not fixed—Non-compliance with notice—Offence if constituted.

Where a notice issued to a person under S. 218 of the Madras City Municipal Act did not specify the particulars of the work to be carried out by him nor did it contain the time within which the work was to be carried out,

Held, that the notice was invalid, and that the person served with the notice could not be convicted under S. 357 (1) of the Act for failure to comply with the notice.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Third Presidency Magistrate of the Court of the Presidency Magistrates, Egmore, Madras in M. No. 1380 of 1938.

V. Rajagopala Mudaliar for Petitioner.

A. Suryanarayanayya for Respondent.

K. V. Ramaseshan on behalf of the Crown.

The Court made the following

ORDER.—The evidence justifies the conclusion of the Magistrate that the street in question is a private street, but particulars of the work to be carried out by the petitioner were not specified in the notice issued to him under S. 218 of the City Muni-

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* Crl. R. C. No. 958 of 1938 (Crl. R. P. No. 908 of 1938). • 20th July, 1939.

cipal Act nor was it proved that the time within which the work is to be carried out was specified in the notice served on him. The time was not specified in Ex. E, the copy of the notice on which his acknowledgment for service of notice was obtained, and Ex. E-1, the Office copy of the notice which was produced and marked in evidence just before delivery of judgment does not by itself prove that any time was specified in the notice served on the petitioner. The supervisor (P.W. 1) does not say that to his knowledge the time was specified in the copy served on the petitioner, and it follows that the conviction under S.357, cl. (1) of the City Municipal Act for failure to comply with a notice under S. 218 cannot be sustained. The conviction of the petitioner is therefore set aside and the fine if levied will be refunded.

B.V.V. *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE STODART.

In re Nainamuthu .. *Appellant** (*Accused*).

Criminal Procedure Code (V of 1898), S. 164—Accused himself giving the first information of the crime—Statement recorded by Joint Magistrate—If statement under S. 164, Criminal Procedure Code—Formalities prescribed by section not observed—Admissibility of statement in evidence.

The accused who was charged with the murder of his concubine appeared before a Joint Magistrate and made a statement to him that he had killed the deceased and describing the circumstances of the crime. The Magistrate took down the statement in writing and the police accompanied the accused and discovered the body of the deceased. On appeal against conviction it was contended that the statement by the accused recorded by the Magistrate was one under S. 164, Criminal Procedure Code and since it was not recorded after observing the formalities prescribed by that section, it should not have been put in evidence.

Held, the Magistrate was not investigating the case or any of the facts connected with the case. The information given by the accused was itself the first information of the crime and the statement was admissible.

Nasir Ahmad v. *The King-Emperor*, (1936) 71 M.L.J. 476: L.R. 63 I.A. 372: I.L.R. 17 Lah. 629 (P.C.), distinguished.

Trial referred by the Court of Session of the Coimbatore Division for confirmation of the sentence of death passed upon the said prisoner in Case No. 81 of the Calendar for 1939 on 11th August, 1939 and appeal by the said prisoner against the said sentence passed upon him.

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* R.T. No. 107 of 1939 and Crl. App. No. 439 of 1939. 17th October, 1939.

Naina-muthu, *In re.*

M. C. Sridharan for Accused.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Judgment of the Court was delivered by

Stodart, J.

Stodart, J.—The appellant has been convicted of murdering Palaniammal, his concubine, a woman of thirty years and sentenced to death subject to the confirmation of this Court. There can be no doubt about the facts of this case. The parties are Adi-Dravidas. The accused was a married man and he had been keeping the deceased as his concubine for a considerable time. P.W. 2 his wife, lived with her parents in a house adjoining that in which the accused and the deceased lived. Some four or five months before the crime, the accused and his wife removed to another residence, namely, a shed in a garden belonging to P.W. 3. This removal was in order to put a stop to the scandal of the accused living with his concubine while the accused's wife lived in a separate house. But even after this change of residence, the deceased used to visit the accused and even to spend the night with him in the new house. The accused's parents tried to put a stop to this conduct and complained to the owner of the garden with a view to pressure being brought to bear upon the accused, and that was the state of affairs at the time the deceased was killed.

On the night of 13th February this year, the deceased was in the accused's house and had her food there. Appellant and deceased then went to a tope which is close by and lay down to sleep in front of the shed occupied by P.W. 4 and her son P.W. 5. P.W. 5 waking in the morning and going out to work saw the accused and the deceased lying asleep. That was in the early morning. A little later, according to P.W. 2, the wife of the accused, the accused returned to his own hut and asked for a drink of water which P.W. 2 gave to him. He then left after telling P.W. 2 that he was going to the Pollachi Court "to tell everything there in person." P.W. 9, the Joint Magistrate of Pollachi, proves that the accused appeared before him at 11-30 in the morning of 14th February and made a statement to him that he had killed the deceased and describing the circumstances of the crime. P.W. 9 took down the statement in writing and that is Ex. C. The accused then went back to the village accompanied by the Circle Inspector of Police and took him to a place in the tope fifty yards from the hut of

P.Ws. 4 and 5. The body was there in a hollow of the ground covered over with coconut leaves. The accused had already told the joint Magistrate that he had covered the body with a thatti. The cause of death was a cut on the neck which cut through the spinal cord and also involved the trachea and the large blood vessels on either side of the neck. There is also evidence about the weapon with which the throat of the deceased woman was cut. P.W. 5 had purchased an aruval from the accused five or six months before this crime and he kept this aruval in his hut in the coconut tope. On the morning of the crime it was missing from the hut and the accused produced it from his own hut.

It is urged upon us by the learned Counsel for the appellant that the statement made by the appellant to the Joint Magistrate, P.W. 9, was improperly admitted in evidence. Learned Counsel argues that this was a statement made under S. 164 of the Criminal Procedure Code and since it was not recorded after observing the formalities prescribed by that section, it should not have been put in evidence. We think that that objection would be very just if the Magistrate had been investigating the case but he was not investigating the case or any of the facts connected with the case. On the contrary this information given by the accused was itself the first information of the crime. The ruling cited to us in *Nazir Ahmad* v. *The King-Emperor*[1], does not apply to the facts here. When he was examined in the committing Magistrate's Court, the statement he had made, Ex. C, to the joint Magistrate was brought to the notice of the accused and he admitted that he had made it. At the Sessions, however, he denied that he had made it, and said that when he came into the Joint Magistrate's Court his intention was merely to tell the Magistrate that his concubine had been killed, that thereupon a Head Constable and the Inspector of Police pushed him into the dock and after that he did not remember what he had said to the Joint Magistrate. There is no doubt in our minds that the appellant did make this confessional statement, Ex. C, and the facts of the crime correspond in all material details with that statement. The facts proved against the appellant, therefore, establish that he killed Palaniammal.

The question however remains whether in the circumstances of the case, the offence was one of murder or whether it comes

1. (1936) 71 M.L.J. 476: L.R. 63 I.A. 372: I.L.R. 17 Lah. 629 (P.C.).

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Stodart, J.

within the fifth exception to S. 300. The learned Public Prosecutor does not support the finding of the learned Sessions Judge that the offence proved against the appellant was murder. The evidence in the case is that the accused and the deceased were on affectionate terms and there was no motive whatever for the accused to encompass the death of the deceased. In his confession to the Joint Magistrate, the appellant stated that he killed the deceased at her own request and with her glad consent. He stated that on the night in question, after some talk, she declared that she would sever her connexion with him and go away and then, in the alternative, she suggested that both of them might commit suicide, and that in the morning he killed her at the place where her body was found. This version of the crime apparently has been accepted from the beginning by the prosecution and it clearly amounts to this, that Palaniammal suffered death at the hands of the appellant with her own consent. There were two contusions on the body besides the fatal wound on the neck which look as if they were caused by blows with a stick. But the accused was not asked about these marks. It was not suggested to him that the said marks were inconsistent with the statement which he had made to the Magistrate that the deceased had consented to be killed. There may be an explanation of these marks consistent with the story given by the appellant. In these circumstances, we set aside the conviction for murder and convict the appellant of culpable homicide not amounting to murder. We sentence him to transportation for life.

K. S. —— *Conviction varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE LAKSHMANA RAO.

The Public Prosecutor .. *Appellant**

v.

Ramaswami Nadar .. *Respondent (Accused).*

Public Prosecutor *v.* Ramaswami Nadar.

Penal Code (XLV of 1860), Ss. 300, Ill. (c) and 326—Offence under—Use of sword for hacking off limb—Injured man dying as result of cut in arteries—Nature of offence—Nature of weapon used to be looked into.

An ordinary person is not presumed to know the precise location of the arteries in the human limbs. If, therefore, a stab with a knife or dagger, aimed at an arm or a leg, severs an artery and the injured man dies as a result, it may be quite reasonable to argue that the offence is not one of

* Crl. Appeal No. 686 of 1939. 5th March, 1940

culpable homicide and that the assailant can only be presumed to have intended to cause hurt or grievous hurt with a dangerous weapon. The case is quite different when a weapon like a sword is used in order to chop off or hack at a limb. The person who uses a sword or aruval chopping at an arm or a leg and by so doing severs the arteries of the arm or the leg, must know that he is inflicting an injury which in the ordinary course of nature is sufficient to cause death. The offence in that case is clearly one of murder.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) by the Sessions Judge of Ramnad division in S. C. No. 83 of 1939 on his file.

Appellant in person.

R. Sadasivam Pillai for Respondent.

The judgment of the Court was delivered by

Burn, J.

Burn, J.—This is an appeal by the Provincial Government from the decision of the learned Sessions Judge of Ramnad in S. C. No. 83 of 1939. The respondent Ramaswami Nadar was tried on a charge of murder. The learned Sessions Judge convicted him under S. 326, Indian Penal Code and sentenced him to rigorous imprisonment for five years. The learned Public Prosecutor contends that the facts established constitute the offence of murder.

The respondent did not appeal from his conviction under S. 326, Indian Penal Code and the learned counsel who has appeared for him in this Court has not attempted to show that the learned Sessions Judge's findings of fact are wrong. The evidence recorded by the learned Sessions Judge showed that there was some enmity between the respondent and one Periana Nadar, arising partly out of gambling with cards and partly out of the association of Periana Nadar with the respondent's wife. On the 5th August, 1939, about 11-30 A.M. the respondent attacked Periana Nadar with a weapon which is described as "Patta knife" or "gin knife". One witness, P.W. 8, says that it was "something like a sword". P.W. 7 says that the blade was about two cubits long. The respondent himself in a confession which he made to the taluk Magistrate on the 10th August described it as a piece of iron bar. He also used the description 'patta'. With this weapon the respondent inflicted nine wounds on Periana Nadar: (1) an incised wound across the back of the right elbow exposing the bones of the joint; (2) an incised wound on the palm of the right hand;

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(3) an incised wound on the middle of the right forearm; (4) an incised wound on the back of the left foot (the lower portion, the doctor says, was hanging down); (5) an incised wound over the left heel; (6) an incised wound four inches long, two inches wide and 2 inches deep across the back of the left knee, cutting all the blood vessels, arteries, veins as well as nerves; (7) the left thumb was cut and was hanging down; (8) the left index finger was split into two, and (9) a contusion on the tip of the left middle finger. The doctor, P. W. 1, who made the *post-mortem* examination, says that the cut across the back of the knee severed the popliteal arteries and the veins, and he says, "the injuries to such arteries are necessarily fatal." He goes on to say "It is not a fatal or vital part." The learned Sessions Judge appears to have been very gravely misled by this remark. The doctor was simply contradicting himself when he said in one breath that the injury was fatal and in the next that it was not an injury in a fatal or vital part. If the injury is necessarily fatal, it is obvious that the part of the body upon which it has been inflicted is a vital part.

The real question for decision is, what was the respondent trying to do when he inflicted all these injuries upon Periana Nadar, or in other words, what was his intention? The learned Sessions Judge appears to think that his intention was only to maim the man. If by that the learned Sessions Judge means that the respondent was trying to chop off the man's leg, that is, possibly correct. But if that be so, the respondent must be held to have intended to cause bodily injury which is sufficient in the ordinary course of nature to cause death. Every body knows that if a man's leg is severed close below the knee, the man must die from loss of blood in a very short time, unless some skilful person appears, who can stop the arterial bleeding. The cut described by the doctor as the sixth injury was 4 inches long, 2 inches deep, and gaping 2 inches wide. It is clear that it had cut across practically the whole of the muscular structures of the leg. It is not possible for a person who inflicts an injury like this to say that he did not intend to cut the arteries, or to cause the man to bleed to death. The case is very different from the frequent cases of stabbing with a knife or dagger. If a man armed with a knife or dagger stabs another in the arm or in the leg, it can generally be urged on his behalf that he was not trying to kill, and that he was not

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trying to inflict such bodily injury as sufficient in the ordinary course of nature to cause death. An ordinary person is not presumed to know the precise location of the arteries in the human limbs. If, therefore, a stab with a knife or a dagger, aimed at an arm or a leg, severs an artery and the injured man dies as a result, it may be quite reasonable to argue that the offence is not one of culpable homicide and that the assailant can only be presumed to have intended to cause hurt, or grievous hurt, with a dangerous weapon. The case is quite different when a weapon like a sword is used in order to chop off or to hack at a limb. The person who uses a sword or aruval, chopping at an arm or a leg and by so doing severs the arteries of the arm or the leg, must know that he is inflicting an injury which in the ordinary course of nature is sufficient to cause death. The offence is clearly one of murder. *See* illustration (*c*) to S. 300, Indian Penal Code.

Accordingly we set aside the conviction for an offence under S. 326, Indian Penal Code and the sentence of five years' rigorous imprisonment. We convict the respondent for the offence of murder with which he was charged and we sentence him to transportation for life.

B.V.V. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

The Commissioner of Income-tax, Madras ... *Petitioner**

v.

Messrs. Harveys, Limited, Tuticorin .. *Respondents.*

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Income-tax Act (XI of 1922), S. 10 (2) (vi)—Depreciation allowance—Basis of fixing value of assets—If income-tax authorities can go behind a contract of sale to determine the true value of the assets—Arrangement to allot certain shares and gin cotton at a particular rate for a number of years—Benefit of ginning.

The assessee H. Co. was a private company incorporated in May 1933 with a capital of Rs. 5,00,000 divided into 5,000 shares of Rs. 100 each, and all the shares have been issued. Of these, A. and F. Harvey firm was allotted 3,998 shares, Madura Mills. Ltd., 1,000 shares and Comorin Investment and

* O.P. No. 160 of 1939. 4th March, 1940.

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Trading Co., Ltd., 2 shares. Partners of A. and F. firm were two brothers (A. Harvey and J. C. Harvey) and Tuticorin Co., Ltd.

In April 1933 it was arranged that on incorporation the assessee Company should purchase for Rs. 15,00,000 the assets of a cotton ginning business owned by A and J. C. Harvey as individuals and not as partners of A. and F. firm. For several years Messrs. A and J. C. Harvey had ginned cotton for Madura Mills at Rs. 12-8-0 per candy on an average. It was arranged that on incorporation the Madura Mills should allot 20,000 shares to the assessee Company and as consideration the assessee Company should allot to the Madura Mills 1,000 shares and gin cotton at Rs 8 per candy for ten years and as per that the respective shares were also allotted The assessee Company paid no cash for the assets which it acquired from A. and J C. Harvey. Five lakhs of rupees was satisfied by the issue of shares and the balance of ten lakhs of rupees by the issue of two debentures for Rs. 5,00,000 each to F. Co. and K. Co, two companies registered in Canada and controlled by Messrs. A. and J. C Harvey through their wives. The position was found to be that instead of the vendors receiving Rs. 10,00,000 in cash the Canadian companies which they controlled received debentures for this amount and the Canadian companies in turn issued their own debentures to the wives of the vendors. The income-tax authorities found that the issue of debentures represented an artificial transaction undertaken to give an air of reality to the inflation in the value of the assets acquired by the company and a scheme to defeat the payment of income-tax. The books showed that the assets acquired from A and J. C. Harvey were originally acquired for Rs. 10½ lakhs and allowing for depreciation, the assets in the books stood at Rs. 5 lakhs but the contract valued it at Rs 15 lakhs and the assessee H. Co. claimed that depreciation allowance under S. 10 (2) should be as on an asset of 15 lakhs. But the income-tax authorities allowed only as on 5 lakhs. The income-tax authorities regarded the transaction between the company and the Madura Mills as involving a payment on account of ginning charges of Rs. 6,00,000 and treated it as a payment by the Madura Mills to the assessee company on account of ginning charges for ten years.

Held, (*i*) that, where the circumstances show that the assessee has arranged to put an entirely fictitious price on his assets, it is open to the income-tax authorities to refuse to accept that price and to ascertain what the true value is. The original cost of any particular asset is entirely a question of fact and the mere existence of a document showing that a contract has been made for purchase at a certain price does not preclude the Commissioner from determining its real value. The Commissioner was therefore entitled to look behind the contract figure of 15,00,000 and fix its true value as a fact.

(*ii*) that where the issue of debenture loan is found to be illusory the interest paid on the debentures is not allowable as a deduction.

(*iii*) that the arrangement by which a proportion of the shares of the Madura Mills was issued to the assessee company in respect of the ginning contract is not a transaction of a capital nature and the benefit received by the company represents profits received in the year of payment.

Reference to this Court by the Commissioner of Income-tax, Madras, under S. 66 (2) of the Indian Income-tax Act, XI of 1922, for decision on the following question:—

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"1. Whether the Income-tax authorities were justified in law in going behind the contract for the sale of the assets of the Harvey Brothers, to the petitioner company for Rs. 15 lakhs?

2. If the answer to the above is in the affirmative (*a*) whether there was any material before the Income-tax authorities to justify their finding that the original cost of those assets to the petitioner company was not Rs. 15 lakhs and (*b*) if there was such material was there any material for their finding that the cost of the assets was Rs. 5 lakhs?

3. Whether there was any material before the Income-tax authorities to justify their conclusion that the debenture loan of Rs. 10 lakhs was illusory and colourable and that the interest paid thereon is not therefore allowable as a deduction?

4. Whether the transaction of exchange of the Madura Mills shares with the shares of the Petitioner company is an isolated transaction and of a capital nature?

5. Whether on the facts of the case the difference if any between the values of the exchanged shares could be said to be profit in the hands of the petitioners assessable to tax;

6. Whether the Income-tax authorities were correct in adopting the market value in respect of the 20,000 Madura Mill shares allotted to the petitioners?

7. Whether there was any material before the Income-tax authorities to justify their finding that the difference in value between the 20,000 shares of the Madura Mills, Limited, received by the petitioners and the 1,000 shares of their own company allotted by the petitioners to the Madura Mills amounted to six lakhs?"

K. V. Sesha Aiyangar for Petitioner.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *M. Subbaroya Aiyar* for Respondents.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—The assessee company is a private company having been incorporated in British India in May 1933. The capital is Rs. 5,00,000 divided into 5,000 shares of Rs. 100 each and all the shares have been issued. The shareholders and their holdings are as follows: (i) the firm of A. and F. Harvey, 3,998 shares; (ii) the Madura Mills Company, Limited, 1,000 shares and the Comorin Investment and Trading Company, Limited, 2 shares. For the sake of brevity I will refer to the assessee company as "the Company", to the firm of A and F. Harvey as "the firm" and to the Madura Leach, C. J.

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Mills Company, Limited, as the "Madura Mills". The firm consists of three partners, namely, Mr. A. Harvey, Mr. J. C. Harvey and the Tuticorin Company, Limited, the shareholders of which are mostly certain employees of the firm. Mr. A. Harvey and Mr. J. C. Harvey are brothers. The profits of the firm are divisible between the partners in the following proportions: Mr. A. Harvey 63/128; Mr. J. C. Harvey 63/128; and the Tuticorin Company, Limited, 2/128. The capital of the Comorin Investment and Trading Company, Limited, is divided into 10,000 shares of which Mr. A. Harvey and Mr. J. C. Harvey hold between them 9,999 shares.

In April 1933 it was arranged that on incorporation the Company should purchase for Rs. 15,00,000 the assets of a cotton ginning business owned by Messrs. A. and J. C. Harvey as individuals and not as members of the firm. The assets consisted of lands, buildings, plant and machinery. Of the purchase consideration Rs. 4,71,383 was allocated to the lands and buildings, and Rs. 10,28,617 to the plant and machinery. For several years Messrs. A and J. C. Harvey had ginned cotton for the Madura Mills. The rates charged for the years 1930, 1931 and 1932 averaged Rs. 12-8-0 per candy. Before the incorporation of the Company negotiations took place between Messrs. A. and J. C. Harvey and the Madura Mills for the conclusion of an arrangement under which the Madura Mills should allot 20,000 shares to the company and as consideration the company should allot to the Madura Mills 1,000 shares and enter into a contract under which the company should agree to gin cotton for the Madura Mills at a flat rate of Rs. 8 per candy for a period of ten years from 1st April, 1933. An agreement was arrived at on this basis after the incorporation of the company and 1,000 of its shares were allotted to the Madura Mills on the 24th July, 1933. The formal contract with the Madura Mills was executed on the 26th August, 1933, and the allotment to the company of the 20,000 shares of the Madura Mills duly followed.

The company paid no cash for the assets which it had acquired from Messrs. A. and J. C. Harvey. Of the Rs. 15,00,000 stated to be the consideration, Rs. 5,00,000 was satisfied by the issue of shares and the balance of Rs. 10,00,000 by the issue of debentures. On the 2nd June, 1933, the company passed the following resolution:

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"Resolved unanimously that the sum of Rs. 10,00,000 be raised by the issue of two debentures for Rs. 5,00,000 each bearing interest at 7 per cent. per annum charged upon its undertaking and all its property whatsoever and wheresoever both present and future including its uncalled capital if any and goodwill in the form now submitted to the meeting and that in consideration of the Finchley Investments, Limited, and the Kochadai Investments, Limited, having each paid to the company the sum of Rs. 5,00,000 that the above-mentioned two debentures be scaled and issued to the above companies."

The Finchley Investments, Limited, and the Kochadai Investments, Limited, are two private companies registered in Canada and controlled by Messrs. A. and J. C. Harvey through their wives. The Finchley Investments, Limited has an authorized capital of $50,250, divided into 50 class A Cumulative preferred shares of $5 each, and 10,000 class B shares of $5 each, of which all the class A shares and 5,990 of the class B shares have been issued. All the class B shares are held by Mrs. A. Harvey. This company has taken authority to issue debentures to the value of $10,00,000 and has in fact issued $5,99,000, all of which are also held by Mrs. A. Harvey. The Kochadai Investments, Limited, has an authorized capital of $25,250 made up of 50 class A Cumulative preferred shares of $ 5 each and 5,000 class B shares of $ 5 each, of which all the class A shares and 1,990 of class B shares have been issued. Mrs. J. C. Harvey is the holder of the 1,990 class B shares. This company has authority to issue debentures to the amount of $500,000. Of these debentures $1,99,000 have been issued and $6,000 of them have been redeemed. The outstanding debentures are all held by Mrs. J. C. Harvey. Of the debentures issued by the Finchley Investments Limited the amount of $1,69,000 was issued on the 17th October, 1933, and of those issued by the Kochadai Investments, Limited, a similar amount was issued on the 12th October, 1933.

On the passing of the resolution which I have just quoted, two cheques for Rs. 5,00,000 each were drawn by the firm in favour of the company, but it was not intended that they should be presented for payment. In the course of explanations given on behalf of the company in answer to questions put by the income-tax authorities it was stated that the two cheques were issued by the firm on behalf of the Canadian Companies in pursuance of an oral arrangement between Messrs. A. and J. C. Harvey on the one side and the agents of the Canadian Companies on the other with a view to avoiding

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costly cross remittances. It was also stated that Mrs. J. C. Harveys had received Rs. 5,00,000 from the Kochadai Investments, Limited and that Mrs. A. Harvey had received an equal sum from the Finchley Investments, Limited. It turned out that the payments to these ladies did not represent cash but merely the issue to them of debentures by the Canadian Companies. Therefore the position was that instead of the vendors receiving Rs. 10,00,000 in cash the Canadian Companies which they controlled received debentures for this amount and the Canadian Companies in turn issued their own debentures to the wives of the vendors. The fact that the vendors received by this roundabout way debentures in lieu of cash will not affect the legal position if the transaction is a genuine one, but the Income-tax authorities say that it is not. They contend that the issue of debentures represents an artificial transaction undertaken to give an appearance of reality to the inflation in the value of the assets acquired by the company and a scheme to defeat the payment of Income-tax.

It is made abundantly clear by the Commissioner of Income-tax in the statement of the case that the Rs. 15,00,000 representing the purchase consideration is in fact a highly inflated figure. All the assets of the business had been purchased by Messrs. A. and J. C. Harvey between the years 1897 and 1931 for about Rs. 10,50,000.

[Their Lordships here extract a statement showing the dates of construction or purchase of the various assets, their original cost, their written down value according to the accounts of the firm, and the values placed upon them at the time of the sale to the assessee. The table shows that the total original cost is, Rs. 10,51,323-10-6, the written down cost in the books of A. and F, Harvey is Rs. 5,00,000 and that the value as adopted by the assessee at the time of sale is Rs. 15,00,000.]

It is not necessary to examine these figures in detail to show that Rs. 15,00,000 was out of all proportion to the real value of the assets. It will be sufficient if attention is drawn to the machinery statement. The press at Sattur was purchased in 1914 for Rs. 1,01,411-13-2 and 19 years later was sold for Rs. 2,06,250. The gins at Sattur were purchased between 1905 and 1915 for Rs. 1,05,683-14-2 and were sold for Rs 2,06,250. The press at Dindigul was acquired during the years 1928 and 1929 for Rs. 84,944-13-10, and was also sold for Rs. 2,06,250.

The gins at the same place were purchased during these years for Rs. 60,892-10-11 and they were sold for Rs. 2,06,250. The total assets stood in the books of firm at Rs. 5,00,000 and notwithstanding that there must have been considerable depreciation they were passed on to the company at the figure of Rs. 15,00,000. It has not been suggested by the company that the value of the assets had increased owing to special circumstances. On the contrary it had to be admitted to the income-tax authorities that the value of ginning factories had been seriously affected by the depression prevailing in the textile trade. Indication of the extent of depression may be gathered from the fact that a factory built by another company at Sattur at a cost of over Rs. 2,00,000 was acquired by the company in 1934 for Rs. 40,000.

The company was assessed by the Income-tax Officer, Tuticorin, for the year 1934-35 on a total income of Rs. 82,643. The previous year was the year ended 31st March, 1934, and the assessment was completed on the 31st August of that year. In arriving at the figure of Rs. 82,643 the Income-tax Officer allowed a deduction of Rs. 61,130 as interest on the debentures which were issued to the Canadian companies. The true nature of the transaction with those companies had not then been realized, but further investigations carried out by the Income-tax Officer led to the disclosure of the position which I have stated. It was also discovered that the company had not declared any dividend out of the profits of the year ended 31st March, 1934, and that out of the total book profits amounting to Rs. 85,225 during the two years ended 31st March, 1935 only Rs. 25,000 had been distributed by July, 1935. The explanation given on behalf of the company was that the year 1933-34 was the first year of its working and that having regard to the world depression the directors had decided on the ground of prudence not to pay a dividend in respect of that year. Not being satisfied with this explanation and being of the opinion that the real object of not distributing profits was to enable Messrs. A. and J. C. Harvey to avoid a large amount of super-tax, the Income-tax Officer asked the Assistant Commissioner to give his approval under S. 23-A (2) of the Indian Income-tax Act, 1922, to an order being passed that the sum payable as income-tax by the company should not be determined and that the proportionate share of each member in the profits

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and gains should be included in the total income of the member for the purpose of assessment to tax. After giving the company an opportunity of being heard the Assistant Commissioner passed the order asked for by the Income-tax Officer. The Income-tax Officer then computed the income of the company for the year 1933-34 which had escaped assessment in 1934-35 at Rs. 7,11, 316. This figure included the following major items:

(a) Rs. 48,149 depreciation allowed in excess of the original assessment.

(b) Rs. 61,130 interest on debentures allowed in the original assessment.

(c) Rs. 6,00,000 advance received on account of ginning charges.

The Income-tax Officer regarded the transaction between the company and the Madura Mills as involving a payment on account of ginning charges of Rs. 6,00,000. This figure was arrived at after allowing the company to treat the allotment of 1,000 of its shares to the Madura Mills as a capital transaction. The market value of the 20,000 shares of the Madura Mills which the company acquired was Rs. 7,00,000. The 1,000 shares of the assessee which the Madura Mills received in exchange in consequence of the arrangement had no market value, but the Income-tax Officer took the nominal value of Rs. 1,00,000 to be their true value. The difference between Rs. 7,00,000 and the Rs. 1,00,000 represented the payment by the Madura Mills to the company on account of ginning charges for the period of ten years.

The company appealed to the Assistant Commissioner against this new computation of income and objected to the inclusion of the three items (a), (b) and (c) in the total income. The Assistant Commissioner accepted the Income-tax Officer's computation and dismissed the appeal. The company then applied to the Commissioner of Income-tax for revision of the Assistant Commissioner's order under S. 33 and asked in the alternative that certain questions of law be referred to this Court under S. 66 (2). Messrs. A. and F. Harvey also appealed against the order passed under S. 23-A. That appeal is pending but the question of the validity of the order does not arise in the present proceedings. The Commissioner acceded to the request of the company for a reference and has asked the Court to decide the following questions:—

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2. If the answer to the above is in the affirmative, (*a*) whether there was any material before the Income-tax authorities to justify their finding that the original cost of those assets to the petitioner company was not Rs. 15,00,000 and (*b*) if there was such material was there any material for their finding that the cost of the assets was Rs. 5,00,000?

3. Whether there was any material before the Income-tax authorities to justify their conclusion that the debenture loan of Rs. 1,00,000 was illusory and colourable and that the interest paid thereon is not therefore allowable as a deduction?

4. Whether the transaction of exchange of the Madura Mills shares with the shares of the petitioner company is an isolated transaction and of a capital nature?

5. Whether on the facts of the case the difference if any between the values of exchanged shares could be said to be profit in the hands of the petitioner assessable to tax?

6. Whether the Income-tax authorities were correct in adopting the market value in respect of the 20,000 Madura Mills shares allotted to the petitioners?

7. Whether there was any material before the Income-tax authorities to justify their finding that the difference in value between the 20,000 shares of the Madura Mills, Limited, received by the petitioners and the 1,000 shares of their own company allotted by the petitioners to the Madura Mills amounted to 6,00,000?"

Question No. 1.—By virtue of S. 10 (2) (*vi*) of the Indian Income-tax Act, 1922 an assessee is entitled to an allowance on account of depreciation in respect of buildings, machinery or furniture which belong to him and are used for the purposes of his business. The Commissioner rightly observes that the original costs of any particular asset is entirely a question of fact, and like any other question of fact depends upon the evidence produced to prove it. The mere production of documentary evidence showing that a contract has been made for purchasing assets at a certain price does not conclusively establish the correctness of a claim made by an assessee that for the purpose of S. 10 (2) (*vi*) the original cost is the amount shown in the document. I also agree with the statement of the Commissioner that where the circumstances show that an assessee has arranged to put an entirely fictitious price on his assets it is open to the income-tax authorities to refuse to accept that price and to ascertain what the true value is.

On behalf of the company the learned Advocate-General has contended that the Court cannot go behind the contract and in support of this argument has quoted the decision of the

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House of Lords in *Aron Salomon* v. *Salomon & Co., Ltd.*[1], but I fail to see what bearing that case has here. A leather merchant and a boat manufacturer sold his business to a limited company which had a nominal capital of 40,000 shares of £1 each. Before the incorporation of the company the vendor entered into a contract with the trustee of the future company settling the terms upon which the transfer was to be made. One of the conditions was that part payment might be made to the vendor in debentures of the company. The memorandum of association was signed by the vendor, his wife, a daughter and four sons all of whom subscribed for one share each. In part payment of the purchase consideration debentures were issued to the vendor to whom was allotted 20,000 shares which were paid for out of the purchase money. The total number of shares issued was 20,007 and with his 20,000 shares the vendor had complete control of the company. At the time of the sale the business was solvent, but bad times came and the company was forced to go into liquidation. The question was whether the vendor as the holder of the debentures was entitled to preference over the other creditors of the company. Overruling the Court of Appeal, the House of Lords held that it was not contrary to the true intent and meaning of the Companies Act, 1862, for a trader to sell his business to a limited liability company consisting of himself and the members of his family, the business then being solvent, all the terms of sale being known to and approved by the shareholders, and all the requirements of the Act being complied with. There had been no fraud upon the creditors or shareholders and the liquidator was not entitled to rescission of the contract of purchase.

In the present case the Court is not considering a situation analogous to the situation in *Aron Salomon* v. *Salomon & Co., Ltd.*[1] and it is not considering the provisions of the Indian Companies Act, but the provisions of the Indian Income-tax Act. To accept the argument of the learned Advocate-General would mean that where an assessee had placed a fictitious value on his assets he would be entitled to the statutory allowance for depreciation on the fictitious figure and consequently would escape payment of income-tax. Therefore, to accept the argument would be to go against the true intent and meaning of the Indian Income-tax Act. As I hold that the income-tax

1. (1897) A.C. 22.

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authorities have the right to look behind the contract of sale it follows that my answer to the first question is in the affirmative.

Question No. 2.—I have shown the basis on which the company says that the figure of Rs. 15,00,000 is arrived at and I am of the opinion that there was material to justify the finding of the income-tax authorities that the original cost of the assets acquired was not Rs. 15,00,000. The purchase consideration was the allotment of shares of the face value of Rs. 5,00,000 and debentures of the nominal value of Rs. 10,00,000 but the shares and the debentures had no value beyond the value of the assets acquired. The company adduced no evidence of the value of the assets. It relied entirely on the figure stated in the contract of sale. In these circumstances the income-tax authorities took the true value to be the figure at which the assets stood in the books and as this was the only evidence before them I consider that they were justified in their conclusion, especially in view of the age of most of the assets. If the company had placed before the income-tax authorities evidence to show that the assets stood in the books of the firm at a lower figure than their true value the position would have been different. But it did not do so and the inference is that it was not in a position to show that the assets were of higher value.

I would answer both parts of the second question in the affirmative.

Question No. 3.—I have already stated the facts relating to the debenture issue and I consider that these facts provide material amply sufficient to justify the conclusion that the debenture loan of Rs. 10,00,000 was illusory and colourable. It follows that in my opinion the interest paid on the debentures is not allowable as a deduction.

Questions Nos. 4, 5, 6 and 7.—These questions may be dealt with conveniently together. The learned Advocate-General has contended that the exchange of the shares of the Madura Mills for the shares of the company and the benefit of the ginning contract must be regarded as one transaction and entirely of a capital nature. He has also said that as the Madura Mills has been alllowed to treat it as being a transaction of a capital nature the company must be allowed to treat it in the same way. I am unable to accept either of these propositions. The main part of the consideration which the

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Madura Mills received for its 20,000 shares was the benefit to be derived from the ginning contract. For ten years the company has to gin cotton for the Madura Mills at a price far below the market price. I consider that the income-tax authorities were justified in regarding the transaction of a capital nature only to the extent of Rs. 1,00,000, represented by the shares of the company allotted to the Madura Mills. The company in return for an immediate gain of Rs. 6,00,000 agreed to reduce its probable annual gains over a period of ten years. In other words instead of getting a probable income of Rs. 6,00,000 spread over ten years it obtained a lump sum payment in one year. Nor do I regard the fact that this gain was not in money but in money's worth, namely, shares, makes any difference.

In my opinion the income-tax authorities were also justified in taking the value of the 20,000 shares which the company received from the Madura Mills to be the market value at the date of the transaction. It has been argued by the learned Advocate-General that to place on the market at once a block of 20,000 shares would mean a depression in the price. As the Commissioner has remarked the shares were not put on the market and were not intended to be put on the market.

In support of his argument that the answers to these four questions should be in favour of the company, the learned Advocate-General has quoted to us *Hawley* v. *Commissioner of Inland Revenue*[1], *Van Den Berghs, Ltd.* v. *Clark*[2], *Short Brothers, Ltd.* v. *The Commissioners of Inland Revenue*[3] and *The Commissioner of Income-tax* v. *Shaw, Wallace & Co.*[4], but I can find no support for him in these judgments.

In *Hawley* v. *The Commissioner of Inland Revenue*,[1] the facts were these. In consideration of an advance of £,7000 made by the assessee to a company in 1905, he received debentures of the nominal value of £7,000 repayable after December 1914, by half yearly instalments of £500 and from a director 5,600 £1 ordinary shares of which he was to transfer 400 shares on receiving each payment of £500 in respect of the debentures. He was also to receive one-fifth of the profits each

1. (1925) 9 Tax Cases 331. 2. (1935) A.C. 431.
3. (1926) 12 Tax Cases 955.
4. (1932) 63 M.L.J. 124: L.R. 59 I.A. 206: I.L.R. 59 Cal. 1343 (P.C.).

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year up to December, 1914, and thereafter a share of the profits corresponding, in effect, to the proportion of the debentures remaining unpaid from time to time. The assessee received no share of the profits for the years 1915, 1916 and 1917 until 1920 when he received a sum of £6,000 in settlement of what was due to him by way of profits for those years. In May, 1921, he was paid £10,000 in full settlement of the liability under the agreement up to December, 1921, the prospective date of its termination. The sums of £6000 and £10,000 were assessed to super-tax for the years 1920-21 and 1921-22 respectively as forming part of his total income for the years 1919-20 and 1920-21. It was held that he was entitled under the original contract to have his share of the profits paid to him each year and that for the purpose of computing his income for super-tax the £6,000 and £10,000 must be spread over the years in respect of the profits of which they were paid, subject to the entire exclusion from liability to super-tax of such part of the sum of £10,000 as represented a composition of his right to receive a share of the profits of the year 1921. In the case now before us there was no arrangement by which the payment was to be spread over a period of years. The contract was one under which the company got an immediate gain in consideration of its reducing its charges. It must be regarded as a contract entered into in the ordinary course of its ginning business and nothing else.

Van Den Berghs, Ltd. v. *Clarke*[1] was a decision of the House of Lords. The facts are even further away from the facts in the present case but an observation of Lord Macmillan has application here, not in favour of but against the argument of the learned Advocate-General. An English company carried on a large business in the manufacture of margarine and other substitute for butter. In 1908 the company entered into an agreement with a Dutch company of rival manufacture under which the two companies undertook to share profits and losses in the proportion which, on an average of five years, the profits of the rival tradings in margarine bore to each other. In 1913 there was an extension of the agreement which was to be prolonged till the end of 1940. The two companies carried on their businesses separately until the end of 1913. During the last war the agreement could not be observed, but in 1920 a

1. (1935) A.C. 431.

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third agreement was entered into by which the former agreements were amended. One of the terms of the amended agreement was that the results of trading in the year 1914 and the later years should be ascertained by accountants on each side and that any dispute arising under the agreements should be settled by arbitration. Disputes did arise and there was a submission to arbitration. The arbitration proceedings were, however, settled on terms by which the agreements were rescinded and the Dutch company paid the English company a sum of £4.50,000 as damages. The question was whether the £4,50,000 was in the nature of a capital asset or a receipt of income to be included in the profits of the English company. It was held that the payment was in the nature of a capital asset. The passage in the judgment of Lord Macmillan which has bearing in the present case is this:

> "Now what were the appellants (the English company) giving up? They gave up their whole rights under the agreements for thirteen years ahead. These agreements are called in the stated case 'pooling agreements', but that is a very inadequate description of them, for they did much more than merely embody a system of pooling and sharing profits. If the appellants were merely receiving in one sum down the aggregate of profits which they would otherwise have received over a series of years the lump sum might be regarded as of the same nature as the ingredients of which it was composed."

Lord Macmillan's judgment was accepted by all the members of the House of Lords who heard the appeal and therefore we have here authoritative indication that if a payment represents a lump sum payment of profits which would otherwise be received over a series of years it may be regarded as representing income.

The decision in *Short Brothers, Ltd.* v. *The Commissioners of Inland Revenue*[1], was that the compensation paid in cancellation of certain contracts was chargeable to excess profits duty as a receipt of profits in the course of the company's ordinary trade, and must be included in the profits for the accounting period in which it became payable and was in fact paid. This case certainly does not help the company. *The Commissioner of Income-tax* v. *Shaw, Wallace & Co.*,[2] was quoted because the Privy Council there said that the word 'income' connotes a periodical monetary return coming in with some sort of regu-

1. (1926) 12 Tax Cases 955.
2. (1932) 63 M.L.J. 124: L.R. 59 I.A. 206: I.L.R. 59 Cal. 1343 (P.C.).

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larity, or expected regularity, from definite sources. The source is not necessarily one which is expected to be continuously productive, but it must be one whose object is the production of a definite return, excluding anything in the nature of a mere windfall. It cannot be suggested that the allocation of the 20,000 shares of the Madura Mills was in the nature of a windfall. The contract fell within the scope of the memorandum of association of the company and it seems to me that the resulting benefit to the company must be classed as income.

A decision which is far more in point is that of Rowlatt, J., in the *Commissioners of Inland Revenue* v. *The North Fleet Coal and Ballast Co., Ltd.*[1] A company owned a chalk quarry and contracted to supply a purchaser with a specified quantity of chalk yearly for ten years. The contract also included in its terms that the quarry company should build a wharf at which the purchaser's ships could load the chalk. As the result of the war of 1914 the agreement was suspended and after the war the purchaser did not wish to take further deliveries. It was then agreed between the quarry company and the purchaser that in consideration of a payment of £900 a year for the remaining four years of the term the purchaser should be relieved of his liability under the contract. Subsequently, the quarry company accepted a lump sum payment of £3,000 in lieu of the four annual payments of £900 and the £ 3,000 was applied by the quarry company in writing down the cost of the wharf. It was held that the £3.000 was chargeable to excess profits duty as a trading profit of the quarry company and therefore must be included in the profits of the year in which it was agreed to be paid. Rowlatt, J., refused to graft a distinction upon the decision of the Court of Appeal in *Short's case*[2]. He considered that if a sum represented profits in a new form then that was income and income in the year in which it was received.

The answers which I would give to the four questions are these:

No. 4.—The arrangement by which a proportion of the shares of the Madura Mills was issued to the company in respect of the ginning contract is not a transaction of a capital

1. (1927) 12 Tax Cases 1102.
2. (1926) 12 Tax Cases 955.

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nature and the benefit received by the company represents profits received in the year of payment.

No. 5.—On the facts of the case the difference between the values of the exchanged shares must be allocated to the ginning contract and as such is profit in the hands of the company assessable to the tax.

No. 6.—The income-tax authorities were right in adopting the market value in respect of the 20,000 shares of the Madura Mills allotted to the company.

No. 7.—There was material before the income-tax authorities to justify their finding that the difference between the 20,000 shares of the Madura Mills received by the company and the 1,000 shares of the company allotted to the Madura Mills amounted to Rs. 6,00,000.

The result is that the income-tax authorities have succeeded on all the questions raised and therefore are entitled to their costs, which we fix at Rs. 250.

King, J.

King, J.—I agree.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I agree.

S. V. V. *Reference answered in favour of Commissioner.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Commissioner of Income-tax, Madras .. *Petitioner**

v.

Madras and Southern Mahratta Railway Company, Limited, Madras .. *Respondent.*

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Indian Income-tax Act (XI of 1922), S. 4—Interest paid in London—Whether interest accruing in British India—Guaranteed interest—Secretary of State paying interest on the amount of guarantee—Whether the amount liable to deduction by the Company.

By virtue of a contract entered into between the Secretary of State for India and the Southern Mahratta Railway Company the company undertook to pay into the Bank of England a certain sum to the credit of the Secretary

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* O. P. No. 225 of 1939. 14th March, 1940.

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of the State and he in return undertook to pay half yearly to the company out of the revenues of India interest at the rate of 3½ per cent. per annum on that amount. The practice was the distribution of profits of the company for every year rested with the Secretary of State who was entitled to deduct the equivalent in rupees of the amount he has paid to the company by way of guaranteed interest in the course of the year. In the year of accounting the company deducted a certain sum as having been received from the Secretary of State as interest under his guarantee. On the question whether the said sum of guaranteed interest paid by the Secretary of State which was deducted for the purpose of the company's return was liable to assessment in the company's hands,

Held, that the company was not liable to deduction. Following *The Madras and Southern Mahratta Railway Co , Ltd.* v. *The Commissioner of Inland Revenue*, (1926) 12 Tax. Cas. 1111, the Secretary of State must be considered to have recouped out of what is called the Company's share of the surplus receipt and the extent of his recoupment depends upon the amount of profits. Hence it is a distribution of profits in recoupment of a guarantor who guaranteed those profits.

The Bengal Nagpur Railway Co., Ltd. v. *The Secretary of State for India*, (1922) I.L.R. 49 Cal. 815: 1 I.T.C. 178, dissented from.

Held, further, that all the profits of the company accrue or arise in British India including the payment of interest in London within the meaning of S. 4 of the Indian Income-tax Act.

Sarupchand Hukumchand v. *The Commissioner of Income-tax, Bombay*, (1931) 5 I.T.C. 108; *Commissioner of Income-tax, Bombay* v. *Chunilal B. Mehta*, (1938) 1 M.L J. 785: L.R. 65 I.A. 132: I.L R. 1938 Bom. 752 (P.C.) and *The Right Rev. C. J. C. Saunders* v. *The Commissioner of Income-tax, United Province*, (1931) 5 I.T.C. 454, referred to.

Case stated by the Commissioner of Income-tax, Madras, under S. 66 (1) of the Act.

2. The reference arises out of the assessment of the Madras and Southern Mahratta Railway Co., Ltd., Madras (hereinafter referred to as the 'company') for the year 1937-38. Under S. 22 (1) of the Act the company returned an income of Rs. 24,36,479 for the accounting year 1936-37. In arriving at this income, the company deducted Rs. 23,33,333 being the amount of "guaranteed interest" payable to them by the Secretary of State. This "guaranteed interest" is a sum which, as subsequently explained, the Secretary of State is bound under a contract to pay over to the company for distribution among their shareholders and which he has power to recoup by retaining an equivalent sum from the surplus receipts of the railway. The deduction for income-tax purposes of "guaranteed interest" had been allowed in the assessment of the company in previous years on the authority of the decision of the Calcutta High Court in the case of *The Bengal Nagpur Railway Co., Ltd.* v. *The Secretary of State for India*[1], which was presumed to be applicable to all Guaranteed Railway

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Companies. In 1926, however, the case of the assessment of the guaranteed interest of the Madras and Southern Mahratta Railway Company for the purpose of Corporation Profits Tax was raised by the Inland Revenue Authorities in England. The case was taken to the High Court (King's Bench Division) where it was decided by Mr. Justice Rowlatt that the guaranteed interest was part of the company's profits for Corporation Tax purposes. (*The Madras and Southern Mahratta Railway Co., Ltd.* v. *The Commissioners of Inland Revenue*[1]). Against that decision the company did not appeal. Mr. Justice Rowlatt's judgment caused the Government of India to entertain considerable doubts as regards the correctness of the decision in the Calcutta case of the Bengal Nagpur Railway in so far, at least, as it applied to railways whose "surplus" or "divisible" profits are ascertained before the deduction of guaranteed interest, and in accordance with their instructions the Income-tax Officer, Madras VI Circle, disallowed the deduction of guaranteed interest in the company's assessment for 1937-38 and determined the total income of the company to be Rs. 47,69,812. The company contends that the above disallowance was not correct, and the whole of this reference turns on this one point.

3. The following statement of facts is taken mainly from the case stated in 1926 by the Special Commissioners for the opinion of the King's Bench Division of the High Court of Justice and has been agreed to by the company as representing the facts correctly. It may be mentioned here that the passing into law of the Government of India Act, 1935, has changed the legal position of the Secretary of State in Council as regards the guaranteed interest in this case, but the change is in form only and not in substance. All the contracts referred to in the reference were made between the Secretary of State in Council and the company. Under S. 178 (1) of the Government of India Act, however, all the liabilities of the Secretary of State in Council in respect of guarantees which were secured on the revenues of India are now secured on the revenues of India and all the Provinces. Furthermore under sub-S. (2) of that section all enactments relating to guarantees given by the Secretary of State in Council are to continue to have effect with the substitution of references to the Secretary of State for references to the Secretary of State in Council and with such other modifications as His Majesty in Council may deem necessary. So far as guarantees for Indian Railways are concerned modifications have, in fact, been made by the Government of India (Adaptation of Acts of Parliament)

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1. (1926) 12 Tax Cases 1111.

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Order, 1937, which came into operation on 1st April, 1937. This order modified the India Guaranteed Railways Act, 1879, which is the statute whereby the Secretary of State in Council was empowered to give such guarantees. The legal position, therefore, at present is that so far as the "guaranteed interest" is concerned the guarantor is now the Secretary of State and not the Secretary of State in Council. That however makes no difference to the position in this case.

4. The Madras and Southern Mahratta Railway Company is a guaranteed Railway Company incorporated in England under the Companies Act on the 24th May, 1882, with the following object (*inter alia*) :—

"To enter into a contract with the Secretary of State in Council of India for the construction and carrying on of a railway to be called the Southern Mahratta Railway and for other purposes, in the terms of a draft already prepared and scheduled to an agreement dated the 19th day of May, 1882, and made between the Secretary of State, of the one part, and Sir Douglas Forsyth of the other part and to carry out and perform the same subject to any modifications which the company and the Secretary of State may from time to time agree upon."

5. The company is controlled by a Board of Directors in London and derives its income from railways which it works in India under numerous contracts with the Secretary of State, of which the principal are

(*a*) a contract dated 1st June, 1882, known as the "Original" or "Principal" contract, and

(*b*) a contract dated 26th June, 1908, expressed to be supplemental to the contract of 1882 and which amended the 1882 contract in several important particulars.

6. Under the contract of 1882, the company constructed, equipped and maintained the railways to which the contract related and supplied the necessary staff for working them. The requisite land was provided by the Secretary of State in Council and the land and the railways including all rails, plant, machinery, rolling stock, etc., were his property. All moneys received by or on behalf of the company had to be paid into the Bank of England to the credit of the Secretary of State in Council or into a Government Treasury in India. The Company worked under the supervision and control of the Secretary of State in Council who was empowered from time to time to appoint one person to be a Director of the Company.

7. By cls. 26 and 27 of the Contract of 1882, the company undertook to pay into the Bank of England to the credit of the Secretary of State a sum of £3,000,000 which was to belong absolutely to the Secretary of State who was not to be deemed

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debtor to the company in respect thereof; and the Secretary of State undertook during the continuance of the contract to pay half yearly to the company in India, out of the revenues of India, interest at the rate of 3½ per cent. per annum on this sum of £3,000,000. Cl. 29 of the same contract provided that subject to certain limitations the Secretary of State was to provide all the moneys required for the projected railway whether as regards construction or working.

8. The Contract of 1908 provided for the continuance of the Contract of 1882, subject to certain variations and modifications which it is not necessary to describe except in so far as they relate to the point at issue.

Briefly, so far as that is concerned, the new position which emerged as the result of the 1908 contract was as follows:—

(a) the provisions of the original contract under which

(i) all moneys received by the company (excepting moneys paid to the company by the Secretary of State in Council pursuant to the contract) were to be paid to the credit of the Secretary of State at such times and in such manner as he may dir, and

(ii) Capital, Revenue and Stores accounts were to be kept remained unaltered.

(b) Cls. 26, 27 and 29 of the original contract referred to in paragraph 7 ceased to have effect altogether and a new financial arrangement was made. This new arrangement (which is described in cl. 8 of the Contract of 1908, as subsequently modified) provided that the capital of the Company's and State Lines should be taken to be the sum of £16,250,000, of which £12,750,000 was to be taken to be the capital of the Secretary of State and £3,500,000 to be the capital of the company, the Secretary of State in Council having the right to require the company to issue new capital stock not exceeding £1,500,000 to be allotted as fully paid up to such shareholders of the Madras Railway Company as he may direct. This further issue was in fact made in 1908 with the result that the amount of the company's capital became £5,000,000 at which it still stands. The sum of £12,750,000 taken to be the amount of the capital of the Secretary of State was an assumed figure adopted for the purpose of determining the proportion in which the profits should be distributed. It was reduced to £11,250,000 when the amount of the company's capital was increased to £5,000,000.

(c) Under cl. 2 of the Contract of 1908 the Secretary of State in Council can determine the contract on 31st December, 1937, or at the end of any subsequent fifth year from that date on

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giving the company a year's notice. On such determination of the contract the railways and equipment have to be delivered to the Secretary of State and under cl. 23 the Secretary of State has to repay a sum equivalent to the company's capital.

(*d*) Cl. 15 of the Contract of 1908 provides for payment of the guaranteed interest in respect of which this reference has arisen. This clause is in the following terms:—

"The Secretary of State will during the continuance of the Original Contract and the contracts supplemental thereto has hereby varied until the same shall be determined hereunder pay out of the Revenues of India to the Company in London in sterling interest at the rate of 3½ per cent. per annum for each half year ending on the 30th day of June and the 31st day of December (commencing with the half year ending on the 30th day of June, 1908) on the nominal amount of the capital stock for the time being of the company such interest to be paid on the 1st day of July, or the 1st day of January immediately following the close of such half year."

The amount of the company's capital during the year of account was £5,000,000 and the interest guaranteed by the Secretary of State is 3½ per cent. of this, which expressed in rupees amounted during the year to Rs. 23,33,333.

(*e*) Under cl. 42 of the Contract of 1882, as amended by cl. 17 of the Contract of 1908 and cl. 1 (*c*) of a Contract of 20th May, 1914, moneys received by the company on account of revenue (all of which—except the amount receivable from the Secretary of State on account of the guaranteed interest have to be paid to the credit of the Secretary of State) are to be applied as follows:—

"(1) Primarily in or towards the discharge of expenditure attributable to the half year to which the receipts relate, and

"(2) secondarily in or towards the discharge of expenditure attributable to any previous half year or half years and not already discharged out of receipts on account of revenue, and

"(3) in the next place in payment of the equivalent in rupees of the interest for the half year to which the receipts relate which shall have been paid or shall be payable by the Secretary of State to the company in respect of the company's debentures and debenture stock (except the £1,200,000 debenture stock created under the Contract of 31st August, 1887, relating to the Mysore State Railway) issue with the sanction of the Secretary of State for the purpose of capital expenditure on the Company's and State Lines which shall for the time being be outstanding.

"(4) The surplus (if any) shall subject to cl. 12 of the Contract of 26th June, 1908, be divided between the Secretary of State and the company in proportion to the respective shares in which the capital for the time being of the Company's and State Lines (exclusive of debenture capital) shall have been contributed by them."

(The provisions of cl. 12 of the Contract of 26th June, 1908, are not material to this reference.)

(*f*) Cl. 21 of the Contract of 1908 provided as follows:—

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"The Secretary of State shall be entitled to deduct and retain out of the share of surplus receipts payable to the company in respect of each year (commencing on the 1st January, 1909) under cl. 17 hereof (but not under cls. 19 and 20 hereof), the equivalent in rupees of the guaranteed interest at the rate of 3½ per cent. per annum for such year on the capital stock of the company paid or payable by the Secretary of State to the company under cl. 15 hereof, but if such share of surplus receipts in respect of any such year shall be less than the guaranteed interest of such year, the deficiency shall not be made out of the share of surplus receipts payable to the company in respect of any subsequent year. For the purpose of such deduction as aforesaid the company's share of surplus receipts under cl. 17 hereof in respect of the first half of any such year shall, subject to the provisions of cl. 15 hereof, be retained by the Secretary of State until the company's share in respect of the whole of such year shall have been ascertained.

"For the purpose of this clause the guaranteed interest paid or payable by the Secretary of State for such year shall be taken to be the aggregate of (1) one half of the amount paid for the half year ending on the 30th June in that year; (2) the whole of the amount paid for the half year ending on the 31st December in that year; and (3) one half of the amount (if any) payable for the half year ending on the 30th June in the year next following."

(The provisions of cls. 19 and 20 of the Contract of 1908 above mentioned are not material to this reference.)

9. The only other relevant provision which need be mentioned is Art. 73 of the Company's Articles of Association which runs as follows:—

"Any moneys which may from time to time be paid by the Secretary of State to the company by way of interest under the provisions of the Principal Contract (dated 1st June, 1882) or of any modification thereof, shall be distributed by the Board as dividends among the members in proportion to the amounts paid up or credited as paid up on their shares by yearly or half-yearly payments as the Board may from time to time determine and whether or not such balance of interest or any part of it represent profits of the company or not."

10. The above provisions with reference to the receipt of revenue and payment and application of guaranteed interest are strictly followed in practice. All revenue of the railways is paid to the credit of the Secretary of State. On 1st January and 1st July the Secretary of State pays to the company the half-year's interest at 3½ per cent. per annum on its capital of £5,000,000 and subsequently recoups himself the amount of such interest by deducting it from the share of surplus profits payable to the company in respect of each year in accordance with the provisions of cl. 21 of the Contract of 1908. On or about 1st January and 1st July in each year a distribution for the half year is made by the company to its shareholders which includes both the guaranteed interest and a distribution of surplus profits.

11. During the year of account (1936-37) the divisible surplus of the company amounted to Rs. 1,62,17,601. The Secretary

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of State's share of this surplus, worked out in proportion to the capital contributed by him (as referred to in paragraph 8 above), was Rs. 1,15,32,381 and the company's share on their capital of £5,000,000 (or Rs. 7,50,00,000) was Rs. 46,85,220. There is no dispute as regards these figures. The whole of this surplus was not, however, made over to the company as the Secretary of State acting under cl. 21 of the Contr act of 1908 deducted and retained out of this divisible surplus a sum of Rs. 23,33,333 being the interest guaranteed by him to shareholders calculated at 3½ per cent. per annum on the company's capital of £5,000,000 and the balance of Rs. 23,51,886 was made over to the company. The company's contention is that for the following reasons this guaranteed interest is not liable to be assessed as part of the company's income:—

(*a*) The company was required to raise a capital of £5,000,000 which it did under the terms of the agreement on condition that interest thereon at 3½ per cent. should be guaranteed by the Government of India.

(*b*) Both under the terms of the agreement between the company and the Secretary of State and the Articles of Association of the company which are unalterable without the consent of the Secretary of State, the company is under an obligation to pass on the amount paid by the Secretary of State to the shareholders and it therefore acts merely as a medium for purposes of passing on the amount to them. The company is a bare trustee in respect of the said amount.

(*c*) The amount is payable and is paid on fixed dates before the profits, if any, of the company are ascertained and independently of any profits being made by the company.

(*d*) The said amount does not form part of the profits of the company.

(*e*) Assuming without admitting that the said amount forms part of the profits of the company the amount is under the terms of the contract between the company and the Secretary of State payable and is paid in fact in sterling in London and no part of it is received in British India. The amount therefore does not accrue or arise nor is it received in British India nor can it be deemed to accrue or arise or be deemed to be received in British India under the terms of the Act.

(*f*) The fact that the amount is brought into account as between the company and the Secretary of State for the purpose of ascertaining the amount payable to the company in British India under the terms of the contract between the parties does

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not cause the amount in question to accrue or arise or to be deemed to accrue or arise or be received in British India. Moreover the company is incorporated and resident in England and is not resident in British India.

(*g*) The amount of the guaranteed interest in its essence and character is interest on capital borrowed within the meaning of S. 10 (2) (*iii*) of the Indian Income-tax Act and inasmuch as payment of such interest does not depend upon the earning of profits it is an admissible deduction for the purpose of computing the profits liable to taxation in British India.

(*h*) The principles of the decision of Rowlatt, J., in *The Madras and Southern Mahratta Railway Co., Ltd.* v. *The Commissioners of Inland Revenue*[1] do not apply as the case there related to levy of Corporation Profits Tax and the principle of the Full Bench decision of the Calcutta High Court governs the case.

12. The following question of law arises out of the case and I refer it for the decision of the Hon'ble Judges of the High Court:—

"Whether the said sum of Rs. 23,33,333 being the equivalent in rupees of the guaranteed interest paid by the Secretary of State for India under the terms of the contracts dated the 1st June, 1882 and 26th June, 1908, between the Secretary of State and the company which was deducted for the purpose of the company's return for the accounting year 1936-37 is liable to assessment in the hands of the company."

13. The company's contention that it is not liable to be assessed on the amount of guaranteed interest rests mainly on the following grounds:—

(1) that it is not the income of the company,

(2) that even if it is the income of the company such income does not accrue or arise in British India and is also not received in British India, and

(3) that it is in the nature of interest on borrowed capital and as such an expenditure admissible under S. 10 (2) (*iii*) of the Act, in arriving at the company's profits.

The contention that it is not income to the company is based on the argument that the amount is paid by the Secretary of State for the purpose of being passed on to the shareholders as interest guaranteed on their capital. This argument is open to the criticism that it ignores the actual facts. The profit arising from working the railway was apportioned between the Secretary of State and the company in certain definite proportions. (Please *see* paragraph 11.) Out of the company's share as thus determined the Secretary of State retains an amount calculated at 3½ per cent.

1. (1926) 12 Tax Cases 1111.

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of the capital raised by the company from shareholders. This is what is called "guaranteed interest", and it is intended for payment to shareholders to whom the company had held out this inducement when it applied to the public for capital. In other words, the company allows the Secretary of State to make use of a certain portion of its share of profits for being distributed among the shareholders. The remaining amount the company distributes as dividends among the shareholders. It is thus clear that what the Secretary of State retains is really part of the company's share of profits. In the words of Rowlatt, J.:

> "It seems to me to be the very simplest case of the application of profits, after they have become profits, by way of distribution of them to make good to somebody who has taken the risks of these profits not reaching that amount."

The company raised capital to the extent of £5,000,000 from the shareholders, who had a Government guarantee that they would get a return of 3½ per cent. per annum on their capital. Although the guarantee was given by the Secretary of State in Council the arrangement was that this should be fulfilled by paying the interest out of the company's share. If the company's share was insufficient to meet the guarantee in full, the Secretary of State in Council had to make good the deficiency, but such a contingency has not so far arisen. As observed by Rowlatt, J., again:

> "The *prima facie* share of profits of the company was greater than the sum which the Secretary of State had paid under the guarantee, therefore the Secretary of State was recouped the full amount of this guarantee and a surplus was left over which enabled the company to distribute not only the 3½ per cent. which the Secretary of State had provided under this guarantee but a further sum which made the dividend up to something like 5 per cent. or something of that sort."

There is no doubt therefore that what is paid by the Secretary of State as guaranteed interest is really a part of the company's share of profits. It is indeed in exactly the same position as the remaining part of the surplus belonging to the company out of which a dividend is paid to shareholders, and to the assessment of which the company has not raised any objection.

As regards the argument that the income accrues or arises outside British India it will suffice to say that the amount which is retained by the Secretary of State to recoup the amount of the guarantee is a part of the profits of the company the whole of which accrues or arises in British India. In short, it is not distinguishable from the remaining part of the profits of the company. Nor can the amount in any sense be regarded as interest on borrowed capital. The subscribed capital of the company raised by the issue of shares is not a loan taken from the shareholders.

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What is paid in the form of guaranteed interest is really not interest in the ordinarily accepted sense but a dividend which in this case is guaranteed whether or not there is sufficient amount of profits. If the profits are insufficient the Secretary of State has guaranteed to make good the deficiency. But so long as there is no deficiency in the profits the payment is made out of profits.

For these reasons, the question should be answered in the affirmative.

Reference by the Commissioner of Income-tax, Madras, under S. 66 (1) of the Indian Income-tax Act (XI of 1922) for decision of the following questions of law:

"Whether the said sum of Rs. 23,33,333 being the equivalent in rupees of the guaranteed interest paid by the Secretary of State for India under the terms of the contracts dated the 1st June, 1882 and 26th June, 1908, between the Secretary of State and the company which was deducted for the purpose of the company's return for the accounting year 1936-37 is liable to assessment in the hands of the company?"

K. V. Sesha Aiyangar for Petitioner.

Nugent Grant and *C. Krishnaswami Aiyar* instructed by *King and Partridge* for Respondent.

The Court delivered the following

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JUDGMENTS. *The Chief Justice.*—The assessee in this case is the Madras and Southern Mahratta Railway Company, Limited, which was incorporated in England in 1882. The main object of the incorporation of the company was the fulfilment of a contract with the Secretary of State for India in Council for the construction and carrying on of a railway in India. After the incorporation, the contract was duly entered into and in accordance therewith the company constructed, equipped and maintained the railway to which the contract related and supplied the necessary staff for its working. The Secretary of State provided the land required for the railway and also the moneys necessary for its construction and working. All the assets of the undertaking including the rails, plant, machinery and rolling stock were to be and are his property. The company manages the railway under the supervision and control of the Secretary of State, who is empowered to appoint one member of the Board of Directors. The Court has been informed that the director appointed by the Secretary of State possesses a power of veto.

By virtue of the contract of 1882 the company undertook to pay into the Bank of England to the credit of the Secretary

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of State a sum £3,000,000 and the Secretary of State undertook during the continuance of the contract to pay half yearly to the company out of the revenues of India interest at the rate of 3½ per cent. per annum on the amount. The £3,000,000 was duly paid by the company into the Bank of England to the credit of the Secretary of State, who has paid to the company in London half yearly the amount required to meet the interest due, but the Secretary of State has reimbursed himself at the end of the year out of the profits of the undertaking. The £3,000,000 represented the company's capital and the Secretary of State guaranteed interest on it at the rate mentioned. The contract also provided for division of the surplus profits between the Secretary of State and the company according to their respective shares in the capital of the undertaking.

The contract of 1882 continued to govern the relations between the company and the Secretary of State until the 26th June, 1908, when a further contract, expressed to be supplemental to the contract of 1882, was entered into. The contract of 1908 provided for the continuance of the original contract subject to certain variations and modifications. It was agreed that the capital of the undertaking should be taken to be the sum of £16,250,000 of which £12,750,000 was to be the capital of the Secretary of State and £3,500,000 to be the capital of the company. The Secretary of State was given the right to require the company to issue new capital stock not exceeding £1,500,000 to be allotted as fully paid up to such shareholders as he might direct. This new stock was issued in the same year with the result that the amount of the company's capital became £5,000,000 the figure at which it now stands. After the issue of this new stock the capital of the Secretary of State was deemed to be £11,250,000 for the purpose of determining the proportion in which the profits should be distributed.

All moneys received by the company in the course of the working of the railway have to be paid over to the Secretary of State. The company is not entitled to use any receipts of the undertaking for the purposes of meeting working expenses. These expenses are met from a grant made each year by the Secretary of State. As I have indicated the net receipts of the undertaking are divided at the end of each year between the Secretary of State and the company in proportion to their

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respective shares in the capital. The distribution of the profits rests with the Secretary of State, who is entitled in calculating the surplus to deduct the equivalent in rupees of the amount he has paid to the company by way of guaranteed interest in the course of the year. The surplus has always been more than sufficient to enable the Secretary of State to reimburse himself.

The reference arises out of the assessment of the company for the year 1937-38. The company returned an income of Rs. 24,36,479 for 1936-37. In arriving at this figure, the company deducted Rs. 23,33,333 which it had received from the Secretary of State as interest under his guarantee. This deduction was in accordance with the practice which had been previously followed, a practice which received the approval of the Calcutta High Court in *The Bengal Nagpur Railway Co., Ltd.* v. *The Secretary of State for India*[1]. This decision however conflicts with a later decision in England affecting the company, *The Madras and Southern Mahratta Railway Co., Ltd.* v. *The Commissioner of Inland Revenue*[2] and it is this conflict which has given rise to the reference. The income-tax authorities say that the Calcutta decision is wrong and that the company in calculating its annual profits must include the amount of guaranteed interest received in London. In order that the question may be decided the Commissioner of Income-tax, in agreement with the company, has referred to this Court under the provisions of S. 66 (1) of the Indian Income-tax Act, 1922, the following question:

> "Whether the said sum of Rs. 23,33,333 being the equivalent in rupees of the guaranteed interest paid by the Secretary of State for India under the terms of the contracts dated the 1st June, 1882 and 26th June, 1908, between the Secretary of State and the company which was deducted for the purpose of the company's return for the accounting year 1936-37 is liable to assessment in the hands of the company?"

In *The Bengal Nagpur Railway Co., Ltd.* v. *Secretary of State for India*[1], that company was called upon to pay tax on an income of Rs. 1,72,60,595 which included a sum of Rs. 13,07,440 being the equivalent of the amount of the guaranteed interest paid in sterling by the Secretary of State on the share of the capital of the company. For the purposes of the present reference the contract of the company with the

1. (1922) I.L.R. 49 Cal. 815: 1 I.T.C. 178.
2. (1926) 12 Taxes Cases 1111.

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Secretary of State may be taken to be on all fours with the contract of the Bengal Nagpur Railway Company, Limited, with the Secretary of State. The Bengal Nagpur Railway Company Limited, claimed that it was only taxable in respect of the amount which it received in India at the end of the year as its share of the surplus profits. A Full Bench of the Calcutta High Court held that the company was only liable in respect of its share of the surplus profits received in return for its services in the management of the railway, and not in respect of the moneys received in London. It was considered that the payment of the guaranteed interest in London was independent of the earnings of the railway and that the repayment of the amount of the guaranteed interest constituted the payment of a debt due from the company to the Secretary of State.

In *The Madras and Southern Mahratta Railway Co., Ltd. v. The Commissioner of Inland Revenue*[1], the question was whether the company was liable to corporation's profits tax in respect of the amount which it received from the Secretary of State as guaranteed interest. Admittedly, there is no difference in principle between assessment in England to the Corporation's Profits tax and assessment to Indian income-tax. It was held by Rowlatt, J., that the guaranteed interest paid by the Secretary of State formed part of the company's profits and that the recoupment to the Secretary of State out of the surplus profits represented a distribution of profits within the prohibition of deduction from profits in S. 53 (2) of the Finance Act, 1920. Rowlatt, J., put the question this way:—

> "Are the profits of the company for the purpose of corporation profits tax the amount of their share before the Secretary of State is recouped, or are they only the balance which is left to them after the Secretary of State is recouped? That is what the question is, or to put it in another way, are they to be taxed on that balance, or are they to be taxed on the balance plus the amount of the guaranteed interest, which is only putting the same thing in another way."

In deciding the case against the company the learned Judge said:

> "If you put it in commercial or financial language or look at it from the commercial or financial point of view, the position simply is that these shareholders have been paid out of the proceeds of the working of the Railway, and the Revenues of India have not paid them a penny. The money they have got is simply because the railway has been so successful, and for no other reason they have got it. If it had not been successful they

1. (1926) 12 Taxes Cas. 1111.

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would have got some of it from the Secretary of State for India, but that position has not arisen; or, if you use language framed more exactly with respect to tax law, this, in my judgment, is the position, that the railway company have earned all these profits, all their one-fifth share, or whatever it is, of the profits of the railway company, and it does not matter in the least that they have had to apply those profits being profits, from the working of the railway, in making good to the Secretary of State a guarantee which he had honoured provisionally in favour of the shareholders. . . . . The Secretary of State is recouped out of what is called the company's share of the surplus receipts and as I have pointed out, the extent of his recoupment depends upon the amount of the profits. I think that this is a distribution of profits within the prohibition in S. 53, sub-S. 2 (*b*) of the Finance Act, 1920. I think it is a distribution of profits. It is a distribution of profits in recoupment of a guarantor who guaranteed those profits—guaranteed them if you like to the shareholders, but what he guaranteed are the profits. He has guaranteed that the people who put up the capital shall have a return on the capital, and if the profits unaided give that return, the person who gives the guarantee gets them to make good his guarantee. It seems to me the very simplest case of the application of profits, after they have become profits, by way of distribution of them to make good to somebody who has taken the risk of those profits not reaching that amount."

Both the company and the income-tax authorities accept the decision of Rowlatt, J., in *The Madras and Southern Mahratta Railway Co., Ltd.* v. *The Commissioner of Inland Revenue*[1], as correctly stating the law and consequently are agreed that *The Bengal Nagpur Railway Co., Ltd.* v. *Secretary of State for India*[2], ought not to be followed. While accepting the judgment of Rowlatt, J., in *The Madras and Southern Mahratta Railway Co., Ltd.* v. *The Commissioner of Inland Revenue*[1], Mr. Grant has contended on behalf of the company that the payment of interest on the £5,000,000 in London cannot be regarded as profits accruing or arising in British India within the meaning of S. 4 of the Indian Income-tax Act, 1922. In fact this is the only point taken on behalf of the company. As the correctness of the decision in *The Madras and Southern Mahratta Railway Co., Ltd.* v. *The Commissioner of Inland Revenue*[1], is not challenged, I fail to see any basis for the argument that the receipt of the interest in London must be taken to be income earned there. The decision of Rowlatt, J., emphatically negatives the contention. The basis of his judgment is that all the profits of the undertaking are earned in India, and the payment by the Secretary of State in London is merely a provisional payment which he recovers out of the profits in India.

1. (1926) 12 Taxes Cases 1111.
2. (1922) I.L.R. 49 Cal. 815: 1 I.T.C. 178.

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There are cases arising under the Indian Income-tax Act, which also militate against Mr. Grant's contention. In *Surupchand Mukumchand* v. *The Commissioner of Income-tax, Bombay*[1], the Bombay High Court had to consider whether S. 4(1) of the Indian Income-tax Act, 1922, applied in these circumstances. A company registered in Indore, a Native State, entered into an agreement with a firm in Bombay under which the firm was to open and maintain at the company's expense shops in Bombay and elsewhere for the sale of the company's goods, to keep the books of account in Indore in respect of all sale proceeds and disbursements of the company, to charge a commission of 1¼ per cent. on the gross sale proceeds of all cloth and yarn produced by the company, and to pay itself out of the moneys of the company all sums due to it by way of commission or otherwise. The sale proceeds of the Bombay shop were all sent to Indore and the commission was paid there. It was contended that in these circumstances no income accrued or arose in British India, but the contention was rejected and the decision was approved of by the Privy Council in the *Commissioner of Income-tax, Bombay* v. *Chunilal B. Mehta*[2]. In *The Right Rev. C. J. C. Saunders* v. *The Commissioner of Income-tax, United Province*[3], the Allahabad High Court held that a sum of money paid annually in London to the Bishop of Lucknow by the trustees of a certain fund as a gratuitous and unconditional personal allowance of the holder of the Lucknow See was income accruing or arising in British India and assessable as salary under S. 7 (1) of the Act. *V. G. Every*[4] In the matter of, the Calcutta High Court held that commission earned by an assessee in British India for services rendered there as an employee of a company, which was received by him in the United Kingdom while on leave, was income which had accrued or arisen in British India within the meaning of S. 4 (1).

It is not necessary to carry the discussion any further. There is ample authority in the cases which I have quoted to support the contention of the Income-tax authorities that all the profits of the company accrue or arise in British India and

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1. (1931) 5 I.T.C. 108.
2. (1938) L.R. 65 I.A. 332: I.L.R. (1938) Bom. 752 (P.C.).
3. (1931) 5 I.T.C. 454.
4. I.L.R. (1937) 2 Cal. 327.

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therefore I would answer the question referred in the affirmative. I would add that the Court is not called upon to consider whether the payment in London would constitute profits arising in British India in the event of the working of the undertaking not realizing sufficient to reimburse the Secretary of State at the end of the year, as this situation has not arisen.

As the reference has been made by consent in order that there should be a pronouncement by the Court on the question there will be no order as to costs.

King, J.

King, J.—I agree.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I also agree.

K. C. *Questions answered in the affirmative.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—VISCOUNT MAUGHAM, LORD PORTER AND SIR GEORGE RANKIN.

Sir Jamshedjee Jeejibhoy, Bart., and others .. *Appellants**

v.

Sorabji Byramji Warden and others .. *Respondents.*

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Executor—Grant of equitable mortgage to creditor of estate—Undertaking by creditor not to sue for two years—Executor's undertaking to pay interest "in the meantime"—Nature and extent of personal liability of executors on the mortgage—Doctrine of "admission of assets"—Applicability in India.

Where the executors of a will decide for consideration to grant security over an asset belonging to the testator's estate, then, if it is not intended that the executors should assume personal liability for the secured debt, there is nothing in the Transfer of Property Act or in the law of India to make them so liable by reason either that they have granted the security or that they have done so by deposit of the testator's title deeds. On the other hand, where the executors in granting such security, make promises relating to the payment of interest, it is for them to make clear that their words of promise are not to be taken in the exact sense of a personal covenant. Where a creditor of the estate agrees with the executor to give time for payment of the debt due to him from the estate, it is a question of fact, or of construction of any relevant document, whether the executor is to be regarded as intending to make himself liable for the debt. There is in Indian law no presumption that the executor so intended, although his words of covenant will *prima facie* be given their ordinary meaning. There is no trace in the Code of Civil Procedure or in the decisions of the Courts in India of any doctrine comparable with the English doctrine of admission of

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*P. C. Appeal No. 31 of 1939. 7th March, 1940

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assets. While Indian law places on a legal representative the burden of showing that he has duly applied all assets proved to have come to his hands, it has no bias tending to make him liable to answer with his own property for the debts of the deceased.

The executors of a will granted to one of the creditors of the testator's estate an equitable mortgage by way of deposit of title deeds, the registered memorandum of which provided *inter alia* that the mortgagee would not sue for the debt for two years and that the executors would "in the meantime pay interest every month . . . . . . at the rate of six per cent. per annum with compound interest at the same rate." The deed recited *inter alia* that the executors had at the time no cash available for the satisfaction of the debt.

Held that, on the true construction of the memorandum, the executors' promise to pay interest not having been expressly qualified, and having regard to the limited period to which that provision extended and to the circumstances of the transaction, the executors had made themselves liable personally for the interest accruing during those two years, with interest on that interest as provided. Their liability did not, however, extend to the principal of the debt or to interest beyond the two years or until the debt should be repaid.

Appeal from a decision of the High Court, Bombay, dated 28th September, 1937 (*Beaumont, C. J.* and *Blackwell, J.*) reversing a judgment of Bailee, J., dated 5th August, 1936.

The facts appear fully from the judgment.

R. F. Roxburgh, K.C. and *R. J. T. Gibson* for Appellant.—Clearly the three possibilities are that the executors are fully liable for both principal and interest; that they are liable for neither; or that they are liable for interest either until the debt is repaid or for the period of two years from the date of the memorandum. The liability whatever it may be held to be, can be fixed on the executors either because they have agreed to pay or on the basis that they have made an admission of assets, for there is every indication that the doctrine of English law of 'the admission of assets' is applicable also in India. It is only necessary to saddle the executors with liability that they should have made a statement about the testator's assets which amounts to an admission of assets. Moreover, the executors can be saddled with personal liability to repay the principal itself of the debt by reason only of their liability in respect of interest, for the obligation which they have undertaken in the mortgage memorandum in respect of interest differs from the original obligation of the testator in that he was never liable for compound interest. There again, admission of assets is arrived at through the different undertakings by the executors, with consequent personal liability also for the principal. *Bradley* v. *Heath*[1] and *Childs* v. *Monins*[2].

1. (1830) 3 Simon 543 : 57 E.R. 1101.
2. (1821) 2 Br. & Bing. 460 : 129 E.R. 1044.

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To examine the provisions of the memorandum more closely, it is submitted that the fact that a mortgage imports a covenant to pay, coupled with the expression for repayment of the principal at any time within two years to be selected by the executors, imports as a matter of construction a covenant by the executors themselves to pay at or before the end of that period. The suspension of remedy with the promise to pay together constituted an admission of assets by the executors and a consequent assumption of personal liability by them. With regard to interest alone, the words in the memorandum relating specially to that matter aptly express a personal covenant to pay the interest. They cannot be explained away as a mere fixing of dates.

Sir T. Strangman, K.C. and *S. P. Khambatta* for Respondents.—We submit not only that the appellant's construction of the memorandum is incorrect, but further that, assuming them to be right in their argument that the executors have saddled themselves with personal liability in respect of interest, it is not established that by virtue of the provision for payment of compound interest they have by way of admission of assets saddled themselves with personal liability to repay the whole debt and the doctrine of admission of assets forms no part of the law of India, and there is no principle on which the executors could possibly be held liable for more than the interest for the material two-year period.

7th March, 1940. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—This is an appeal by the representatives of the original plaintiff in a suit to enforce a mortgage by deposit of title deeds. The suit was brought on the Original Side of the High Court of Bombay on 7th January, 1936, by an old lady named Jaiji Hirjibhoy Parekh. Her daughter Meherbai had married one Byramji Hirjibhoy Warden, father of the defendants. Byramji had died on 26th October, 1924, leaving a will whereby he had appointed the defendants, his four elder sons, to be his executors. Probate had been granted to them in 1925.

By his will dated 6th October, 1922 (codicil of 19th August, 1924), Byramji declared (cl. 11) that his immovable properties were generally mortgaged and that it would take a long time before they could be sold at the best price after paying the mortgage debts. He accordingly authorised his executors to postpone the sale for any period not exceeding five years from the date of his death. He referred (cl. 12) to the fact that Bai Jaiji (the plaintiff) and a number of other

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persons held his promissory notes, stating that he ordinarily renewed them yearly or at longer intervals and paid them interest monthly or at times at longer intervals. He directed that the amount due to these creditors should be paid with interest by his executors and he authorised his executors to renew these notes with interest. After making provision for his daughters, for a fifth son named Rustomji and for certain other persons, he directed that at the end of seven years after his death the residue of his property should be divided into four equal parts, each part to be held in trust for one of his four elder sons (the present defendants-respondents) for life and on such son's death for his children.

At his death the estate of Byramji, which consisted mainly of shares in companies and immovable properties in Bombay, was valued by the Collector for the purposes of the duty payable on obtaining probate at about 8½ lacs of rupees and the debts of Byramji were returned at about 6 lacs. The debt due to Bai Jaiji was entered as amounting to Rs. 25,780 for principal and Rs. 620 for interest. That the solvency of the estate would depend entirely upon the condition of the property market in Bombay has at all times been plain and after the death of Byramji his executors found it difficult to realise his properties. By 1928 the fifth son, Rustomji, was threatening steps to realise the sum of Rs. 50,000 which had been settled upon him by his father's will and in this year several mortgages were given by the executors over immovable properties of the estate to creditors of the testator. In particular, on the 10th August, 1928, an equitable mortgage by deposit of title deeds was given to Bai Jaiji and the registered memorandum set forth the terms thereof as follows:—

"Memorandum of Agreement made and entered into at Bombay this 10th day of August, 1928, between Sorabji Byramji Warden, Hirjibhoy Byramji Warden, Jamshedji Byramji Warden and Pestonji Byramji Warden all the four of Bombay, Parsi Inhabitants, Executors and Trustees of the last Will and Testament of the late Byramji Hirjibhoy Warden of the one part and Bai Jaiji Hirjibhoy Parekh of Bombay, Parsi Inhabitant of the other part. WHEREAS the said Byramji Hirjibhoy Warden, was during his lifetime indebted to the said Jaiji Hirjibhoy Parekh in a certain sum, which with interest up to date exceeds the sum of Rs. 30,000 AND WHEREAS the said Byramji Hirjibhoy Warden, died in October, 1924, leaving a Will dated 6th October, 1922, Probate, whereof has been issued by the High Court of Bombay in its testamentary Jurisdiction to the said Sorabji, Hirjibhoy, Jamshedji and Pestonji, the sons of the said Byramji Hirjibhoy Warden, and Executors and Trustees of the said Will AND WHEREAS the said

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Bai Jaiji Hirjibhoy Parekh, has called upon the Executors to pay off the debt due to her by the estate and in default, threatened to proceed further in a Court of Law, and the Executors having at present no cash available for the satisfaction of the said debt, offered to give security to the extent of Rs. 30,000 by giving an Equitable Mortgage of the right, title and interest of the said Byramji Hirjibhoy Warden in the immovable properties described in the Schedule A, B and C hereto by depositing their respective title-deeds described in the Schedules D, E and F which the said Bai Jaiji Hirjibhoy Parekh, the Creditor, has agreed to accept and not to sue, till such time not exceeding two years as the depression in the property market in the opinion of the Mortgagors passes off, AND WHEREAS the said Byramji Hirjibhoy Warden was entitled to the entirety of the immovable properties in the Schedules A and B and to a half share in the immovable property described in the Schedule C hereto, NOW IT IS HEREBY AGREED that the deeds and documents specified in the Schedules D, E and F relating respectively to the immovable properties described in the Schedules A, B and C have this day been deposited by the said Sorabji Byramji Warden, Hirjibhoy Byramji Warden, Jamshedji Byramji Warden and Pestonji Byramji Warden, with the said Bai Jaiji Hirjibhoy Parekh with intent to create an Equitable mortgage upon the said immovable properties for securing to her the said Jaiji repayment with interest of the sum of Rs. 30,000 (Thirty thousand) this day due to her by the estate of the said Deceased Byramji Hirjibhoy Warden, represented by the Executors of his Will the said Sorabji, Hirjibhoy, Jamshedji and Pestonji, such sum to be repayable at any time within two years from the date hereof, such time to be selected by the said Executors and that they will in the meantime pay interest every month on the first day of each English month at the rate of six per cent. per annum with compound interest at the same rate with quarterly rests on all arrears of interest not paid on the due date, AND IT IS HEREBY FURTHER AGREED that the said sum of Rs. 30,000 is repayable in Bombay, and until so repaid with interest as aforesaid, the said deeds and documents and the respective properties to which they relate will be held by the said Baj Jaiji Hirjibhoy Parekh as an equitable security and that the executors will, if so require by the said Jaiji, insure the structures on the lands comprised in the said security in a sum not exceeding Rs. 30,000 at the costs of the executors."

Having received no payment whether on account of principal or interest, Baj Jaiji brought her suit as already mentioned on 7th January, 1936. She asked for the usual preliminary decree for sale but added a claim that if the proceeds of sale should be insufficient, the defendants be held personally liable to make up the deficiency, contending that by the memorandum of 10th August, 1928, the defendants had made themselves personally liable for the repayment of the principal sum of Rs. 30,000 and interest thereon. This was a very proper question to be decided at the trial. Barlee, J., as trial Judge found against the defendants both as regards principal and interest, proceeding on the view that an executor must perform a promise made by him as executor *de bonis propriis* unless he has expressly excluded his own liability and that this he does not do by the mere use of

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the word executor. By his preliminary decree (5th August, 1936), he gave liberty to the plaintiff to apply for a personal decree against the defendants in the event of the net sale proceeds being insufficient to satisfy in full the plaintiff's claim for principal, interest and costs. While the defendants' appeal to an Appellate Bench was pending, Bai Jaiji died on 25th December, 1936, and the executors of her will (the present appellants) were substituted in her stead. At the hearing of the appeal, Beaumont, C.J. and Blackwell, J., construed the memorandum as imposing no personal liability on the defendants. Their decree dated 28th September, 1937, negatived the plaintiff's right to apply for a personal decree against the defendants but gave liberty to the plaintiff to lodge a claim for any deficiency against the estate of Byramji but without prejudice to any question whether such claim was maintainable.

The evidence called at the trial has little bearing upon the true construction of the memorandum of 10th August, 1928. The second defendant, Hirjibhai, who appears to have been the most active of the executors, gave evidence that he had advanced some money for paying off debts of the estate, that several creditors had been paid off chiefly out of monies of the estate, that some legacies had been paid out of monies advanced by him including a legacy left to one of his sisters which was paid on her marriage. He stated that the promissory notes held by Bai Jaiji carried interest at 6 per cent. with quarterly rests and that these had been handed over to him at the time of the mortgage transaction of 10th August, 1928, and destroyed. He admitted that the income of the property in suit was collected by him after the granting of the mortgage on 10th August, 1928, just as before. His evidence is that whatever might have been thought possible at the date of his father's death in 1924, by 1928 he had no longer any hopes of taking anything by the residuary legacy, since the utmost that could then be expected was that the debts of the estate might be cleared if land values improved. The only other witness called by the defendants was the solicitor who drew up the memorandum of 10th August, 1928. He stated that he did so on the instructions of the second defendant who wanted to protect his grandmother, but that he did not himself see or consult the lady nor were any instructions taken by him from her though the second defendant was in communication with her throughout. Bai

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Jaiji herself gave evidence giving her age as 90 years: she said that Byramji had paid her the interest in his lifetime but that after his death the second defendant had not done so in spite of demands but had asked her to wait two years. She denied that she had handed over to him the promissory notes.

Before the Board Mr. Roxburgh, for the appellants, in a clear and careful argument, examined separately three possible answers to the question whether the defendants had rendered themselves personally liable to Bai Jaiji, (1) that they were so liable both for principal and interest; (2) that they were so liable for interest alone either (*a*) for two years from the date of the memorandum, or (*b*) until repayment; (3) they were not so liable at all. In the High Court the learned trial Judge had taken the first view and the Appellate Bench the third: their Lordships agree, however, that the second must be carefully considered. It was further contended for the appellants that personal liability might be brought home to the defendants either on the footing that they have agreed to pay or on the footing that they have admitted assets. Upon the second of these alternatives it was suggested that the learned Judges in India do not seem to have disputed the applicability of the principles of English law and that the English decisions, some of which were followed by Barlee, J., are particularly strong to the effect that an executor may incur liability by making a statement about the assets of the testator which amounts to an admission of assets. Their Lordships, however, for reasons which will be indicated later in this judgment, are not prepared to give unqualified adherence to the view that English law as to admission of assets is law in India either within or outside of the Presidency towns.

In the present case it is to be observed that in the plaint the personal liability of the defendants was put entirely upon the memorandum of 10th August, 1928. It was not pleaded that the defendants had become liable by reason of any admission of assets *dehors* the memorandum whether by conduct or by words. Indeed admission of assets as distinct from agreement to pay personally was not in the plaint put forward as a ground of claim at all. In these circumstances while the memorandum must be given its true effect in law, it is not open to the appellants, for the purposes of this appeal, to rely on statements made in evidence by the second defendant as

to his sister's legacy having been paid or other creditors having been paid or having been given security. If however, the appellants should at any time get judgment against the defendants for any sum to be realised out of the assets of the testator, it may be that in execution proceedings it will still be open to them on the basis of some such facts to make a case (under sub-S. (2) of S. 52 of the Code) that the defendants have not duly applied all the assets which came to their hands.

The only matter upon this appeal is the nature and extent of the liability incurred by the defendants under the memorandum of 10th August, 1928. The defendants are in the opening words described as executors and trustees of the will of Byramji. The recitals do not contain any details of the debt due from Byramji's estate. The dates of the loans, the rate of interest, the sums outstanding for principal and for interest are not given: all that is said is that up to date the debt exceeds Rs. 30,000. The recitals do, however, purport to disclose in terms that the executors had no cash available wherewith to pay the debt, that their only prospect of paying depended on the state of the property market which was at that time depressed, and that they were giving security in order to gain two years time. There is here no suggestion that the defendants as executors had been in default in any way or were admitting that they had assets out of which they might and should have paid. Their offer to Bai Jaiji as recited is an offer to give her security for the testator's debt to the extent of Rs. 30,000 by equitable mortgage of the right, title and interest of the testator. Though the second defendant deposed that the debt originally carried interest at six per cent. with quarterly rests, the learned trial Judge was not prepared to believe that compound interest was payable at all, the promissory notes having been destroyed But the way in which the debt is recited in this memorandum without any distinction between what was then due for principal and interest is, in their Lordships' opinion, some corroboration of the defendant on this point and there is no contradiction by Bai Jaiji. Their Lordships find it very difficult to make any inference against the defendants on the ground that the original terms as to interest were varied by the memorandum—a contention which seems to them to be unproved.

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The operative clause of the memorandum begins by creating an equitable mortgage upon the properties for securing to Bai Jaiji repayment with interest of the sum of Rs. 30,000 then due to her by the estate of Byramji represented by the executors of his will. This is followed first by a clause—"such sum to be repayable at any time within two years from the date hereof such time to be selected by the said executors"—which is no more than a way of saying that it was not to be demandable for two years. Then comes the interest clause (so to call it): "that they (the said executors) will in the meantime pay interest every month on the first day of each English month at the rate of six per cent. per annum with compound interest at the same rate with quarterly rests on all arrears of interest not paid on the due date."

By S. 58, cl. (*a*), of the Transfer of Property Act, it is clear that a mortgage may be given as security not merely for money lent but for any debt or liability. If the executors of a deceased debtor think fit for consideration to give security over an asset belonging to his estate to one of his creditors in respect of a debt due from the estate, the transaction may or may not be one to which other creditors or persons can take exception. But if it is not intended that the executors should assume personal liability for the secured debt there is nothing in the Transfer of Property Act or in the law of India to make them so liable by reason that they have granted the security or by reason that they have done so by deposit of the testator's deeds. Apart from the clause as to interest, which calls for a separate discussion, the memorandum contains no covenant by anyone to repay the principal sum of Rs. 30,000, no statement that the executors would assume personal liability for it, no representation or admission to the creditor as to the sufficiency of the testator's assets to meet either the original debt or the sum of Rs. 30,000.

There is, however, a covenant to pay interest on the sum of Rs. 30,000. This is not itself qualified by any phrase to the effect that they agree "as executors" to pay it or that they are to pay it out of the assets of the testator. Nor is there any other specific expression directed to distinguish between a simple promise by the defendants to pay and a promise by the defendants, for themselves and their successors in office, to pay upon condition that the assets of the testator should permit of the payment being made thereout. The question arises whether such a

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qualification can be derived from the context, and on this point much depends upon the period in respect of which the promise to pay interest is made. Their Lordships think it to be reasonably plain that the words "in the meantime" have reference to the period of two years or less referred to in the words immediately preceding and that they cannot be extended to cover the whole period that might elapse between the date of the memorandum and the actual payment of Rs. 30,000 to Bai Jaiji. The defendants were to continue to collect the rents of the mortgaged property and might very reasonably have been expected, for the two years during which she gave up her right to recover her money, to see that the interest was paid to her. The recitals as to her having made demands must be taken against the defendants and it seems unreasonable to doubt that the lady would feel the loss of this portion of her income. On the other hand the clause is the only covenant to pay interest and the only part of the memorandum in which any specific rate of interest is mentioned. It is expressed in language which is common form in Indian mortgages which not infrequently, as the reports show, provide expressly for the payment of interest up to the "due date" of the mortgage but omit to make provision for any subsequent period. The last clause, however, makes the property a security for the interest as well as the principal until repayment. The learned Judges of the Appellate Bench considered that the covenant to pay interest was to be read with the reference to interest in the previous part of the same clause and merely specified the interest already referred to. The question is by no means free from difficulty, but upon a careful consideration of the clause their Lordships think, the promise not having been expressly qualified, that in the context there is not enough to show that the promise was intended as conditional upon the sufficiency of the testator's assets having regard to the limited period of time (two years) to which it extends and the circumstances of the transaction.

It is to be noticed that the executors had not been paying the interest and that apparently the estate was without sufficient cash even to ensure that the interest would be regularly paid. The rate is not expressly stated to be the same rate as applied to the original debt even if it was so in fact. Their Lordships do not think that they will be applying to this Indian case a technical or unjust rule if they hold that it was for the executors

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to make clear that their words of promise were not to be taken in the direct and simple sense of a personal covenant, and that on a true construction of this memorandum they have made themselves personally liable for the interest which accrued during the two years with, of course, interest thereon.

It was contended for the appellants that if it be found that the defendants had made themselves personally liable to pay any interest, this finding would involve a liability on their part in respect of the whole of the debt both principal and interest, at all events if the obligation which they undertook differs in any way from the original obligation of the testator. It was said that the sum of Rs. 30,000 was only a part of the testator's debt and that the testator was not shown to have been liable for compound interest. Hence, on the facts of the present case, the principle was invoked that a promise by an executor to pay interest differing in any particular from the testator's own obligation involves admission of assets and renders the executor personally liable for principal also. As authority for this proposition, reference was made to *Bradley* v. *Heath*[1] and *Childs* v. *Monins*[2], Williams on Executors, 12th Ed., Vol. II, pp. 1164-5.

These were both cases in which executors appear to have qualified their promise to pay the testator's debt by the words "as executors" and yet were held personally liable on the construction of the instrument as a whole upon the ground that they promised to pay in the future with interest for which the testator was not liable. In *Bradley's case*[1] the matter was entangled with further debts incurred by the executors to the creditor after the testator's death. In *Childs' case*[2] the instrument was a promissory note, the promise was joint and several and was to pay on demand. These cases disclose reasons why the words "as executor" will not in all circumstances be sufficient to show that the payment is only to be made "out of the estate".

In India as in England it is open to an executor in consideration that a creditor of his testator will forbear to sue to make himself liable for the debt whether the assets of the testator be sufficient or insufficient. The forbearance will be consideration to support the promise. It may even be that

1. (1830) 3 Simon 543: 57 E.R. 1101.
2. (1821) 2 Br. & Bing. 460: 129 E.R. 1044.

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where there is an agreement by the creditor to give time, the executor will readily be regarded as intending to make himself personally liable. This must, however, in all cases be a question either of fact (what the agreement was) or of construction, if the agreement was reduced to writing: though their Lordships know of nothing in the law of India which warrants any presumption against the executor in this regard, his words of covenant will *prima facie* be given their ordinary meaning. If the truth be that the executor has obtained time not by promising that he would pay but by granting to the creditor a mortgage or charge over assets of the testator in respect of the debt or part of the debt, there is no rule of Indian law which alters or enlarges the agreement of the parties. And if it be, as in the present case, part of that agreement that the executor shall assume liability for the interest alone and that only for a defined period, to impose a liability for the whole of the debt would be all the more pointedly in conflict with the intention of the parties. It is good sense to infer when a person makes himself liable indefinitely for the interest on a debt that he means to assume liability for the principal since if the debt be never paid the interest would run for ever. It is also true that the mere agreement that interest shall be paid shows forbearance by the creditor. Such considerations throw light upon the intention of the parties but they do not otherwise impose liability upon executors. If the realisation of a testator's estate is a matter of difficulty and if it be thought of benefit to the estate that a creditor should be induced to give time for payment of his debt, there may be every reason why the executor should seek to make an arrangement for time on payment of enhanced interest or on other special terms entirely at the expense of the estate and without risk to himself. The question is whether he has done so: to what has the creditor agreed? This is more safely answered by an Indian Court upon a direct view of the circumstances of the case, the character of the document, if any, and its language fairly taken as a whole, than through the refracting medium of decisions given in another country one hundred years before.

It is maintained, however, that by admission of assets the executor has incurred personal liability without entering into a contract to pay personally or even after entering into a contract under which the creditor's right to payment is con-

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ditional upon the sufficiency of the assets. On the terms of the memorandum in the present case, which their Lordships have now construed, it is not possible to suggest that the executors were representing, affirming or admitting that the assets would be sufficient to meet the debt or the sum of Rs. 30,000. On the contrary they gave plain warning that everything would depend upon the future of land values in Bombay.

As English cases have been cited in the High Court and before the Board upon the subject of "admission of assets" their Lordships think right to notice that the English cases require to be interpreted with reference to their setting or background in English law. In Williams on Executors—the well-recognised repository of learning on this subject—the scheme of the English law and the conditions upon which judgment could be recovered *de bonis testatoris* or *de bonis propriis* are described (*cf.* 12th Ed., 1930, Vol. II, pp. 1166, 1240, 1293-6) and it will be sufficient here to refer to them in a summary manner. If an executor was sued for the debt of his testator and had not assets to satisfy the debt, he had to take care to plead *plene administravit* or *plene administravit praeter*: otherwise judgment for the plaintiff amounted to a conclusive admission that he had assets to satisfy it. Where this plea was taken the burden was on the plaintiff to show that assets existed or ought to have existed in the hands of the defendant at the date of the writ but this burden might be discharged by proof of some conduct of the defendant amounting to admission of assets. In an administration action such admission entitled the plaintiff to an immediate order for payment without taking the accounts. Indeed the general rule was that admission of assets to one claimant on them was an admission to all: also that an admission of assets can never be retracted unless a case of mistake be clearly established. To charge an executor on his own promise to pay, the debt of the testator, in addition to the writing required by the Statute of Frauds, it was necessary to show consideration for the promise. Clearly enough, forbearance by the creditor to sue would be good consideration, but there were also decisions to the effect that assets come to the hands of the executor were consideration and that if admission of assets was implied by the promise, the promise was binding.

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The Indian system of recovering debts due from a person deceased is different in important respects. In the first place the legal representative who is liable to be sued is not in general an executor or administrator at all but the Mahomedan heir or the Hindu son or a mere intermeddler with the deceased's estate as is now made clear by S. 2 (11) of the Civil Procedure Code. The form of judgment given for the debt against the legal representative is for payment out of the property of the deceased. If no such property remains in the hands of the defendant, execution can be had against his own property on proof that property of the deceased had come into his possession, unless he proves that he has duly applied such property of the deceased. The Court executing the decree will require him to produce accounts as necessary (Ss. 50, 52). If the legal representative has wrongly applied part of the assets of the deceased he may be made liable in such proceedings to the creditor: his right being to get credit only for what has been "duly disposed of" or "duly applied". But there is no trace in the Code or, so far as their Lordships are aware, in the decisions of Indian Courts of any doctrine comparable to the English doctrine as to admission of assets. If he has paid a small legacy when the assets are insufficient to meet the debts, the legal representative may fail to get credit for the money wrongly spent but that is all. He will not render himself liable by an admission as though it were an estoppel; though he must like anyone else fulfil his promises and make good his representations (*cf.* S. 115, Indian Evidence Act). The law of India puts upon a legal representative the full burden of showing that he has duly applied all assets proved to have come to his hands but it has no bias tending to make a legal representative liable to answer with his own property for the debts of the deceased, even if it be true that he knows better than the creditor the position of the deceased's estate. That "assets come to his hands" is consideration for a personal promise to pay the debt of the deceased is a doctrine to which it is difficult to give a meaning under the Indian Contract Act, but (as has already been indicated) forbearance to sue is consideration as to which there is no difficulty provided it is in fact agreed; though the counter-consideration given by an executor is not necessarily an unqualified promise to pay the debt.

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Having construed the memorandum of 10th August, 1928, as imposing personal liability upon the defendants in respect only of the interest accruing during the ensuing two years with interest thereon as therein provided, their Lordships are of opinion that there should be added to the preliminary decree for sale as it now stands an order that the appellants be at liberty to apply, in the event of the net sale proceeds proving insufficient to satisfy in full the principal sum and interest and costs and interest on costs due on the security of the equitable mortgage of 10th August, 1928, for a personal decree against the defendants for the interest or the balance thereof as the case may be due in respect of the period of two years from the 10th August, 1928, at 6 per centum per annum with interest thereon at the same rate with quarterly rests.

Their Lordships will humbly advise His Majesty accordingly. They do not find it necessary to disturb the orders for costs made by the High Court on appeal. As the appeal succeeds only upon the question of two years' interest and fails as regards the principal and further interest, their Lordships do not think fit to award any costs of this appeal to the appellants and direct that the appellants pay to the respondents half their costs of this appeal.

Solicitors for Appellants: *Lattey and Dawe.*

Solicitors for Respondents: *T. L. Wilson & Co.*

R. C. C. *Appeal allowed in part.*

K. S.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD THANKERTON, SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

The Secretary of State represented by the Collector of South Arcot .. *Appellant**

v.

Mask & Co. .. *Respondents.*

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Secretary of State v. Mask & Co.

Land Customs Act (XIX of 1924), S. 9, Schedule and Sea Customs Act (VIII of 1870), Ss. 182 and 188—Dispute between importer and Customs authorities with regard to duty leviable—Appeal to customs Collector dismissed—Appeal from that decision to Government also dismissed—Suit in Civil Court—Whether competent.

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* P. C. Appeal No. 23 of 1939. 15th March, 1940.

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Importers having imported into British India a consignment of betel-nuts, the customs authorities levied duty on them on a tariff value. The importers appealed, contending that the goods should be assessed at a lower rate, namely, as raw betel-nuts subject to duty *ad valorem*. The Collector of Customs dismissed the appeal, the Government of India affirming his decision. The importers having brought an action against the Collector to recover the amount of duty which they alleged to have been overpaid.

Held, that the Civil Courts had no jurisdiction to entertain the suit.

Quaere, whether the importers would have been entitled to resort to the Civil Courts before appealing under S. 188 or were confined to the right of appeal given by that section.

Appeal from a decision of the High Court, Madras, in its civil appellate jurisdiction, dated 2nd February, 1938 (Varadachariar and Pandrang Row, JJ.) reversing a decision of the Subordinate Judge of Cuddalore.

The facts and arguments clearly appear from the judgment.

Cur adv vult.

H. V. Willink, K.C. and *W. W. K. Page* for Appellant.

W. Wallach for Respondents.

15th March, 1940. Their Lordships' judgment was delivered by

Lord Thankerton.

LORD THANKERTON.—The sole question for determination in this appeal is as to the jurisdiction of the Civil Courts to entertain the suit. The appeal is taken from a judgment and order of the High Court of Judicature at Madras, dated the 2nd February, 1938, which set aside a decree of the Subordinate Judge at Cuddalore, dated the 30th March, 1937 (which had dismissed the respondents' suit on the ground of want of jurisdiction), and directed the Subordinate Judge to restore the suit to the file and to dispose of it on the merits.

The respondents are a firm of merchants, having their head office at Panruti in the Province of Madras, and, in the course of their business, they import betel-nuts from Java into British India. The facts in the present suit, which was filed by the respondents on the 10th April, 1934, are not materially in dispute. The suit relates to two consignments of betel-nuts, imported by the respondents in December, 1932, from Java to Pondicherry by sea, and thereafter by rail to Panruti. These consignments, which originally consisted of 3,927 bags in all, were repacked at the Port of Pondicherry, owing to damage to the gunnies, into 4,063 bags, before importation into British India. The consignments were imported into the Province of Madras by rail and carts from Pondicherry to Panruti by various instalments, the first of which consisted of 1,000 bags imported through the Customs station at Pondicherry on the 31st December, 1932,

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The remaining bags were imported in several instalments in the months of February, March and November, 1933, through the Customs Stations at Pondicherry and Madalapet.

It appears that, prior to this occasion, the respondents had been in the habit of importing their betel-nuts at the port of Cuddalore in the Province of Madras, but, in the beginning of the year 1932, the Customs Collector at that port had assessed a similar consignment of 3,605 bags as boiled betel-nuts subject to duty on a tariff value, contrary to the respondents' contention that they should be assessed as raw betel-nuts, subject to duty *ad valorem*. In the hope that they might achieve an assessment in accordance with their contention, the respondents altered their place of importation in the case of the consignments here in question, but their disappointment in that respect has given rise to the present suit, in which they seek to challenge the adverse decision in a civil suit.

On the arrival of the consignments at Pondicherry, the respondents wrote on the 27th December, 1932, to the Collector of Customs, Madras, asking to be allowed to import the goods as raw sliced betel-nuts and not as boiled. As they anticipated an increase in the *ad valorem* duty to come into effect at the beginning of 1933, they requested a telegraphic reply, which they received on the 29th December, 1932, saying, "If you desire import before January first you must import goods and deposit duty calculated on higher tariff value Inspector will at time of taking deposit and passing goods take sealed samples for test and will also deliver to you other sealed samples to enable you appeal if necessary." The respondents thereupon imported 1,000 bags on the 31st December, 1932, and paid the higher duty under protest to the Assistant Inspector of Customs at Pondicherry Railway Chauki, samples being duly taken. After examination of the samples, the Assistant Collector of Customs, Madras, wrote to the respondents on the 28th February, 1933, as follows:—

"I have to state that on examination of the samples from the consignment in question, it has been found that the betel-nuts imported are 'boiled'. The 1,000 bags cleared on 31st December, 1932, are therefore assessable at 37½ per cent. on a tariff valuation of Rs. 23 per cwt. and the remaining bags, if cleared, will be liable to duty at 45 per cent. on a tariff value of Rs. 16 per cwt."

An appeal by the respondents against this decision was dismissed by the Collector of Customs on the 20th June, 1932.

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The matter was taken to the Government of India in revision, but by their order dated the 13th August, 1933, the Government of India confirmed the Collector's decision. The present suit was filed on the 10th April, 1934.

In the suit the respondents seek to recover the excess amount collected from them by levying duty upon a tariff value of Rs. 23 per cwt. upon 1,000 bags and of Rs. 16 per cwt. upon the remainder, *viz.*, 3,063 bags instead of levying duty upon the invoice value of Rs. 10-9-1 per cwt. In paragraph 14 of the plaint they state that the cause of action arose on the 18th August, 1933, when their petition for revision to the Government of India was thrown out. Various issues were framed by the Subordinate Judge, but it was decided to determine in the first instance Issue No. 3—"Has this Court no jurisdiction to entertain this suit and is the suit barred by the provisions of the Sea Customs Act?" By a judgment delivered on the 30th March, 1937, the Subordinate Judge held that the Court had no jurisdiction to entertain the suit and dismissed the suit. An appeal was allowed by the High Court on the 2nd February, 1938, and the Subordinate Judge was directed to proceed to dispose of the suit on the merits. This appeal is from that decision.

While the imposition of the duties here in question is regulated by the Land Customs Act (Act XIX of 1924), the matter in issue arises under certain provisions of the Sea Customs Act, (Act VIII of 1878) which are incorporated, subject to the necessary verbal modifications, by S. 9 of the Land Customs Act and the schedule to the Act. The sections of the Sea Customs Act which are material are contained in Chapter XVII of the Act, which is headed "Procedure relating to offences, appeals, etc.", and which includes Ss. 169 to 193. The material sections are as follows:—

"182. In every case, except those mentioned in S. 167, Nos. 26, 72 and 74 to 76 both inclusive, in which, under this Act, anything is liable to confiscation or to increased rates of duty;

or any person is liable to a penalty,

such confiscation, increased rate of duty or penalty may be adjudged—

(*a*) without limit, by a Deputy Commissioner or Deputy Collector of Customs, or a Customs-Collector;

* * * * *

186. The Award of any confiscation, penalty or increased rate of duty under this Act by an officer of Customs shall not prevent the infliction of any punishment to which the person affected thereby is liable under any other law.

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188. Any person deeming himself aggrieved by any decision or order passed by an officer of Customs under this Act may, within three months from the date of such decision or order, appeal therefrom to the Chief Customs Authority, or, in such cases as the Local Government directs, to any officer of Customs not inferior in rank to a Customs-Collector and empowered in that behalf by name or in virtue of his office by the Local Government.

Such authority or officer may thereupon make such further enquiry and pass such order as he thinks fit, confirming, altering or annulling the decision or order appealed against:

Provided that no such order in appeal shall have the effect of subjecting any person to any greater confiscation, penalty or rate of duty than has been adjudged against him in the original decision or order.

Every order passed in appeal under this section shall, subject to the power of revision conferred by S. 191, be final.

189. Where the decision or order appealed against relates to any duty or penalty leviable in respect of any goods, the owner of such goods, if desirous of appealing against such decision or order, shall, pending the appeal, deposit in the hands of the Customs-Collector at the port where the dispute arises the amount demanded by the officer passing such decision or order.

When delivery of such goods to the owner thereof is withheld merely by reason of such amount not being paid, the Customs-Collector shall upon such deposit being made, cause such goods to be delivered to such owner.

If upon any such appeal it is decided that the whole or any portion of such amount was not leviable in respect of such goods, the Customs-Collector shall return such amount or portion (as the case may be) to the owner of such goods on demand by such owner.

190. If, upon consideration of the circumstances under which any penalty, increased rate of duty or confiscation has been adjudged under this Act by an officer of Customs, the Chief-Authority is of opinion that such penalty, increased rate or confiscation ought to be remitted in whole or in part, or commuted, such Authority may remit the same or any portion thereof, or may, with the consent of the owner of any goods ordered to be confiscated, commute the order of confiscation to a penalty not exceeding the value of such goods.

191. The Local Government may, on the application of any person aggrieved by any decision or order passed under this Act by any officer of Customs or Chief Customs-Authority, and from which no appeal lies, reverse or modify such decision.

193. When a penalty or increased rate of duty is adjudged against any person under this Act, such officer, if such penalty or increased rate be not paid, may levy the same by sale of any goods of the said person which may be in his charge, or in the charge of any other officer of Customs . . . ."

Under S. 9 of the Land Customs Act, references to a Chief Customs Officer in the Sea Customs Act are to be deemed to refer to a Collector of Land Customs, references to a Customs Collector to a Lands Customs Officer, and references to Officers of Customs to Collectors of Land Customs or Land Customs Officers. Further, by S. 4 of the Central Board of Revenue

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Act (Act IV of 1924), the Governor-General in Council was substituted for the Local Government in S. 191 of the Sea Customs Act.

At the hearing before the Board, the appellant maintained that the decision of the Assistant Collector of Customs, dated the 28th February, 1933, was a "decision or order passed by an officer of Customs" within the meaning of S. 188 of the Sea Customs Act, and that the decision of the Collector of Customs on appeal therefrom, dated the 20th June, 1933, which had been confirmed on revision under S. 191, was final, and excluded the jurisdiction of the Civil Courts. He maintained that the only right of challenge of a decision or order by an officer of Customs was by an appeal under S. 188 and that the jurisdiction of the Civil Courts was excluded. Alternatively, he maintained that the right of appeal conferred by S. 188 constituted a procedure which was alternative to procedure in the Civil Courts, and that as the respondents, in their option, had chosen to proceed under S. 188, they were bound by that election, and were thus excluded from resort to the civil courts.

There can be little doubt that adjudications as to confiscations, increased rates of duty or penalties made under the power conferred by S. 182 are decisions or orders within the meaning of S. 188, and the appellant submitted in the first place that the decision of the Assistant Collector in the present case was an adjudication as to increased rate of duty under S. 182. In their Lordships' opinion this contention is untenable, as the decision was as to the normal rate of duty, whereas an increased rate of duty connotes something in the nature of a penalty, an illustration of which is to be found in S. 167, No. 35, where goods in excess of the manifest or not corresponding with the specification are liable to confiscation or to be charged with such increased rates of duty as the Chief Officer of Customs directs.

The appellant next maintained that the decision or order referred to in S. 188 was not confined to adjudications under S. 182, but included decisions by an officer of Customs as to the rate of duty applicable to particular goods, which necessarily involved the determination of the particular category in the tariff classification into which the goods fell, and that, accordingly, the decision of the Assistant Collector in this case was a decision or order within the meaning of S. 188. The respon-

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dents, on the other hand, maintained that the decisions or orders referred to in S. 188 related only to adjudications under S. 182. This argument of the respondents was not mentioned by the Subordinate Judge, and his judgment does not suggest any doubt of the applicability of S. 188. But it was raised in the High Court, who decided it in favour of the appellant.

Their Lordships are of opinion that the High Court were right in deciding that S. 188 is applicable. The words "decision or order" are wide words, and they appear to be of a more general nature than the adjudications referred to in S. 182, which are also referred to as awards in S. 186. The difference of language in sections which are in such close juxtaposition primarily suggests an intention to cover a wider area in S. 188. It is suggested that the heading of the chapter—"Procedure relating to Offences, Appeals, etc."—rather indicates that the appeals are correlated with the offences. Their Lordships are unable to draw any such inference. The chapter is one relating to procedure and not a chapter relating to offences; indeed, it might be suggested that if the provisions as to appeals were merely part of the procedure relating to offences, there would be no occasion for a separate mention of appeals in the heading. But, in their Lordships' opinion, the heading of the chapter is of no material assistance in the construction of S. 188.

In the next place, the proviso in S. 188, which is limited to adjudications under S. 182, does not, in the opinion of their Lordships, necessarily involve the narrower construction of the opening words of the section. If the latter had expressly referred to any decision or order under S. 182 or any other section in the Act, the proviso would have been drawn in exactly the same terms. But S. 189 uses terms naturally applicable to any duty leviable under any part of the Act.

Their Lordships agree with the High Court that there is no reason for limiting the words "any decision or order passed . . . under this Act" in S. 188 to decisions or orders passed under S. 182. Their Lordships are unable to agree with the somewhat tentative opinion expressed by Sir Charles Innes in *Hari Bhanji* v. *Secretary of State for India*,[1] which is referred to by the High Court. That opinion was not relevant to the case before the learned Judge, which related to an illegal levy of duty under the Act of 1863.

1. (1879) I.L.R. 4 Mad. 344 at 353.

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The Sea Customs Act, 1878, was passed to consolidate and amend the law relating to the levy of Sea Customs duties which was then regulated by the Consolidated Customs Act (Act VI of 1863), which was repealed by the Act of 1878. If there were any doubt as to the proper construction of S. 188 of the 1878 Act, it would undoubtedly be legitimate to consider the previous law which it was consolidating and amending, and their Lordships desire to add that their view already expressed as to the construction of S. 188 is confirmed by a consideration of the provisions of the Act of 1863. The material provisions of the latter Act are as follows:—

"VI. If any dispute shall arise between any Officer of Customs and any Master or Commander of a vessel, or importer, exporter, owner, or consignee of goods, or agent, or other person, in repect to any matter (not specially provided for by any law for the time being in force) relating to the importation, exportation, or warehousing of any goods, or to the levy of any duty or penalty thereon, or to any seizure or forfeiture thereof, the Chief Customs Authority of the Presidency or place in which such dispute shall have arisen shall settle the same, subject to an appeal to the Local Government, acting under the general instructions of the Governor-General of India in Council.

CLXXXIV. If any dispute shall arise as to the proper rate of Duty payable in respect of any goods imported into, or exported from, any Port in British India, the importer, exporter, owner, or consignee of such goods, or his agent, shall deposit in the hands of the officer in charge of the Custom House at the Port of importation or exportation respectively, the amount of Duty demanded by such Officer, pending the decision of the Chief Customs Authority. Upon payment of such deposit and compliance with the provisions of this Act relating to the entry of such goods, the Officer in charge of the Custom House shall cause the goods to be delivered to such importer, exporter, owner, or consignee, or his agent.

CCXVIII. In every case in which, under this Act, any vessel, cart, or other means of conveyance, or any horse or other animal is liable to confiscation; or any goods are liable to confiscation or to increased rates of Duty; or any person in charge of or owning a vessel, or landing or shipping goods, or passing them through the Custom House, is liable to a penalty, an Officer in charge of a Custom House may, unless it be otherwise provided in this or any other Act relating to the Customs, adjudge such confiscation, penalty, or increased rates of Duty.

CCXX. In any case adjudicated by an Officer of Customs, any party aggrieved by the award may appeal to the Chief Customs Authority of the Presidency or place, or to any superior Officer of Customs empowered in that behalf by the Local Government. It shall thereupon be lawful for such authority or superior Officer to make such further enquiry, and to pass such order as he shall think proper, confirming, altering or annulling the original award. Provided that no such order in appeal shall have the effect of subjecting any person to any greater confiscation, penalty, or rates of Duty than shall have been adjudged against him in the original award.

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CCXXI. The award of any confiscation, penalty or increased rates of Duty under this Act by an Officer of Customs shall not interfere with any punishment to which the person affected thereby shall be liable under any other law.

CCXXIII If, upon consideration of the circumstances under which any penalty or confiscation has been adjudged under this Act, by an Officer of Customs or by a Magistrate, the Chief Customs Authority of the Presidency or place shall be of opinion that such penalty or confiscation ought to be remitted in whole or in part, or commuted, such Chief Customs Authority may remit the same or any portion thereof, or may commute any order of confiscation to a penalty not exceeding the value of the goods ordered to be confiscated.".

S. 6 appears under the heading of "General Rules"; S. 184 under "Miscellaneous Provisions"; and the other four sections under "Offences and Penalties". In their Lordships' opinion, it is clear that the provisions of S. 6 and of S. 220 are both now incorporated in S. 188 of the later Act, the subject-matter of the appeal being altered from an "award" to a "decision or order", and the heading of the chapter being altered to "Procedure relating to Offences, Appeals, etc." S. 184 of the 1863 Act is reproduced in S. 189, while S. 221 is reproduced as S. 186 of the 1878 Act, before S. 188, and S. 223 reappears as S. 190 of the later Act.

The decision of the Assistant Collector therefore falls within the terms of S. 188 of the Sea Customs Act of 1878, and the respondents in fact acted on that view, and exercised the right of appeal conferred by that section and by S. 191. It is now necessary to determine whether the order of the Collector of Customs, dated the 20th June, 1933, which dismissed the appeal under S. 188, and which was confirmed by the Governor-General in Council on an application under S. 191, excludes the jurisdiction of the Civil Courts to entertain a challenge of the merits of that decision. It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. Many of the cases referred to in the judgments below are of this nature, and are not relevant to the present case, in which there are no allegations of that nature.

S. 188 provides that "every order passed in appeal under this section shall, subject to the power of revision conferred by S. 191, be final". By Ss. 188 and 191 a precise and self-contained code of appeal is provided in regard to obligations which are created by the statute itself, and it enables the appeal to be carried to the supreme head of the executive government. It is difficult to conceive what further challenge of the order was intended to be excluded other than a challenge in the Civil Courts. . . . . . .

Further, it is to be noted that the same finality clause applies equally to appeals against adjudications under S. 182 and to appeals against decisions or orders as to the rate of duty leviable under the tariff; their Lordships are unable to construe this clause differently according as it applies to these two classes of appeals, as apparently the High Court were prepared to do. In their judgment the High Court refer with approval to the unreported decision of Coutts-Trotter, J., in C. S. No. 747 of 1920, in which he held that the suit, which challenged the adjudication of a fine under S. 182, was barred by S. 188, and the learned Judges add, "We think that the decision in that case is, if we may say so, not open to exception and it does not help the Government in this case, because the Act of the Customs Authorities in that case was an adjudication." Later, the learned Judges rejected the argument that S. 188 only applied to decisions or orders passed by Customs Authorities when acting under S. 182, and held that the opening words of S. 188 were not so limited. Nevertheless, they held, as regards the present case, that the finality clause was not so worded as to exclude the jurisdiction of the civil courts. Their Lordships are unable to agree with this distinction.

Their Lordships are of opinion that in this case the jurisdiction of the civil courts is excluded by the order of the Collector of Customs on the appeal under S. 188, and it is unnecessary to consider whether, prior to taking such appeal under S. 188 the respondents would have been entitled to resort to the civil courts, or whether they would have been confined to the right of appeal under S. 188.

The determination of this question must rest on the terms of the particular statute which is under consideration, and decisions on other statutory provisions are not of material assistance, except in so far as general principles of construction

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are laid down. The main principles to be observed in the present case are to be found in the well-known judgment of Willes, J., in *Wolverhampton New Waterworks Co.* v. *Hawkesford*[1], which was approved of in the House of Lords in *Neville* v. *London "Express" Newspaper, Limited*[2]. The question is whether the present case falls under the third class stated by Willes, J., *viz.*, "Where the statute creates a liability not existing at common law, and gives also a particular remedy for enforcing it . . . . With respect to that class it has always been held, that the party must adopt the form of remedy given by the statute."

It has been held that the jurisdiction of the civil courts is excluded in three cases in which an appeal under S. 188 had been taken—C. S. No. 747 of 1920, already referred to, *Bhiwandivalla and Company* v. *Secretary of State*[3], which is referred to by the High Court, and *Thin Yen* v. *Secretary of State for India*[4]. Each of these cases related to an appeal against an adjudication under S. 182. In the case referred to in 71 M.L.J., Notes of Recent Cases, p. 40, Varadachariar, J., held that jurisdiction was not excluded in circumstances similar to the present case, except that there had been no appeal under S. 188, and, for the reasons already explained, their Lordships do not find it necessary to consider the question. Similarly, in the cases of *Vacuum Oil Company* v. *Secretary of State for India*[5] and *Ford Motor Company* v. *Secretary of State*[6], no appeal had been taken under S. 188; the question of jurisdiction was not in issue, though in the former case an issue had been framed, but it was abandoned by the Advocate-General. It was submitted on behalf of the respondents that an exclusion of the subject's right of resort to the civil courts would be *ultra vires* of the Indian Legislature in view of the provisions of S. 32 of the Government of India Act, 1915, which re-enacted S. 65 of the Government of India Act of 1858, and reference was made to *Moment's case*[7], which was a case of tortious trespass on land. But, in their Lordships' opinion, neither S. 32 nor the principle involved in the decision in *Moment's case*[7] affect the validity of an Act of the Indian

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1. (1859) 6 C.B, (N.S.) 336 at 356: 141 E R. 486.
2. (1919) A.C. 368.
3. A.I R. 1937 Mad. 536.
4. I.L.R. (1939) 1 Cal. 257.
5. (1932) 63 M.L.J. 437: L.R. 59 I.A. 258: I.L.R. 56 Bom. 313 (P. C.).
6. (1938) 1 M.L.J. 161: L.R. 65 I.A. 32: I.L.R. (1938) Bom. 249 (P.C.).
7. (1912) 24 M.L.J. 459: L.R. 40 I.A. 48: I.L.R. 40 Cal. 391 (P.C.).

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Legislature which creates an obligation and provides an exclusive code for its determination; such an obligation is not covered by sub-S. 2 of S. 32.

On the whole matter, their Lordships are of opinion that the decision of the Subordinate Judge was correct, and they will humbly advise His Majesty that the appeal should be allowed, that the order of the High Court should be set aside and that the decree of the Subordinate Judge should be restored. The appellant will have the costs of the appeal, and also his costs in the High Court.

Solicitors for Appellant: *The Solicitor, India Office.*

Solicitors for Respondents: *Lambert and White.*

R. C. C. *Appeal allowed.*

K. S.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—VISCOUNT MAUGHAM, LORD PORTER AND SIR GEORGE RANKIN.

Thomas Bear & Sons (India), Limited .. *Appellants**

v.

Prayag Narain and another .. *Respondents.*

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Thomas Bear & Sons (India), Ltd. *v.* Prayag Narain.

Trade marks—Picture of elephant used by plaintiffs on cigarettes or smoking tobacco—Similar picture used by defendants on chewing tobacco—Likelihood of deception of public—Question of fact in each case—Necessity for evidence as to deception or probability of deception.

If a manufacturer of a special kind of smoking tobacco under a trade mark seeks to restrain the use of that mark as for example, cigars, or chewing tobacco, the vital matter is the probability or otherwise of deception resulting from the use complained of and it is a question of fact in each case. It is not a sound test for the Court to compare the plaintiff's and the defendant's marks side by side, since the purchaser will rarely have the two marks before him when he makes his purchase, and in spite of many differences there may be an element of similarity sufficient to cause deception. It is not an answer to the claim of a plaintiff trader who has established a trade mark to say that, apart from the mark, his (the defendant trader's) labels or containers are very different from those of the plaintiff. Differences in the form in which products are put up are, however, not immaterial for they must inevitably form an element in considering the question of the probability of deception through the use of the mark.

The plaintiffs were the manufacturers of smoking tobacco and cigarettes which they marketed under a trade mark the distinguishing feature of which was an elephant in which they had acquired proprietary rights in respect of their cigarettes and tobacco. The plaintiffs' tobacco was well known in India and asked for by members of the public under such names as "Elephant

* P. C. Appeal No. 18 of 1939. 7th March, 1940.
Allahabad Appeal No. 22 of 1935.

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mark tobacco". The cigarettes were known as "Elephant cigarettes". The defendant sold chewing tobacco in tins also designated by an elephant having a certain similarity to the plaintiffs' elephant although different in colour. The defendant's containers were unlike those of the plaintiffs. The plaintiffs contended that, having regard to their reputation as makers of smoking tobacco in India, the public would think that the defendant's chewing tobacco was product manufactured by them. No evidence of actual deception of the public was tendered by the plaintiffs, nor any evidence by a member of the public that he would be deceived.

Held, that the question whether or not the defendant's use of his mark would be likely to deceive the public into thinking that the chewing tobacco was manufactured by the plaintiffs was one of fact on which evidence was essential, being a different question from that whether one mark or name was a colourable imitation of another, in considering which the judge had before him the necessary materials for his decision; and that, in the complete absence of evidence on that question the plaintiffs had failed to make out a case for relief against the defendant.

Appeal from a decree of a Division Bench of the High Court, Allahabad, dated 13th March, 1935, in its appellate jurisdiction (Iqbal Ahmad and Niamatullah, JJ., King, J., dissenting) dismissing an appeal from a decree of the Additional District Judge, Cawnpore, who dismissed an action by the plaintiffs, Thomas Bear & Sons (India), Ltd., to restrain alleged infringement of their trade mark rights by the defendant, Prayag Narain.

The plaintiffs were manufacturers and sellers of "Virginia Bird's Eye" tobacco for pipes and of cigarettes. Both articles had since long before 1922 been sold in India in packets and tins bearing a trade mark of which an elephant was the distinguishing feature; and the packets and tins of cigarettes bore also the legend "Elephant Cigarettes." Prayag Narain had been manufacturing and selling chewing tobaccos since 1926, the tobacco being sold in packets and tins also bearing the picture of an elephant not dissimilar to the plaintiffs' elephant. The containers of the defendants' goods were quite different from those used by the plaintiffs. The second respondent, Jagannath, was joined as a respondent as the purchaser from the date of his trade mark, trade-name labels and designs.

The plaintiffs having brought an action to restrain the defendants from infringing their trademark rights, the Additional Subordinate Judge, Cawnpore, dismissed the petition. That decision was upheld on appeal, and the plaintiffs now appealed to His Majesty in Council.

F. E. Bray, K.C. and *James Mould* for Appellants.—Before elaborating the appellants' contentions it should be made clear that they do not contend that the public are likely to buy the

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respondent's chewing tobacco thinking it to be the appellants' smoking tobacco and their cigarettes. Moreover it is submitted that to establish that is not necessary to the appellants' case. It is sufficient for them to establish that the public are likely to believe that the goods manufactured and marketed by the respondent are those of the appellants.

It is not conclusive in the respondent's favour that he can point to certain dissimilarities between his elephant and that of the appellants because the actual purchaser, the probability of whose deception is the vital matter, will not have the two marks before him simultaneously. The comparison in the purchaser's mind will take place by recollection, and the question is whether the hypothetical purchaser remembering the one mark, will, on seeing the other, think that they are the same, and consequently that the respondent's goods are the appellants', or *vice versa*.

The likelihood of deception resulting from the similarity of the two elephants is not dispelled by the presence of the respondent's firm-name, Rama & Co., on his packages, because the large numbers of the illiterate will go by the elephant only. It is submitted that King, J., applied the right test when he said that, since the public associated the elephant brand with the appellant's goods, the question was the psychological one whether seeing a tin of chewing tobacco also bearing the picture of an elephant they would be likely by association to suppose that the chewing tobacco was also manufactured by the appellants. Comparing the two marks it can hardly be doubted that confusion is likely to be caused in the public mind in spite of the obvious dissimilarities. That being so, it is submitted the appellants need go no further, for they have established their case. It is of no avail to the respondent to rely on the dissimilarities between his packages and those of the appellants, for the same manufacturer would be likely to adopt widely differing packages for too very different products while yet marketing both under his trade mark.

The appellants have established their case because, with the marks before them and other evidence, the judges were not in a position to decide where deception of the public would begin or end, and they ought, it is submitted, to have reached the conclusion that the elephant or chewing tobacco will necessarily create an assumption that it was manufactured by the appellants.

There was no appearance by or on behalf of the respondent.

Cur. adv. vult.

7th March, 1940. Their Lordships' judgment was delivered by

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VISCOUNT MAUGHAM.—This appeal is against a decree of a Division Bench of the High Court of Judicature at Allahabad

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dated the 13th March, 1935. That Court affirmed the decree of the Additional District Judge of Cawnpore in an action brought by the appellants to restrain infringement of trade mark rights and passing-off. At the hearing before their Lordships the respondents were not represented; but the case of the appellants was placed before the Board with equal ability and fairness by their counsel.

The appellants are manufacturers and sellers of cigarettes and of tobacco described as "Virginia Bird's Eye" smoked in pipes. These goods are marketed in a European style. Both the said cigarettes and the tobacco have from a date long before 1922 been sold in India (by the appellants and their predecessors) in packets and in tins bearing a mark the distinguishing feature of which is the representation of an elephant and the packets and tins of cigarettes have also borne the designation "Elephant Cigarettes". Upon the tobacco the representation of the elephant has appeared in red and upon the cigarettes the representation of the elephant has appeared on a red background. These goods were well known and asked for throughout India as "Elephant Mark", "Hathi Markha", "Lal Hathi" and the like.

The defendant has been manufacturing and selling chewing tobacco since 1926, that is, some three years before the action was brought. He sells in packets and in tins. The commodity in the packets is intended for use with ***chunam*** (lime), that in the tins for use as an addition to *pan* (betel). Certain ingredients are added to give fragrance to the article. The tobacco is grown in India. Both the packets and the tins have the picture of an elephant on them, not unlike the elephant used by the plaintiffs though there are differences, particularly in colour, which is black or red as used by the appellants and white as used by the respondent. In other respects the packets and the tins are quite unlike the containers in which the appellants' goods are put upon the market, and the respondent's labels bear the firm name "Rama & Company", while the appellants' goods bear their own name.

The appellants, of course, did not contend that any persons would purchase the respondent's chewing tobacco in the belief that it was smoking tobacco manufactured by the appellants. Their contention was a very different one; they said that having regard to the reputation they had acquired in India in connexion

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with smoking tobacco and cigarettes sold under the elephant trade mark and frequently asked for as "elephant" tobacco or "elephant" cigarettes, the use of the elephant on the respondent's chewing tobacco was calculated to lead persons buying that article to believe that it was manufactured or put upon the market by the appellants.

There is no statutory law in British India relating to trade marks, and the law which is applied there on the subject is substantially the same as that applied in England before the Trade Marks Act, 1905. It is, however, plain that conditions peculiar to India must be borne in mind in applying any doctrine of English law, and that English decisions which turn or partly turn on questions of fact—as do most cases of common law trade marks and passing-off—can only be applied with care and circumspection. The general principle, founded as it is on justice and equity, is the same in both countries. "No man", as James, L.J., said in the case of *Singer Manufacturing Co.* v. *Loog*[1], "is entitled to represent his goods as being the goods of another man; and no man is permitted to use any mark, sign or symbol, device or means, whereby without making a direct false representation himself to a purchaser who purchases from him, he enables such purchaser to tell a lie or to make a false representation to somebody else who is the ultimate purchaser."

It is clear that the right of property that may be acquired in such a trade mark is based on the proved association in the market of the device, name, sign, symbol or other means in question with the goods of the plaintiff, so that the use by the defendant on such goods of the trade mark will amount—whether the defendant intends it or knows it or not—to the false representation that the goods are manufactured or put on the market by the plaintiff. There can obviously be no monopoly in the use of the trade mark. A manufacturer of cigarettes under an undoubted trade mark such as an animal, or any other device, cannot legally object to the use of the identical mark on, say, hats, or soap, for the simple reason that purchasers of any of the latter kinds of goods could not reasonably suppose, even if they were well acquainted with the mark as used on cigarettes, that its use on hats or soap denoted that these goods were manufactured or marketed by the cigarette manufacturer

1. (1880) 18 Ch. D. 395 at 412.

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(see *Somerville* v. *Schembri*[1]). Those would be simple cases, but some much more difficult ones can be suggested. If a manufacturer, of a special kind of smoking tobacco under a trade mark seeks to restrain the use of it on cigars, or on a very different kind of smoking tobacco, or on cigarettes, or on snuff, or on chewing tobacco, or on tobacco in some form sold for use as a weed killer—all these things being made of tobacco—questions, sometimes of great difficulty, may arise. It is, however, very important to observe that each of these questions will be a question of fact to be decided on the evidence adduced. The vital element in such a case is the probability of deception. This may depend on a number of matters as well as the question of similarity of the marks or of the get-up. Witnesses can be called to prove the circumstances and the places in which the articles are sold, the classes of persons who buy them, and whether they include persons who are illiterate or ignorant or the reverse, the manner in which the public are accustomed to ask for the articles, and any other matters which will assist the Court to decide whether deception is probable. Evidence of actual deception may be available and if available may be very valuable. There is no such person as an expert in human nature, and it is now well settled that a witness cannot be called to say that it is likely that purchasers of the goods will be deceived. This can only be a matter of opinion formed after the dispute has arisen and too often without any judicial consideration of the opposing contentions. On the other hand a person who is accustomed to buy the articles in question may be called to say that he would himself be deceived, and cross-examination will often show what weight should be attached to such a statement.

It seems desirable to state the views of their Lordships on some of the topics of criticism of the views of the learned Judges which were urged on behalf of the appellants. Their Lordships think that the test of comparison of the marks side by side is not a sound one, since a purchaser will seldom have the two marks actually before him when he makes his purchase; and marks with many differences may yet have an element of similarity which will cause deception, more especially if the goods are in practice asked for by a name which denotes the mark or the device on it. This has been settled in England

1. (1887) 12 A.C. 453.

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since the case of *Seixo* v. *Provesende*[1], where there will be found some remarks by Lord Cranworth, L.C., very relevant to this matter. He also pointed out (at p. 197) that the adoption by a rival trader of a mark which would cause his goods to bear the same name in the market, may be as much a violation of the rights of the first owner as the actual copy of his device. This same view was taken in the case of *Johnston* v. *Orr Ewing*[2], a case relating to the use of two elephants on tickets placed upon goods for sale in India. (*See* as to the effect of the differences between the tickets the remarks of Selborne, L. C., at pp. 224 *et seq.*) Further, it is not an answer to the claim of a trader who has established, as the appellants have done in the present case, the right to a trade mark (namely a device or a fancy word) to say that, apart from the device or the word, the labels or containers of the rival trade are very different from those of the trade mark owner. It may be observed that, if it were so, such a trade mark would be of little value, for its use by several traders would soon result in its becoming common to the trade. (See *Wotherspoon* v. *Currie*,[3] and *Johnston* v. *Orr Ewing*[2]). In the present case there may well have been persons who knew of the reputation of the appellants' "elephant mark" goods, but were illiterate or did not know or did not remember the particular get-up of their goods; and again the differences of labels and get-up might have been supposed to have been made by the appellants themselves in putting a different or cheaper article upon the market. Their Lordships, however, are not to be understood as saying that the differences in get-up are immaterial; for they must inevitably form an element in considering the question of probability of deception by the use of the mark.

It is a remarkable feature of the present case that there was neither evidence of actual deception, nor any evidence from members of the public that they themselves would be deceived. It is to be observed that the important issue was, not whether the use of the elephant on smoking tobacco or on cigarettes would be likely to cause deception; but whether its use on chewing tobacco in the circumstances in which that article is sold by the respondent would be likely to cause deception,

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1. (1866) 1 Ch. App. 192. 2. (1882) 7 A.C. 219 at 225, 226.
3. (1872) L.R. 5 H.L. 508.

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that is, to cause ordinary purchasers to purchase the chewing tobacco of the respondent in the belief that it was manufactured by or put upon the market by the appellants. The difficulty of answering this question in the affirmative in the absence of evidence as to the probability of deception is apparent from the fact that, apart from the trial Judge, who was not satisfied that there was any point of resemblance between the trade mark used by the appellants and that used by the respondent, King, J., in the High Court alone thought that the probability of deception would exist, whilst Iqbal Ahmad, J., took the other view and Niamat Ullah, J. (to whom the matter was referred under cl. 27 of the Letters Patent of the High Court having regard to the difference of opinion between the two Judges in the High Court) came to the conclusion in his careful judgment that whilst some ignorant and indiscriminating persons might be deceived, persons exercising ordinary caution would not be likely to assume that the chewing tobacco sold by the respondent was manufactured by the appellants.

Their Lordships see no reason to doubt the finding of the trial Judge that the appellants had acquired a proprietary right in respect of their elephant trade mark with reference to their cigarettes and Virginia Bird's Eye tobacco. Nor are they of opinion that the appellants' right is confined only to the sale of the same kind of cigarettes and of Virginia Bird's Eye tobacco; for, in the absence of strong evidence to the contrary, such a mark would ordinarily extend to protect goods so similar in kind to the goods actually put upon the market by the trader in connexion with the trade mark that it is an almost inevitable inference that such goods would be manufactured or marketed by the trader. In other words the probability of deception in the case of goods of a closely similar kind to those actually marketed by the plaintiff would be proved in the course of establishing the trade mark. No such inference could be made in the present case as regards the respondent's goods, since the chewing tobacco he sells differs widely in appearance and in use from the goods sold by the appellants.

Some of the learned Judges in India seem to have taken the view that it was for the Court to decide as to the area of trade protected by the appellants' trade mark, that is, to answer the question whether the use of the trade mark on goods not closely similar in character to the appellants' goods would be

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likely to deceive. A number of well-known authorities were cited which it was thought would throw light on the correct answer to this question. Their Lordships must repeat that this question is one of fact on which evidence is essential. The question differs from the question whether a particular mark or name is an imitation or a colourable imitation of a mark or name used by the plaintiff. There the Judge has before his eyes the materials for a decision; and in some cases it cannot be doubted that the Judge can himself decide on the degree of resemblance or on the materiality of alleged differences of the marks or words (*North Cheshire and Manchester Brewery Co.* v. *Manchester Brewery Co.*[1], *Payton & Co., Ltd.* v. *Snelling, Lampard & Co., Ltd.*[2], per Lord Macnaghten at p. 635). If the decision of the Court of Appeal in *London General Omnibus Co.* v. *Lavell*,[3] or some of the dicta in that case are contrary to these decisions, it cannot be relied upon. On the other hand there are many trade mark and passing-off cases which cannot be decided by a visual comparison of the rival marks or names and must depend on the evidence of witnesses. That indeed is nearly always the case when there are factors involved other than the mere resemblance of the marks or words. In the present case a Judge may be entitled to form his own view as to the resemblance of the elephants in shape and colour or on the differences between them; but their Lordships are of opinion that a Judge cannot properly decide except upon evidence as to the classes or kinds of goods which are protected by the appellants' mark, or, to be more precise, on the question whether purchasers of chewing tobacco from the respondent in the packets and tins above described are likely to be misled into thinking that that article is manufactured or put upon the market by the appellants. This question is one which does not depend on a matter of resemblance. As already pointed out, the appellants have no monopoly in the elephant as a trade mark. The English cases may be instructive as showing the way in which such a question should be approached, but the actual decisions depending as they do on what purchasers would be likely to think in England are not a guide in India.

1. (1899) A.C. 83. 2. (1900) 17 R.P.C. 628: 1901 A.C. 308.
3. (1901) 1 Ch. 135.

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Their Lordships are not disposed to attach much importance to the fact that the appellants were unable to call evidence of actual deception, and they are well aware of the fact that the procuring of evidence of probability of deception is often a difficult and troublesome task. On the other hand the appellants had to establish their case, and in the complete absence of evidence on the point to which attention has been above directed, their Lordships must come to the conclusion that they failed to do so.

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be dismissed.

Solicitor for Appellants: *D. M. Oppenheim.*

S. V. V. *Appeal dismissed.*

R. C. C.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

The Salem District Urban Bank, Limited, Salem .. *Respondent.*

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Income-tax Act (XI of 1922), S. 3—Co-operative Central Bank registered under Co-operative Societies Act—Shareholders, individuals and co-operative societies—If the bank an association of individuals under S. 3 of the Indian Income-tax Act—Individual, if means only a person or includes corporations—Business with non-members also—If a mutual benefit society.

Where a co-operative central bank consists of a certain number of shareholders, of whom some are individual persons and the rest co-operative societies, and the Bank does not confine its business to its shareholders but carries on an ordinary banking business as well,

Held, (*i*) the bank is an association of individuals within the meaning of S 3 of the Income-tax Act and can be assessed to income-tax as such. 'Individual' is not there used as denoting only a person but takes in also a corporate body created by a statute, which is an individual within the meaning of the section.

The Commissioner of Income-tax, Bombay v. *Ahmedabad Millowners' Association,* I.L.R. (1939) Bom. 451, not followed.

(*ii*) the bank cannot maintain to be a mutual benefit society inasmuch as it carries on banking business with non-members.

* O. P. No. 256 of 1939. 6th February, 1940.

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Case stated by the Commissioner of Income-tax, Madras, under S. 66 (2) of the Indian Income-tax Act (XI of 1922) (hereinafter referred to as the Act) is as follows:—

2. The petitioner, the Salem District Urban Bank, Limited (hereinafter referred to as the Bank) is a Co-operative Central Bank registered under the Co-operative Societies Act II of 1912 (Madras Act VI of 1932) carrying on banking business at Salem within the jurisdiction of the Income-tax Officer, Salem. The main objects of the Bank are:

(1) collection of funds, for financing co-operative societies registered under the Co-operative Societies Act and affiliated to it,

(2) to develop, assist and co-ordinate the work of the affiliated supervising unions and to secure for them financial help where necessary, and

(3) to undertake such other work as will promote the cause of co-operation in general and to carry out the above objects in particular.

The Bank may also carry on general business of banking not repugnant to the provisions of the Co-operative Societies Act and the rules framed thereunder.

The nominal capital of the Bank is Rs. 3 lakhs made up of 400 shares of Rs. 250 each, termed A class shares, and 4,000 shares of Rs. 50 each, termed *B* class shares. Any individual can become a member by taking *A* class shares and any registered society by taking *B* class shares. The income of the Bank is made up mainly of (1) interest on loans to members, (2) interest on investments, (3) entrance and other fees, and (4) dividends earned, share capital invested in other societies, etc.

3. For the assessment year 1937-38 (previous year ended 30th June 1936) the Bank applied to the Income-tax Officer, Salem, for a refund of the tax deducted at source from the interest on Government Securities held by it. As the Income-tax Officer had information that the Bank had other sources of income assessable to tax he issued a notice under S. 22 (2) calling upon the Bank to make a return of its total income of the previous year. The Bank accordingly filed a return showing an income of Rs. 17,997 for the year ended 30th June 1936. This was made up of the following items:

Interest on taxed securities	.. ..	Rs. 14,500
" " tax-free securities	.. ..	" 5,000
" " mortgages, etc. (loss)	.. ..	" 1,503
Total	..	" 17,997

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After examining the profit and loss statement filed by the Bank the Income-tax Officer determined its total income to be Rs. 37,445 made up of Rs. 5,293 interest on taxed securities, Rs. 1,519 interest on tax-free securities, Rs. 4,009 other sources (interest) the balance of Rs. 26,624 being described as 'co-operative income'. Excluding Rs. 1,519 representing interest on tax-free securities and Rs. 26,624 being profits from co-operative business exempted by Notification issued under S. 60 (1) of the Act from being charged to tax but not exempted from inclusion in the total income the Income-tax Officer worked out the taxable income to be Rs. 9,302 and assessed the Bank on this figure applying the rate of tax appropriate to the total income of Rs. 37,445. The status of the Bank was taken to be that of an association of individuals. A copy of the Income-tax Officer's order is enclosed—Exhibit A.

4. The Bank appealed to the Assistant Commissioner against the assessment contending that it was not an association of individuals as its shareholders consisted of individuals as well as other co-operative societies, that it did not come under any of the classes of assessees mentioned in S. 3 of the Act, and that, in any case, it was a mutual benefit concern and therefore the income derived from its own members was outside the scope of the Act altogether. The Assistant Commissioner overruled these contentions and confirmed the assessment made by the Income-tax Officer. A copy of his order is appended, marked Exhibit B.

5. In its present application under Ss. 66 (2) and 33 the Bank raises the same contentions urged before the Assistant Commissioner and also some other contentions not raised before the Assistant Commissioner on appeal. A copy of the application is enclosed marked Ex. C. The Bank requests that the assessment may be modified as prayed for or that in the alternative the following questions of law may be referred to the High Court:—

(a) "Whether the petitioner is an "association of individuals" within the meaning of S. 3 of the Income-tax Act and whether the petitioner can be assessed to income-tax as an association of individuals;"

(b) "Whether the petitioner earned or derived any income or profits assessable for the year 1937-38 and whether the sum of Rs. 26,624-10-0 included by the Income-tax Officer as "co-operative income" in the total income of the petitioner was income or profits within the meaning of the Income-tax Act and not to be included in the total income;"

(c) "Whether the petitioner is not a mutual benefit society and as such cannot be said in law to have derived any income or profits assessable under the Income-tax Act;"

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(*d*) "Whether in computing the total income of the petitioner the addition of the sum of Rs. 15,000 being the reserve for bad and doubtful debts is legal in view of the uniform practice of the petitioner to write off the bad debts not out of current profits of the year but out of the reserve;"

(*e*) "Whether the petitioner is not entitled under S. 8, second proviso to an exemption from assessment to income-tax in respect of the sum of Rs. 5,000 as interest on tax-free securities and not merely Rs. 1,519 allowed by the Income-tax Officer;"

(*f*) Whether in the circumstance of the case the computation of the Income made by the Income-tax Officer and the refund order issued is legal and in accordance with the provisions of the Income-tax Act".

Questions (*d*) and (*e*) do not arise out of the Assistant Commissioner's order and questions (*c*) and (*f*) cover the same ground as questions (*a*) and (*b*). I do not therefore refer them. I accordingly refer the following two questions for the decision of the Hon'ble the Judges of the High Court.

Question (*a*).—"Whether the Bank is an association of individuals within the meaning of S. 3 of the Act and whether it can be assessed to income-tax as an association of individuals."

Question (*b*).—"Whether the Bank is not a Mutual Benefit Society and as such can be said to have derived a profit of Rs. 26,624 as a co-operative society to be included in its total income."

6. *Question* (*a*).—One of the contentions of the Bank is that the expression 'other association of individuals' in S. 3 of the Act refers only to cases where the association has no separate legal existence of its own apart from the individuals composing it and that as the Bank is registered under the Co-operative Societies Act as an entity having a separate legal existence it cannot be called an association of individuals any more than a Hindu undivided family or a company. The language of S. 3 of the Act does not warrant such an interpretation of the term. On the contrary, the use of the adjective "other" to qualify the term "association of individuals" indicates that the items enumerated before, namely, "Hindu undivided family, company and firm" are also associations of individuals. The legislature evidently intended to provide for the assessment of all associations of individuals which had income falling within the scope of the Act, and while it specified three well-known classes of such associations, namely, the Hindu undivided family, the company and the firm, it included the remaining classes of associations in the category of "other association of individuals". This is also evident from the langu-

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age used in clause (*c*) under sub-section (2) to S. 14, where reference is made to the share of the profits or gains of an association of individuals *other than* a Hindu undivided family, company or firm. The argument that an incorporated body with a separate legal existence cannot be regarded as an association of individuals has therefore no substance. Another point urged by the Bank in support of the contention that it is not an association of *individuals* is that its members consist not only of individuals but also of registered societies. The term 'individual' has not been defined either in the Income-tax Act or in the General Clauses Act. The word means "an indivisible entity" and connotes not only a single person in the ordinary accepted sense, but also an entity like a company or a society which, to adopt the petitioner's own phraseology has a separate legal existence of its own. Thus an 'individual' may be either a single human being or a unit in a class, and in this view an association of individuals may be interpreted as meaning a "body of persons whether incorporated or not". In the present case, each registered society which joined the Bank as a member is an individual unit of the class to which it belongs and the Bank is an association of individuals. Reference is in this connection solicited to the judgment of the Bombay High Court (subsequently confirmed by the Privy Council)* in the case of *Trustees of Sir Currimbhoy Ebrahim Baronetcy Trust*[1] and of the Allahabad High Court in *Ram Ratan Das Madan Gopal's case*[2] in which it has been recognised that it is possible to regard an incorporated body or a group of persons forming a unit as an "individual". I may also be permitted to refer their Lordships to the decision of the Lahore High Court in the case of *Mian Channu Factories Union*[3] where this union which was a combination of firms and a Hindu undivided family, was held to be assessable as an "association of individuals". I submit that the question should be answered in the affirmative.

Question (*b*).—The Bank claims exemption from assessment in respect of the profit made from transactions with its members on the ground that it is a Mutual Benefit Society. The term "Mutual Benefit Society" has not been defined; nor does the Bank say in what way it is a Mutual Benefit Society. The principle underlying the exemption of the income of Mutual Benefit Societies is that one cannot make a profit out of oneself. As observed by Lord Watson in *Styles* v. *New York Life Insurance Company*[4], when a number of persons agree to contribute funds for

1. (1932) 5 I.T.C. 484. 2. (1935) 8 I.T.C. 69: A.I.R. 1935 All. 444.
3. (1936) 4 I.T.R. 203: 9 I.T.C. 246: A.I.R. 1936 Lah. 548.
4. (1889) 2 Tax Cases 460.
* 61 I.A. 209: I.L.R. 58 Bom. 317.

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a common purpose and to stipulate that their contribution so far as not required for that purpose shall be repaid to them they should not be regarded as traders and the contributions returned to them should not be regarded as profits. This principle was followed by this High Court when deciding the case of *English and Scottish Joint Co-operative Wholesale Society, Limited*[1]. In the course of his judgment *In the case of Madura Hindu Permanent Fund, Ltd.*[2], Beasley, C.J., referred to a Mutual Benefit Society as "an association of persons not having share capital but borrowing and lending from and to themselves for the mutual benefit of themselves" (at page 338). The question is whether the Bank satisfies this test. A perusal of its bye-laws and an examination of its activities as disclosed by the profit and loss account will show that the Bank is an ordinary banking concern and not a Mutual Benefit Society. The transactions are not confined to its own members and there is no "mutuality" in them. Loans are taken by the Bank from members as well as from others, and interest is payable on such loans at fixed rates. Loans are granted to co-operative societies, individual shareholders, and also to depositors who are not shareholders. There is thus nothing in the activities of the Bank to distinguish it from an ordinary banking concern. The mere fact that it has certain dealings with its own members cannot make it a Mutual Benefit Society, nor is it entitled to claim immunity from taxation in respect of income attributable to such dealings. The contention that it is a Mutual Benefit Society is founded on a wrong understanding of the inherent nature of such societies. It may be possible for a co-operative society to function purely as a Mutual Benefit Society and to claim total exemption in respect of income so derived. The *English and Scottish Joint Co-operative Wholesale Society, Ltd.*[1], whose case was decided by this Hon'ble Court is an example of such a society. But to say that every co-operative society is a Mutual Benefit Society betrays ignorance of the true nature of a Mutual Benefit Society. The Bank is a co-operative society doing business as an ordinary banking concern and is therefore assessable in accordance with the Notification issued by the Government of India under S. 60 (1) of the Act—please *see* paragraph 18 (3) on pages 172-173 of the Income-tax Manual (Seventh Edition). This Notification lays down that the profits of any co-operative society (subject to certain exceptions) are exempt from the tax payable under the Act but shall be taken into account in determining the total income of an assessee for the purpose of the Act. The

1. 3 I.T.C. 385.
2. (1933) 64 M.L.J. 260: I.L.R. 56 Mad. 415: 1 I.T.R. 46: 6 I.T.C. 326.

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assessment in the present case having been made on this basis the inclusion of the profit of Rs. 26,624 in the total income of the Bank is correct. The question should be answered accordingly.

Reference to this Court by the Commissioner of Income-tax, Madras, under S. 66 (2) of the Indian Income-tax Act (XI of 1922) for decision on the following questions:—

"(a) Whether the Bank is an association of individuals within the meaning of S. 3 of the Income-tax Act and whether it can be assessed to income-tax as an association of individuals?

(b) Whether the Bank is not a Mutual Benefit Society and as such can be said to have derived a profit of Rs. 26,624 as a co-operative society to be included in its total income."

K. V. Sesha Aiyangar for Petitioner.

M. S. Venkatarama Aiyar and *P. R. Srinivasan* for Respondents.

The Court delivered the following

Leach, C. J.

JUDGMENTS. *The Chief Justice.*—The assessee is a co-operative central bank registered under the Indian Co-operative Societies Act of 1912. This statute has been replaced, so far as this Presidency is concerned, by the Madras Co-operative Societies Act (VI of 1932), but nothing turns on this. The assessee corporation consists of 671 shareholders. Of the shareholders 138 are persons and 533 co-operative societies. For the year of assessment 1937-38 the Income-tax authorities have held that the assessee had a total income of Rs. 37,445 made up as follows:— Rs. 5,293, interest on taxed securities; Rs. 1,519, interest on tax free securities; Rs. 4,009, interest obtained on deposits and Rs. 26,624, profits made on its transactions. The assessee does not confine its business to its shareholders but carries on an ordinary banking business as well. By virtue of a notification of the Government of India under S. 60 of the Indian Income-tax Act of 1922 the "profits" of a co-operative society are exempt from income-tax, but the notification stipulates that the profits shall be taken into account in determining the total income for the purposes of the Indian Income-tax Act. After excluding the Rs. 1,519, representing the interest on tax-free securities of the assessee and the Rs. 26,624 made on its business, the Income-tax authorities have assessed the assessee on an income of Rs. 9,302, but by taking into account the Rs. 26,624 they have held that the assessee must pay tax on the Rs. 9,302 at the rate which would be payable on an income

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of Rs. 37,445. The assessee challenged the correctness of this decision and asked the Commissioner of Income-tax to refer to this Court under the provisions of S. 66 (2) of the Act certain questions. The Income-tax Commissioner considered that only two questions of law arose and these he has referred. They are as follows:

"(*a*) Whether the Bank is an association of individuals within the meaning of S. 3 of the Act and whether it can be assessed to income-tax as an association of individuals.

(*b*) Whether the Bank is not a Mutual Benefit Society and as such can be said to have derived a profit of Rs. 26,624 as a co-operative society to be included in its total income."

The assessee is satisfied with the reference of these two questions and therefore the Court is not called upon to go beyond them.

The first question arises out of a contention advanced on behalf of the assessee that the assessee was not liable to income-tax at all as the assessee does not come within the charging S. 3. S. 3 says:

"Where any Act of the Indian Legislature enacts that income-tax shall be charged for any year at any rate or rates applicable to the total income of an assessee, tax at the rate or those rates shall be charged for that year in accordance with, and subject to the provisions of, this Act in respect of all income, profits and gains of the previous year of every individual, Hindu undivided family, company, firm and other association of individuals."

The argument is that the word 'individual' must be taken to be used merely as denoting a person and therefore the words "and other association of individuals" cannot apply to a corporate body which for the most part is composed of co-operative societies. In support of this contention great reliance is placed on the judgment in *The Commissioner of Income-tax, Bombay* v. *Ahmedabad Millowners' Association*[1]. In that case it was held that the expression "association of individuals" in S. 3 means an association of human beings. The question which the Court had to decide was whether the Ahmedabad Millowners' Association which was composed of 61 members, 60 of whom were limited liability companies and one a person, was assessable to income-tax. The case was decided by Beaumont, C.J. and Wadia, J. In the course of his judgment, the learned Chief Justice stated that he was disposed to agree with the Commissioner of Income-tax that if one merely took the dictionary meaning of the word 'individual' it would include a limited

1. I.L.R. (1939) Bom. 451.

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liability company, but he considered that to do so would not be in accordance with its popular use by people speaking the English language. He concluded his judgment with this statement:

"The question is whether 'other association of individuals' includes an association of companies. It seems to me quite clear on the context that it cannot do so. 'Individuals', where first used, must mean human beings, because it is used as something distinct from a joint family, firm and company. The whole expression seems to me to mean "every human beings, Hindu undivided family, company, firm and other association of human beings." One cannot give to the word 'individuals' in the expression 'association of individuals', a different meaning to that which the word 'individual' bears in the same phrase."

This opinion is in direct conflict with the opinion expressed by the learned Chief Justice in an earlier case: *Currimbhoy Ebrahim Baronetcy Trust* v. *The Commissioner of Income-tax, Bombay*[1]. One of the questions in that case was whether a corporation styled "The Trustees of the Sir Currimbhoy Ebrahim Baronetcy Trust" which had been created under an Act passed by the Governor-General in Council was to be deemed to be an "individual' within the meaning of S. 3 of the Income-tax Act. The income-tax authorities had assessed the corporation as an "association of individuals." Beaumont, C. J., held that the corporation was an 'individual' within the meaning of the section and not an 'association of individuals'. The question of the legality of the assessment was taken to the Privy Council and although the question of the status of the corporation was not directly raised before the Board it falls to be observed that the decision of the Bombay High Court was affirmed.

I consider that the opinion expressed in *Currimbhoy Ebrahim Baronetcy Trust* v. *The Commissioner of Income-tax, Bombay*[1], is preferable to that expressed in *The Commissioner of Income-tax, Bombay* v. *Ahmedabad Millowners' Association*[2]. While it is true that ordinarily in conversation the use of the word 'individual' would be taken to denote a person, the word has in fact a far wider meaning. The first definition of the word given in the Oxford Dictionary is: "One in substance or essence; forming an indivisible entity; indivisible." It is also defined as "existing as a separate indivisible entity, numerically one, single." If a corporate body created by a statute is an individual within the meaning of the section—and I hold that it is—a co-operative society registered under the Co-operative

1. (1934) 61 I.A. 209: I.L.R. 58 Bom. 317: 66 M.L.J. 643: 5 I.T.C. 484 (P.C.).
2. I.L.R. (1939) Bom. 451.

Societies' Act must fall within the same category. It is a corporate body and has perpetual succession. I consider that it is not reasonable to suppose that the Legislature intended that there should be a difference in the meaning of the word 'individual' and the plural 'individuals'. If the word 'individual' includes a corporation, the words "association of individuals" must embrace an association of corporate bodies, and therefore the assessee is an "association of individuals."

Support for the opinion that the assessee comes within S. 3 is to be found in the decision of the Allahabad High Court in *Ramratan Das Madan Gopal* v. *The Commissioner of Income-tax, Central and United Provinces*[1] and of the Lahore High Court in *Mian Channu Factories Union* v. *The Commissioner of Income-tax*[2]. In the former case a Bench of the Allahabad High Court held that the word "individual" in the proviso to S. 55 of the Income-tax Act includes an undivided Hindu family. In the Lahore case, which was also decided by a Bench, a "ginning factories union" which was composed of two firms and a Hindu undivided family was assessed to income-tax on the basis that it was an association of individuals. To give the word "individual" the meaning of "person" only would, it seems to me, be to disregard the scheme of the Act and to rob the word of an accepted meaning. It follows that in my opinion the first question referred should be answered in the affirmative.

The second question requires little discussion. The income-tax authorities have held that the assessee is carrying on an ordinary banking business. It carries on a banking business with non-members and therefore cannot maintain the claim to be a mutual benefit society. It can only escape taxation under the provisions of the notification which the Central Government has published under S. 60 of the Act, which means that it must pay tax at the rate applicable to the amount of its total profits, namely, Rs. 37,445. The principle stated in *The Commissioner of Income-tax* v. *Trichinopoly Tennore Hindu Permanent Fund*[3] and repeated in *Trichinopoly Tennore Hindu Permanent Fund, Ltd.* v. *Commissioner of Income-tax*[4], applies.

I would answer the second question in that sense.

1. (1935) 8 I.T.C. 69
2. (1935) 9 I.T.C. 246: A.I.R. 1936 Lah. 48.
3. (1927) 53 M.L.J. 881: 2 I.T.C. 386 (F.B.).
4. (1938) 1 M.L.J. 130: I.L.R. (1938) Mad. 183 (F.B.).

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As my learned brothers agree with me, the assessee must pay the costs which we fix at Rs. 250.

King, J.:—I agree.

Krishnaswami Aiyangar, J.:—I agree.

Question answered in the affirmative.

S. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

A. L. S. P. P. L. Subramanian Chettiar by Agent Narayanan Chettiar .. *Petitioner* (Petitioner in C. R. P. No. 825 of 1939 on the file of the High Court)*

v.

Muthuswami Goundan *alias* Avanashi Goundan ... *Respondent (Respondent in do.).*

Subramanian Chettiar *v* Muthuswami Goundan.

Civil Procedure Code (V of 1908), O. 45, rr. 2, 3 and 17—Application for leave to appeal to Federal Court—Decision of single Judge of High Court in revision—Appealability—Certificate by Judge under Government of India Act, 1935, S. 205 (1) that case involves important question as to interpretation of Government of India Act—Consideration whether, or certificate that, case involves question as to interpretation of Government of India Act—Whether necessary in a petition under O. 45, r. 2, Civil Procedure Code, for leave to appeal.

At the time of dismissing a revision-petition [against an order scaling down a debt under Madras Act (IV of 1938) following the Full Bench decision that the Act was *intra vires*], the Judge gave a certificate under the Government of India Act, S. 205 (1) that the case involved an important question as to the interpretation of the Constitution Act. The present application for leave to appeal to the Federal Court was opposed on the ground that no appeal lay from the order of a single Judge of a High Court.

Held, that the order dismissing the revision petition was a final order and the Judge having given the certificate under the Government of India Act, S. 205 (1) that his order does involve a substantial question of law as to the interpretation of the Government of India Act, 1935, the appeal to the Federal Court must be admitted.

In a petition under O. 45, r. 2 for leave to appeal to the Federal Court, it is unnecessary for the Court to consider whether there is a substantial question of law involved as to the interpretation of the Government of India Act, 1935. It is unnecessary for the petitioner to apply for a certificate or for the Court to grant one.

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* C. M. P. No. 4901 of 1939. 11th April, 1940.

Subramanian Chettiar v. Muthuswami Goundan.

Petition under O. 45, rr. 2 and 17 of the Code of Civil Procedure and S. 205 of the Government of India Act, praying that, in the circumstances stated therein, the High Court will be pleased to grant leave to the petitioner to appeal to the Federal Court against the judgment and order of the High Court dated 2nd May, 1939 and passed in C. R. P. No. 825 of 1939 presented to the High Court to revise the order of the Court of the Subordinate Judge of Coimbatore dated 11th February, 1939 and made in I. A. No. 1587 of 1938 in O. S. No. 174 of 1934.

V. V. Srinivasa Aiyangar and *P. S. Sarangapani Aiyangar* for Petitioner.

B. K. B. Naidu and *R. Muthialuswami* for Respondent.

The Order of the Court was pronounced by

Leach, C. J.

The Chief Justice.—This is an application for leave to appeal to the Federal Court from an order of Wadsworth, J., which involves a substantial question of law as to the interpretation of the Government of India Act, 1935. The application is opposed and it is necessary to set out the course of events preceding the order of the learned Judge and to examine the provisions of the Act and the amendments which have been made to the Code of Civil Procedure by the Government of India (Adaptation of Indian Laws) Order, 1937.

On the 21st November, 1934, the petitioner obtained a money decree for Rs. 7,569-0-9 with interest and costs against the respondent in the Court of the Subordinate Judge of Coimbatore. At that time the Madras Agriculturists' Relief Act had not been placed on the statute book. It came into force, however, on the 22nd March, 1938, and in accordance with its provisions the judgment-debtor applied for an order scaling down the decretal amount. His application was granted and as the result of the investigation it was found that taking into account the scaling down provisions the debt had been completely discharged. Consequently the judgment-debtor applied to the Subordinate Judge for an order directing full satisfaction to be recorded and this application was granted. The petitioner then applied to this Court to revise the Subordinate Judge's order on the ground that the Madras Agriculturists' Relief Act was *ultra vires* the powers of the Provincial Legislature and to set aside the order for scaling down and the order directing satisfaction to be recorded.

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The application for revision came before Wadsworth, J., on the 2nd May, 1939. By that time the question of the validity of the Madras Agriculturists' Relief Act, had been considered by a Full Bench of this Court in *Mada Nagarathnam* v. *Puvvada Seshayya*[1]. The Full Bench held that the Act was *intra vires* the powers of the Provincial Legislature. As he was bound to do in the circumstances, Wadsworth, J., dismissed the revision petition, but as it involved an important question as to the interpretation of the Government of India Act, 1935, he granted a certificate under S. 205 (1) of the Act. It is in respect of that order of dismissal that the petitioner wishes to appeal to the Federal Court. The respondent says there is no appeal from the order of a single Judge of a High Court and in this connection relies on the provisions of S. 111 (*a*) of the Code of Civil Procedure. An examination of that section fails to reveal any support for the argument.

S. 205 (1) of the Government of India Act reads as follows:—

"An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any order in Council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly.

(2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave."

The effect of this section is this. Where a High Court has certified that a judgment, decree or final order passed by it involves a substantial question of law as to the interpretation of the Act, the dissatisfied party has the right of appeal to the Federal Court. If the case involves the amount of Rs. 10,000 or more and otherwise complies with the conditions regarding appeals to His Majesty in Council under the Code of Civil Procedure, then the Federal Court is empowered to hear and decide all the questions arising in the appeal. If the Federal Court were not empowered to deal with all the questions in such a

1. (1939) 1 M.L.J. 272: I.L.R. (1939) Mad. 151 (F. B.).

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case it would mean that there would be an appeal to the Federal Court on the question of interpretation of the statute and an appeal to the Privy Council on the other points in the case. It will be observed that the section also provides that the Federal Court can itself give special leave on other points.

By the Government of India (Adaptation of Indian Laws) Order, 1937, two additions were made to the Code of Civil Procedure. The first is the insertion of S. 111-A which reads as follows:—

"Where a certificate has been given under S. 205 (1) of the Government of India Act, 1935, the three last preceding sections shall apply in relation to appeals to His Majesty in Council, and accordingly references to His Majesty shall be construed as references to the Federal Court:

Provided that

(*a*) so much of the said sections as delimits the cases in which an appeal will lie shall be construed as delimiting the cases in which an appeal will lie without the leave of the Federal Court otherwise than on the ground that a substantial question of law as to the interpretation of the said Act, or any order in Council made thereunder, has been wrongly decided.

(*b*) in determining under cl. (*c*) of S. 109 whether the case is a fit one for appeal, and, under S. 110, whether the appeal involves a substantial question of law, any question of law as to the interpretation of the said Act, or any order in Council made thereunder, shall be left out of account."

The object of this section is to bring the Code of Civil Procedure into line with S. 205 of the Government of India Act. The two provisoes make it perfectly clear that nothing in the Code shall be read as affecting the right given to a party to appeal to the Federal Court under sub-section (1) of S. 205 when the High Court has passed a final judgment, decree or order and has certified that a substantial question of law as to the interpretation of the Government of India Act, is involved. The provisoes to S. 111-A have been expressed in very compact language, but when it is followed there is no doubt left as to its effect.

The second addition is to O. 45 of the Code of Civil Procedure. An additional rule has been here inserted, r. 17, and it reads as follows:

"Where a certificate has been given under S. 205 (1) of the Government of India Act, 1935, the provisions of this order shall apply in relation to appeals to the Federal Court as they apply in relation to appeals to His Majesty in Council and references in this order to His Majesty in Council and to any order of His Majesty in Council shall be construed as references to the Federal Court and the rules of the Federal Court:

Provided that

(*a*) rule 3 of this order shall have effect as if at the end of sub-rule (1) thereof there were inserted the words 'apart from any question of law as to the interpretation of the Government of India Act, 1935, or any order in Council made thereunder;

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(b) where the only ground of appeal stated in the petition is that any question of law as to the interpretation of the Government of India Act, 1935, or any order in Council made thereunder has been wrongly decided, the petition need not pray for such a certificate as is mentioned in rule 3, and the like proceedings shall be had thereon as if such a certificate had been given except that no security shall be required for the costs of the respondent."

R. 3 as it stood before the amendment provided that every petition for leave to appeal to His Majesty in Council should state the grounds of appeal and pray for a certificate either that, as regards amount or value and nature, the case fulfils the requirements of S. 110, or that it is otherwise a fit one for appeal to His Majesty in Council. The addition of the words to r. 3 effected by proviso (a) makes it quite clear that it is unnecessary for the Court to consider in a petition filed in compliance with O. 45, r. 2 the question whether there is a substantial question of law involved as to the interpretation of the Government of India Act, 1935. That matter has already been dealt with under S. 205 (1) by the High Court on the passing of its judgment, decree or final order. Proviso (b) emphasises that it is unnecessary for the petitioner to apply for a certificate or for the Court to grant one.

The order of Wadsworth, J., was a final order of this Court. Cl. 15 of the Letters Patent prohibits an appeal from an order passed by the Court in the exercise of its revisional powers. The learned Judge considered whether the matter involved a substantial question of law as to the interpretation of the Government of India Act, 1935, and he has certified that his order does involve such a question. No other question is involved and therefore this appeal must be admitted.

K. S. — *Appeal admitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

N. Krishnaswami Aiyar .. *Petitioner* (Petitioner—2nd Defendant)*

v.

T. N. Nagalinga Mudaliar .. *Respondent (Respondent—Plaintiff).*

Krishnaswami Aiyar v. Nagalinga Mudaliar.

Madras Agriculturists' Relief Act (IV of 1938), S. 9—Prior debt not due from agriculturists—Renewal of debt along with agriculturist—Benefits of S. 9—If available to agriculturist debtor.

* C. R. Ps. Nos. 1115 and 1106 of 1939. 10th April, 1940.

Krishnaswami Aiyar *v.* Nagalinga Mudaliar.

Where the prior debt was not one due from an agriculturist a debtor cannot call in aid S. 9 on the ground that the debt sued on is in renewal of a prior debt. The prior debt also must fall within the definition of "debt" in S. 3 if S. 9 is to have any application.

Petitions under S. 115 of Act V of 1908 and S. 224 of the Government of India Act praying the High Court to revise the orders of the Court of Small Causes, Madras, dated 24th September, 1938 and 13th February, 1939, respectively and made in M. P. No. 1581 of 1938 in Suit No. 1104 of 1937 and N. T. A. No. 421 of 1938 respectively.

S. Ramachandra Aiyar for Petitioner.

N. Muthuswami Aiyar and *N. Ramanatha Aiyar* for Respondent.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This petition raises a question under the Madras Agriculturists' Relief Act. The petitioner was the second defendant in a suit on a promissory note dated 8th October, 1934, executed by himself and by his brother the first defendant. This promissory note was in supersession of an earlier promissory note executed by the first defendant alone on 28th May, 1930. The first defendant is admittedly not an agriculturist within the purview of the Act. The second defendant claims to be entitled to the benefit of S. 9 of the Act on the basis that the debt upon which he has been sued is in renewal of a prior debt so far as he is concerned.

It seems to us unnecessary to decide the question whether, when there is a debt incurred by *A*, superseded by another debt incurred by *A* and *B*, *B* can contend that his liability is in renewal of a prior debt. So far as the facts of this case go, it is clear to us that the original debt is not a debt as defined by S. 3 (*iii*) of the Act which defines a debt as "any liability in cash or kind, whether secured or unsecured due from an agriculturist." The proviso to S. 9 deals with any part of a debt which is found to be a renewal of a prior debt. Both the debts sued on and the prior debt which it is found to have superseded must, if this section is to have any application, fall within the definition of the term 'debt' in S. 3; that is to say, both the prior debt and the debt sued on must be debts due from an agriculturist. In the present case, admittedly the original debt was not due from an agriculturist and it is therefore not open to the petitioner to call in aid S. 9 on the ground that the debt upon which he is sued is in renewal of a prior debt.

Krishnaswami Aiyar *v.* Nagalinga Mudaliar. — Wadsworth, J.

This petition is therefore dismissed with costs.

C. R. P. No. 1106 of 1939.

This petition need not be decided on the merits in view of our decision in C. R. P. No. 1115, for it only seeks to canvass by means of a new trial application the question upon which we have given a finding adverse to the petitioner. The petition is therefore dismissed but there will be no order as to costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Syed Sabjumiah Hussain and others .. *Petitioners* (Defendants 1 to 7)*

v.

Kalayigar Abdul Vahab Sab and another .. *Respondents (Plaintiff and 8th Defendant).*

Syed Sabjumiah Hussain *v.* Kalayigar Abdul Vahab Sab.

Court-Fees Act (VII of 1870), S. 7 (v) (c)—Valuation for court-fees at 15 times the nett profits—Profits of year previous to the filing of suit, in the nature of a windfall—If to be excluded from consideration—Civil Procedure Code, S. 115—Revision—Decision on court-fee in favour of plaintiff—Decision affecting jurisdiction—Interference in revision.

In a suit for possession of land it was found that a portion of the land had been leased to the Municipality during the year previous to the filing of the suit at an annual rental of Rs. 186 for use as a nightsoil dumping ground. It was contended that this profit was in the nature of a windfall and should be excluded from consideration in determining the court-fee.

Held, S. 7 (*v*) (*c*) does not give to the Court any option to consider whether or not the nett profits for the year preceding the presentation of the plaint are exceptional or unusual. Such profits cannot be excluded from consideration.

Held, further, where a decision of the lower appellate Court though on a question of court-fee directs the trial Court to assume a jurisdiction which it has not got, the High Court can interfere in revision.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Kurnool dated 2nd September, 1938, in C. M. A. No. 34 of 1937 (O. S. No. 65 of 1937, District Munsif's Court, Kurnool).

V. Govindarajachari for Petitioners.

P. Chandra Reddi for Respondents.

The Court delivered the following

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* C. R. P. No. 174 of 1939. 22nd April, 1940.

Syed Sabjumiah Hussain *v.* Kalayigar Abdul Vahab Sab.

JUDGMENT.—The petitioners in this case were defendants in a suit for possession of 3·85 acres of inam land and two houses situated within a municipality. Of the 3·85 acres of land an extent of 2·35 acres was admittedly leased to the municipality during the year previous to the filing of the suit at an annual rental of Rs. 186 for use as a nightsoil dumping ground. The trial Court valued this portion of the land under S. 7 (*v*) (*c*) of the Court-Fees Act at 15 times the nett profits, that is to say, at Rs. 2,790. The two houses were valued at Rs. 200 and the balance of the land was valued at Rs. 1,770. On the basis of this valuation the trial Court held that the suit had been under-valued and that the true value was beyond the jurisdiction of a District Munsif and therefore returned the plaint for re-presentation in the proper Court after paying the deficient court-fee. This decision was the subject of an appeal before the District Judge. The learned District Judge held that the extent of 1·5 acres not occupied by the municipal manure depot had been over-valued and that the annual income from it would be approximately Rs. 75 per acre. This portion of the learned District Judge's decision cannot be canvassed in revision. He also held that the valuation of the houses was correct. With reference to the land occupied by the manure depot he held that the income from the land by reason of this use was in the nature of a windfall in a particular year and could not be taken as the true profit from the land and that in any case a deduction would have to be made on account of loss of value of the land by the removal of top soil when the manure was being carted away. I have gone through the evidence and find nothing whatever to justify the learned District Judge's conclusion that there would be any detriment to the land by reason of the process of storing manure upon it and carting it away. The decision that the profits of the year previous to the filing of the suit can be excluded from consideration because they partake of the nature of a windfall, seems to me to run directly contrary to the wording of S. 7 (*v*) (*c*) of the Court-Fees Act which prescribes:

"Where nett profits have arisen from the land during the year next before the date of presenting the plaint, fifteen times such nett profits."

This section does not give to the Court any option to consider whether or not the nett profits for the year preceding

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the presentation of the plaint are exceptional or unusual. On behalf of the respondents it has been contended on the basis of a decision in *Ghasi Ram* v. *Har Gobind*[1], that it must be positively proved that the rental amount for this manure depot was actually received during the 365 days preceding the presentation of the plaint. I find from the evidence and from the judgments of the lower courts that it seems to have been conceded on both sides that this lease amount was paid within the year previous to the filing of the suit. At any rate there is no suggestion that it was not so paid, and it is too late to raise the point now.

It is, however, contended also that this Court has no power in revision to interfere with a decision in a matter of court-fee which is favourable to the plaintiff and the cases in *The Secretary of State for India in Council* v. *Raghunathan*[2] and *Manaithunainatha Desikar* v. *Gopala Chettiar*[3] have been quoted before me. The answer to this contention is that we are not here concerned with the simple question of how much court-fee the plaintiff shall pay. The basic question is whether the District Munsif has jurisdiction to try this suit if it is properly valued. The order which was on appeal before the learned District Judge was one returning the plaint on the ground that the District Munsif had no jurisdiction to try this suit and requiring the plaint to be filed in a superior Court after paying the deficient court-fee. It has been argued that the District Judge cretainly had jurisdiction to decide whether or not the plaint was rightly returned and that S. 115 of the Code of Civil Procedure only empowers the High Court to interfere with a decision of a court below which has exercised a jurisdiction *not vested in it* by law or has failed to exercise a jurisdiction so vested or has acted in the exercise of *its* jurisdiction illegally or with material irregularity. The argument is that when an appellate Court acting in its admitted jurisdiction makes an erroneous decision regarding the jurisdiction of a court below it, there is no ground for interference in revision. This contention runs directly contrary to the decision of a Full Bench of this Court in *Atchayya* v. *Sri Seetharamachandra Rao*[4], where Wallis, C.J., held that such an order comes within

1. (1906) I.L.R. 28 All. 411.
2. (1933) 65 M.L.J. 25: I.L.R. 56 Mad. 744.
3. (1939) 1 M.L.J. 317.
4. (1912) 24 M.L.J. 112: I.L.R. 39 Mad. 195 (F.B.)

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the revisional jurisdiction of the High Court by virtue of S. 115 (*c*) of the Code of Civil Procedure. This decision has been followed by a Bench of this Court in *Kattiya Pillai* v. *Ramaswamia Pillai*[1], where the question of jurisdiction raised expressly depended on a decision as to the proper court-fee. It is needless to say that there are strong practical grounds for interfering to prevent the trial of a case by a Court which has no jurisdiction, when an appellate Court has wrongly directed this Court to assume a jurisdiction which it has not got.

In the result therefore I allow the revision petition with costs and hold that the proper valuation of the suit should be on a value of Rs. 3,575 made up as set forth in the revision petition and that the trial court's order returning the plaint for presentation in a Court having jurisdiction after paying the proper court-fee thereon is correct, subject to the alteration in the valuation of the suit hereby indicated.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Alapati Anandarao and others .. *Appellants* (Plaintiffs)*

v.

The President, Co-operative Credit Society, Pedatadepalli and others .. *Respondents (Defendants 1, 7, 12, 13, 14 and 2).*

Alapati Anandarao v. President, Co-operative Credit Society, Pedatadepalli.

Hindu law—Debts—Pious obligation of sons to discharge father's debts—Lawful receipt of money by father and subsequent misappropriation—Sons' liability for debt.

The decision of the Privy Council in *Toshanpal Singh* v. *District Judge of Agra,* (1934) 68 M.L.J. 1: L.R. 61 I.A. 350: I.L.R. 56 All. 548 (P.C.), accords approval to *McDowell* v. *Raghava Chetti,* (1903) I.L.R. 27 Mad. 71 and leaves unaffected the line of Madras cases which hold that the sons are liable where there was lawful receipt of money and subsequent misappropriation.

Ramasubramania Pillai v. *Sivakami Ammal,* (1925) 21 L.W. 606, approved.

Appeal against the decree of the Court of the Subordinate Judge of Ellore dated 24th September, 1937 and passed in O. S. No. 36 of 1936.

V. Suryanarayana for Appellants.

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1. (1929) 56 M.L.J. 394.

* Appeal No. 334 of 1937. 10th April, 1940.

Alapati Anandarao v. President, Co-operative Credit Society, Pedatadepalli.

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M. Sriramamurthi and *A. Lakshmayya* for Respondents.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—The appellants are the sons of the fourth respondent and are all minors. They filed a suit through their maternal grandfather as their next friend in the Court of the Subordinate Judge of Ellore for partition of the family properties and the setting aside of certain alienations made by their father. They attached to their plaint three schedules. Schedule A contained the descriptions of ten items of immovable property belonging to the family. Schedule B was a list of the family's movable properties, and Schedule C, a list of the debts owed by the family. Of the immovable properties, items Nos. 1 to 9 had been mortgaged by their father, and item No. 10 had been sold. These alienations were said to be invalid so far as the interests of the appellants were concerned and it was also alleged that some of the debts were not binding on them. The mortgage of items Nos. 1 to 9 was in favour of the Co-operative Credit Society of Pedatadepalli, which is represented by its President, the first respondent. The appellant's father had been employed as Secretary of the Society and it was his duty to collect moneys from its debtors. Out of his collections he misappropriated amounts totalling Rs. 8,073-4-8. As security for Rs. 5,490-4-8 he executed a mortgage of items Nos. 1 to 9 in Schedule A, and for the balance of Rs. 2,583 he gave a letter acknowledging his liability. Item No. 10 was sold by the father to the second respondent who has transferred his interest in the property to the third respondent. The respondent society averred that all the immovable properties were the self-acquired properties of the father. After considering the evidence adduced by the parties, the Subordinate Judge found that items Nos. 1 and 9, half of item No. 2 and a quarter of item No. 10 represented ancestral properties, the rest being the separate estate of the father. The Subordinate Judge also held that the interests of the appellants in the ancestral properties were liable for the debts of the father to the respondent society. The finding of the Subordinate Judge that items Nos. 1 and 9, half of item No. 2 and a quarter of item No. 10 formed the ancestral properties is accepted by all the parties. The appellants, however, say that the Subordinate Judge erred in holding that the other properties belonged to their father separately. They further say that the Subordinate Judge erred in holding

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that their interests in the ancestral properties are liable for their father's debts. These are the only two questions which arise in this appeal.

The finding of the Subordinate Judge with regard to the father's separate properties is not really open to serious question. When the father separated from his brothers about the year 1916 his share in the family estate was confined to the properties which the Subordinate Judge has held to be ancestral properties and the income merely sufficed to maintain himself and his wife. The evidence of the father's own brother establishes this. The father, however, held the office of village karnam and was in receipt of its emoluments. He also entered into contracts for the construction of works for local boards and acted as a school master. The non-ancestral properties could only have been acquired out of the income he received from these occupations. We have no hesitation in concurring in the finding of the Subordinate Judge on this question. The alienations of items Nos. 3 to 8, half of item No. 2 and three quarters of item No. 10 therefore cannot be challenged.

The contention of the appellants with regard to the finding of the Subordinate Judge that their shares in the ancestral properties are liable for their father's debts is this. Inasmuch as their father misappropriated moneys of the respondent society he committed a crime and in these circumstances they say that the resultant debt is not binding on them. This argument ignores a long line of decisions of this Court to the contrary. This Court has always held that where a father has lawfully received money the fact that he misappropriates it later will not change the character of the debt and the son is liable under the pious obligation rule. Where a person receives money on behalf of another a civil liability immediately arises and the fact that the person who has received it fails in his duty to pay it over to the person entitled to it does not alter the civil character of the debt—see *Natessayyan* v. *Ponnuswami*[1], *Kanemar Venkappayya* v. *Krishna Charia*[2], *Thirumalayappa Mudaliar* v. *Veerabhadra*[3], *Venugopala Naidu* v. *Ramanathan Chetty*[4], *Garuda Sanyassayya* v. *Narella Murthenna*[5], *Venkata-*

1. (1892) 3 M.L.J. 1 : I.L.R. 16 Mad. 99.
2. (1907) 17 M.L.J. 613 : I.L.R. 31 Mad. 161.
3. (1909) 19 M.L.J. 759.
4. (1912) 23 M.L.J. 61 : I.L.R. 37 Mad. 458.
5. (1918) 35 M.L.J. 661.

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charyulu v. *Mohana Panda*[1] and *Ramasubramania Pillai* v. *Sivakami Ammal*,[2].

In *Mc Dowell* v. *Raghava Chetty*[3], White, C.J. and Subramania Aiyar, J., held that the sons of a Hindu father who had committed criminal breach of trust were not liable for the father's debts. The father was a cashier and he took out of his employer's cash box, which was in the employer's custody, moneys for his own purposes. This was not a case of lawful receipt of money. The act of taking the money out of the cash box constituted an offence. There was here no antecedent civil liability and the decision in *Natessayyan* v. *Ponnuswami*[4], was distinguished on this ground. In *Gurunathan Chetty* v. *Raghavalu Chetti*[5], White, C.J., sitting with Wallis, J., delivered a judgment which at first sight suggests that where a father has made himself amenable to the criminal law the pious obligation rule cannot apply even when a criminal liability arises subsequent to a civil liability, but it is to be doubted whether the learned Judges there intended to depart from the rule laid down in the other cases which I have cited.

I agree with the remarks of Venkatasubba Rao, J., in *Ramasubramania Pillai* v. *Sivakami Ammal*[2], where he said with reference to the decisions of this Court:—

> "It cannot be gainsaid that there is absolute want of harmony, so far as the decisions were made to rest upon particular grounds. But if the facts of the cases are examined, the conflict is only apparent and the true principle appears to be that the sons are not liable, where the moneys were originally obtained by the father by the commission of an offence; the sons' liability is, on the other hand, recognised where, in its origin, the debt was not immoral but there was a supervening dishonest act of the father."

That I regard as being not only an accurate summary of the decisions of this Court, but as correctly stating the law.

Mr. Somasundaram has, however, contended that the decision of the Privy Council in *Toshanpal Singh* v. *District Judge of Agra*[6] has in effect overruled the decisions of this Court. An examination of the judgment does not support this contention. In fact it shows that the Judicial Committee left this Court's decision untouched. In that case the Hindu Secretary of a School Committee was in charge of a fund deposited at a

1. (1920) 39 M.L.J. 586: I.L.R. 44 Mad. 214.
2. (1925) 21 L.W. 606.
3. (1903) I.L.R. 27 Mad. 71.
4. (1892) 3 M.L.J. 1: I.L.R. 16 Mad. 99.
5. (1908) I.L.R. 31 Mad. 472.
6. (1934) 68 M.L.J. 1: L.R. 61 I.A. 350: I.L.R. 56 All. 548 (P.C.).

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bank and was authorized to draw upon it only for specific purposes connected with the school. He drew on it for his own purposes and thereby committed criminal breach of trust. The Privy Council held that as the father had committed a crime the sons were not responsible for the resultant loss. Lord Blanesburgh delivering the judgment of the Board expressly pointed out that until the moment of the withdrawal from the fund the father had been guilty of no breach of duty civil or otherwise, and later observed:

"In view of the powers and duties prescribed for Dhianpal" (the father) "in relation to the Rs. 62,000 there was, as their Lordships have already shown, in relation to the moneys misappropriated by him, no antecedent duty in respect of which any similar liability was either created or survived."

This judgment in effect accords approval to the decision of this Court in *Mc Dowell* v. *Raghava Chetty*[1], but leaves entirely unaffected the line of cases which say that the sons are liable where there was lawful receipt of money and subsequent misappropriation. In this case the father had received moneys lawfully on behalf of the Society and the fact that he had at a later stage used them for his own purposes does not alter the liability of the sons.

The appeal fails and will be dismissed with costs, one set to be divided among respondents 1, 3 and 6 according to the values of their respective claims. As the appeal was filed *in forma pauperis* the appellants will pay the court-fee due to Government.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I entirely agree, but I shall, however, add a few words expressing the result of the decisions of this Court on the question argued before us. That the sons are bound by reason of their pious obligation to discharge a debt arising out of a civil liability of their father is well settled. The application of this principle is beset with difficulty in cases where the father receives or retains money with a duty to apply it for the benefit of a third party but omits so to apply it. Where the original taking or the receipt of the money amounted in itself to a criminal offence the sons are not bound. The reason is quite plain and easily understood. A liability resulting through the commission of a crime is necessarily a tainted liability in its origin. Such would be the case where as in *Mc Dowell*

2. (1903) I.L.R. 27 Mad. 71.

Alapati Anandarao v. President, Co-operative Credit Society, Pedatadepalli.

Krishnaswami Aiyangar, J.

v. *Raghava Chetty*[1], the cashier took for his own purposes money out of the cash chest of his employer and in the Privy Council decision in *Toshanpal Singh* v. *District Judge of Agra*[2], where the Secretary after having properly lodged the money in the bank drew it out for his own purposes. The position will be different where the father is guilty of no misconduct or crime in receiving or withdrawing the money in the first instance though he might be civilly liable to account for it. The civil liability will attach the moment the money is received without any impropriety, and with it will also attach the liability of the sons to relieve the father from the burden of the debt. The pious obligation which thus springs into existence simultaneously with the receipt or withdrawal, subsists so long as the debt itself subsists. Once the liability is thus established it is irrelevant to consider whether the money received or retained by the father lawfully in the first instance was subsequently misappropriated by him. The subsequent misconduct of the father will not be allowed to prejudice the rights already accrued in favour of the third parties on the receipt of their money by the father. This distinction runs through all the decisions of this Court and it is quite apparent that it rests on a logical, intelligible basis. I can see little reason for considering that any doubt has been cast on the rationale of the decisions of this Court by anything said by the Privy Council in *Toshanpal Singh* v. *District Judge of Agra*[2]. It will be found on an examination of the case that their Lordships considered that the case fell within the class of cases where the original taking or withdrawal itself amounted to an offence.

Referring to the conduct of the father in that case in withdrawing the money from the Bank and misappropriating it, their Lordships observed:

"With reference to these balances (at the Bank) he was under no further obligation unless and until their application was otherwise directed by the Committee. No such direction was ever given. Accordingly if, and to the extent to which Thakur Dhianpal Singh (the father) withdrew those moneys and applied them for his own purposes, he was guilty as *from the moment of withdrawal* of a criminal breach of trust. But until the moment of withdrawal he had been guilty of no breach of duty civil or otherwise in relation to them."

Their Lordships then proceeded to declare that this statement furnished the key to the decision of the appeal, and held

1. (1903) I.L.R. 27 Mad. 71.

2. (1934) 68 M.L.J. 1: L.R. 61 I.A. 350: I.L.R. 56 All. 548 (P.C.).

that the sons were not liable, as up to the amount of the misappropriation, the father had completely fulfilled his duty, and there was therefore no antecedent liability established as against him. Their Lordships noticed the argument of the respondents in the case before them, which is identical with the case of the respondents here, but held that that "difficult and doubtful question of law" did not call for decision in the view that the father was, in relation to the moneys withdrawn from the Bank guilty of a criminal breach of trust simpliciter.

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Krishnaswami Aiyangar, J.

The question may be difficult but a solution has been found and consistently acted upon in this Court, and so long as it is not declared erroneous by a higher authority, it must govern our decision.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Muhammad Sahib and another .. *Petitioners* (Defendants)*

v.

C. Kunthanmal Sowcar .. *Respondent (Plaintiff).*

Muhammad Sahib *v.* Kunthanmal Sowcar.

Madras Agriculturists' Relief Act (IV of 1938), S. 9—Interest calculated and paid off in full on 18th November, 1935, on promissory note of 4th March, 1933—Debtor whether entitled to have the interest calculated at 5 per cent and the amount already paid adjusted accordingly—S. 12—Debt outstanding after scaling down—From what date to carry interest.

On 4th March, 1933, the defendant executed a promissory note for Rs 300 in favour of the plaintiff. In October of that year he paid Rs. 100 towards principal On 18th November, 1935, the interest outstanding was paid off. In a suit for the balance of principal and interest from the date of coming into force of Act IV of 1938 it was contended that interest at 5 per cent must be calculated from date of debt and added to the principal and the amounts actually paid should be deducted.

Held, the interest having been paid off in full the plaintiff was entitled to a decree for the balance of the principal outstanding.

Held, further, S. 12 entitled a creditor to interest on any sum remaining outstanding after the debt has been scaled down from the date up to which it has been scaled down, that is, only from the date of the decree.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Poonamallee in S. C. S. No. 987 of 1939.

Basheer Ahmed Sayeed for Petitioners.

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* C. R. P. No. 529 of 1939. 23rd April, 1940.

Muhammad Sahib v. Kunthanmal Sowcar.

K. A. Chakravarthy for Respondent.

The Court delivered the following

JUDGMENT.—On 4th March, 1933, the petitioners executed a promissory note for Rs. 300 in favour of the respondent (plaintiff). In October of the same year he paid Rs. 100 towards the principal. On 18th November, 1935, we find the endorsement "interest calculated up to date has been paid off in full". The plaintiff brings the present suit for the balance of Rs. 200 principal and Rs. 7-8-0 interest from the 22nd March, 1938 (the date on which the Madras Agriculturists' Relief Act came into force) to date of suit. Two questions arose; and the one with which we are concerned is what is the amount due under Act IV of 1938. It was held in favour of the plaintiff by the District Munsif of Poonamallee that the plaintiff was entitled to the amount claimed.

It is strenuously argued by Mr. Chakravarthy that in applying S. 9 of Act IV of 1938, interest should be calculated at 5 per cent. from the date when the debt was incurred; to that should be added the principal; and from that sum should be deducted the amount actually paid. The plaintiff, it is contended, would be entitled only to the balance, which would probably be something less than nothing in the present case. That however is not the correct interpretation to put on S. 9. S. 9 (1) deals entirely with the question of interest. It says that interest shall be calculated up to the date of the commencement of the Act at 5 per cent. simple interest, that credit should be given for the interest already paid, and that the amount outstanding for interest should be added to the principal outstanding and the plaintiff should be given a decree for the amount so calculated. On 18th November, 1935, the interest outstanding was paid off in full and the plaintiff has made no claim whatever for interest. As he is not bound to pay anything back, he cannot be given less than what he has claimed except for the small amount of Rs. 7-8-0, to which I shall presently refer.

It is further argued that if S. 9 (1) be deemed to deal only with the question of interest and that the amount paid by way of interest has not to be deducted from the principal as well as the interest calculated at 5 per cent, then there would be no meaning in S. 9 (2). I do not however agree; for it is easy to conceive of a case in which the debtor had paid off the entire amount of principal due and also paid an amount of interest

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which was greater than that calculated at 5 per cent. In such a case, were it not for the provision of S. 9 (2), the debtor would be entitled to a refund.

I have been asked to remand this C. R. P. because the trial Court says in disposing of this point:

"It is not open to me to re-open the adjustment arrived at between the parties before 18th November, 1935."

I do not know what the learned District Munsif had in mind when he said this; but the Court is clearly entitled to consider what principal was paid in the first instance and what interest had been paid. The Court was entitled and was bound to have regard to the transaction from the date on which the debt was first incurred. However, this point has no significance in view of my findings above; for the decree of the lower Court was right.

The plaintiff has claimed interest from the date on which the Act came into force up to the date of suit and costs and subsequent interest; but I find that he is not entitled to so much. S. 12 entitles a creditor to interest on any sum remaining outstanding after the debt has been scaled down from the date up to which it had been scaled down. That is to say, the plaintiff is entitled to interest only from the date of the decree.

With this slight modification, the petition is dismissed with costs.

K. S. *Petition dismissed in the main.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Jagannatha Aiyangar and others .. *Petitioners* (Petitioners—Defendants 3, 4 and 5)*

v.

Suppiah Chettiar .. *Respondent (1st Respondent—Plaintiff).*

Jagannatha Aiyangar *v.* Suppiah Chettiar.

Madras Agriculturists' Relief Act (IV of 1938), S. 14—Hindu family debt—Respective liability of agriculturist and non-agriculturist members—Applicability and scope of S. 14.

If a debt is a family debt it must be a family debt with regard to everybody, and the members are personally liable for their proportionate share of debt and they cannot be liable unless the debt is a contractual one. S. 14 is

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* C. R. P. No. 2262 of 1939. 17th April, 1940.

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applicable to such a debt. Where there are two non-agriculturist and five agriculturist members in a joint Hindu family, the non-agriculturists are liable for 2/7 of the unscaled debt while the agriculturists are liable for 5/7 of the scaled down debts It is not necessary that the property should be split up into individual shares and each share made liable only for its own share of the family debt.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Subordinate Judge of Devakottai dated 20th October, 1939 and made in I. A. No. 188 of 1939 in S. C. S. No. 661 of 1935.

V. Ramaswami Aiyar for Petitioners.

R. Sethurama Sastri for Respondent.

The Court delivered the following

JUDGMENT.—A decree was obtained against defendants 1 to 5 personally on a promissory note executed by them for a debt binding on the family. Because it was binding on the family, the other two members, defendants 6 and 7, were made liable to the extent of their share of the family property. Defendants 3 to 7 filed an application in the Court below for scaling down the debt. The debt was scaled down in accordance with S. 8 of the Agriculturists' Debt Relief Act (IV of 1938), and a question arose in view of the allegations that defendants 1 and 2 were not entitled to the benefit of the Act (defendant 1 being said to be an insolvent and defendant 2 to have no further interest in the family property) whether, under S. 14 of the Act, the creditor can proceed against each of the defendants only for his proportionate share of the debt. The lower Court held that S. 14 did not apply to the case of a contractual debt. Defendants 3 to 5 appeal.

S. 14 affects:

"A Hindu family . . . . . . where some of the members liable in respect of a family debt are not agriculturists while others are agriculturists."

The case of the respondent, which has been accepted by the lower Court, is that this debt is not a family debt. It is argued that a debt can only be said to be a family debt when the debtors are made liable only because they are members of a family; for example, if the manager of a family contracts a debt legally binding on the family, it is a family debt as far as the other members of the family are concerned but not as far as the manager is concerned. It is difficult to appreciate this distinction; for it appears to me that if a debt is a family debt,

it must be a family debt with regard to everybody. Moreover, I think, the wording of clauses (*a*) and (*b*) of S. 14 indicates that this contention of the respondent cannot be correct; because it makes liable not only the debtors' shares of the family property but makes them liable personally for their proportionate share of debt; and they cannot be liable personally unless the debt is a contractual one. So I cannot agree with the lower Court that S. 14 has no application.

I do not, however, find any reason to suppose that because one or more members of a family are non-agriculturists, the family property has to be split up into individual shares and that each individual share is liable only for its own share of the family debt. That is not how the section reads. Using the words appropriate to the present case:

"The creditor shall . . . . be liable to proceed (*a*) against the non-agriculturist . . . . members and . . . their share of the family property to the extent only of. . . their proportionate share of the debt which shall be scaled down in accordance with the provisions of this Act and (*b*) against the agriculturist . . . members and . . . . their share of the family property, to the extent only of . . . . their proportionate share of the debt."

That would mean that where, as in the present case, there are two non-agriculturists and five agriculturists, the non-agriculturists are liable for 2/7 of the unscaled debt while the agriculturists are liable for 5/7 of the scaled-down debt. That is what one would expect the legislature in justice to have done in order to overcome the difficulty that arises in dealing with a Hindu family, some of whose members are agriculturists and some not. In some Malabar families, for example, there is an enormous number of members and if a creditor could only proceed against the individual small fractions of the family property or the individual share of that member, very great hardship indeed would be entailed; and I do not think the Legislature intended by this section to throw that great burden on the creditor. Moreover, the word 'share' would be incorrect if the petitioners' contentions were correct. The correct word would be 'shares'. It therefore follows that if the Act does not apply to the first and second defendants, defendants 3 to 7 would be liable for 5/7 of the scaled-down debt.

It is contended that S. 21 of the Act, which excludes certain insolvents from the scope of the Act, does not apply to this case; for there is no evidence whether a dividend has been

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declared or not. It is also argued that there is no evidence to show that the second defendant has no longer any interest in the family property. In the view taken by the lower Court, it was not necessary to consider these questions. They will have to be considered in view of the above findings.

The petition is allowed and the interlocutory application remanded for disposal on the lines indicated above. The costs for this petition will be provided for in the order to be made by the lower Court when disposing of the application.

K. S. *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

The Official Receiver of East Godavari at Rajahmundry ... *Appellant** (*Nil*)

v.

Chava Govindaraju and another ... *Respondents.* (*1st Defendant* and *Plaintiff*).

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The Official Receiver of East Godavari *v.* Govindaraju.

Limitation Act (IX of 1908), Arts. 142 and 144—Purchaser in sale in execution of mortgage decree—Suit for possession against person claiming to be in possession adversely to mortgagor—Burden of proof.

In a sale in execution of a mortgage decree plaintiff purchased the suit properties. In 1931 he filed a suit for possession against the first defendant who claimed to be in adverse possession from 1909 and impleaded the mortgagor also.

Held, the burden of proof was on the plaintiff to prove that he was in possession within twelve years prior to the suit. Mere proof of title was not enough to place the burden of proof on the defendant.

Mohima Chunder Mozoomdar v. *Mohesh Chunder Neoghi*, (1888) L.R. 16 I.A. 23: I.L.R. 16 Cal. 473 (P.C.), followed.

Periya Jeeyangarswami v. *Mahomed Esoof Sahib*, (1924) 21 L.W. 398 and *Ramanujachariar* v. *Sundarachariar*, (1927) 25 L.W. 127, overruled.

Tanjore Palace Estate by its Receiver Sundaram Aiyar v. *Thiagaraja Pillai*, (1922) 50 M.L.J. 183, distinguished.

Appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in A. S. No. 9 of 1933 preferred against the decree of the Court of the District Munsif of Rajahmundry in O. S. No. 382 of 1931.

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* S. A. No. 255 of 1937. 23rd April 1940.

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The Official Receiver of East Godavari v. Govindaraju.

K. R. Vepa for Appellant.

A. Lakshmayya for Respondents.

This appeal coming on for hearing on 21st February, 1940, the Court (*Horwill, J.*) made the following

ORDER OF REFERENCE TO A FULL BENCH.

The plaintiff filed the present suit for possession on his title, alleging that the first defendant was left in possession of the suit land by the second defendant in 1909 and that he continued in possession of the land ever since with the permission of the second defendant. The land was brought to sale by the plaintiff in execution of a decree against defendants 2 to 5. When the plaintiff sought to obtain possession he was resisted by the second defendant. The plaintiff brought a claim petition which was dismissed; and hence this suit.

The trial Court found that the title was with the second defendant and that the plaintiff's case that the first defendant was in permissive possession was true. The appellate Court while confirming the finding that the title was with the plaintiff, found that the plaintiff had not proved that the first defendant was ever in possession with the second defendant's permission. He therefore allowed the appeal and dismissed the suit on the ground that the plaintiff had not proved that either he or the second defendant had been in possession within 12 years of suit. The plaintiff appeals, contending that as his allegation was that the first defendant was in permissive possession, the lower appellate Court wrongly threw the onus upon the plaintiff, *i.e.*, the lower appellate court should have applied Article 144 of the Limitation Act and not Article 142. As the evidence of the defendants of their having been in adverse possession was not given much credit to by the lower appellate Court, it is argued that if the burden had been rightly thrown on the first defendant, the first defendant's appeal would have been dismissed.

The argument of the plaintiff amounts to this: that even though he would ordinarily in a suit for ejectment have to prove that he was in possession within twelve years; yet he could get over this difficulty of limitation and displace the onus by a false declaration in his plaint. The decision of a Bench of this Court in *Ramanujachariar* v. *Sundarachariar*[1] gives support to this argument. There, the plaintiff's allegation was that he let the defendants into possession under an agreement of tenancy and that they would not give up possession when the tenancy was terminated. The lower appellate Court had found that the agreement set

1. (1927) 25 L.W. 127.

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up was not proved; but the learned Judges held that the plaintiff was not bound to prove possession. Although no reasons were given for this finding, yet the learned Judges definitely disagreed with the lower appellate Court that the burden was upon the plaintiff to prove possession within 12 years of suit. The argument there seemed to have been that the frame of the suit determined the provisions of the Limitation Act to be applied and that it was immaterial what the actual findings on the questions raised in the pleadings were. Rustomji, at page 1387 of his book on the 'Limitation Act' (5th edition), says:

"When plaintiff comes into Court alleging that defendant's original possession was *permissive*, it is for the plaintiff to *establish* his allegation before defendant can be called upon to substantiate his plea of adverse possession."

He adds at page 1407,

"Decisions of the High Courts in India to the contrary, on the supposed authority of the Privy Council judgment in *Secretary of State for India* v. *Chellikani Rama Rao*[1] are not good law."

A somewhat similar point came up for decision in *Alam Khan Sahib* v. *Karupannaswami Nadan*[2]; and *Ramanujachariar* v. *Sundarachariar*[3], and three other cases were referred to. In that case, Venkatasubba Rao, J., disposed of very briefly with these remarks:—

"Mr. Rajah Aiyar for the appellant, however, relies on the following four cases; . . . of which the first two are decisions of the same single Judge, the third was also decided by a Judge sitting singly, and the fourth (25 L. W. 127) contains no discussion of the principle involved . . . . with great respect, we are unable to follow the four cases relied upon by the appellant."

In view of this conflict between the decisions of two benches of this Court, I direct that the papers in this case be put before my Lord, the Chief Justice, for referring to a Full Bench, if he so pleases, the question whether, in a case where a plaintiff sets up a case of permissive possession and fails to prove it, the burden then lies upon the plaintiff to prove that he was in possession within twelve years of suit, or whether the onus is upon the defendant to prove adverse possession for a period of twelve years.

This case coming on for hearing in pursuance of the above Order of Reference, the Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—The appellant is the Official Receiver of East Godavari and he has filed this appeal as the representative of the estate of one Adusumilli

1. (1916) 31 M.L.J. 324: L.R. 43 I.A. 192: I.L.R. 39 Mad. 617 (P.C.).
2. (1938) 1 M.L.J. 113.
3. (1927) 25 L.W. 127.

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Venkatasubbarayudu, who was adjudicated an insolvent during the pendency of the suit out of which this appeal arises The insolvent was the plaintiff in the suit. On the 29th November, 1911, the second respondent and his sons mortgaged certain land belonging to them and in 1922 the mortgagees filed a suit in the Court of the District Judge of Rajahmundry to enforce the mortgage. They obtained a decree which they assigned to the plaintiff, who caused the land to be put up for sale in execution proceedings. The plaintiff bought the land at the Court auction and in due course obtained a sale certificate. When he went to take possession of the property he was obstructed by the first respondent, who claimed it as his ancestral property. Thereupon the plaintiff applied to the Court for an order under O. 21, r. 98 of the Code of Civil Procedure. His application was dismissed and consequently he filed in the Court of the District Munsif, Rajahmundry, a suit for a decree declaring his title to the property and for the ejectment of the first respondent therefrom. In his plaint he averred that in 1909 the second respondent, on being appointed a village munsif, entrusted the property to the first respondent, his nephew, who was to manage it for him. With the dishonest idea of defeating the mortgage the second respondent had, it was said, instigated the first respondent to claim the property as his own. In addition to claiming the land as his ancestral property the first respondent averred that he had title to it by adverse possession. The District Munsif found for the plaintiff on all the issues and consequently decreed the suit. The first respondent then appealed to the Court of the Subordinate Judge of Rajahmundry. The Subordinate Judge held that the land was not the ancestral property of the first respondent, but belonged to the second respondent and his family. He disagreed with the District Munsif, however, on the question whether the land had been entrusted to the first respondent. In his opinion this had not been proved, but without considering the question whether the first respondent had been in adverse possession for twelve years he allowed the appeal on the ground that possession had been with the first respondent, since that date. The question which the Court is called upon to decide is whether Art. 142 or Art. 144 of the Limitation Act applies to this case. The appellant contends that Art. 144 applies. The first respondent would have it that the proper article is Art. 142. That the first

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respondent has been in possession since 1909 is admitted and it is conceded by both sides that if Art. 142 applies the appeal must fail. It is also conceded that if Art. 144 applies the suit must be remanded to the Subordinate Judge to consider whether the evidence justifies the first respondent's contention that he has obtained a title by adverse possession.

Art. 142 prescribes a period of limitation of twelve years for a suit for possession of immovable property when the plaintiff, while in possession of the property has been dispossessed or has discontinued the possession. The period of twelve years runs from the date of dispossession or discontinuance. Art. 144 prescribes the same period of limitation for a suit "for possession of immovable property or any interest therein not hereby otherwise specially provided for". The period commences when the possession of the defendant becomes adverse to the plaintiff. Arts. 134, 134-B, 135, 136, 137, 138, 139, 140, 141 and 143 also deal with suits for possession of immovable property. Art. 144 is a residuary article and therefore can only be applied if a suit does not fall within any of the earlier articles. There has been much discussion in the Courts of India with regard to the application of Arts. 142 and 144. If a suit falls within Arts. 142 the plaintiff must show that he has been in possession within twelve years of the suit. When Art. 144 applies the burden of proving adverse possession for this period is upon the defendant.

A discussion of the reported cases relating to Arts. 142 and 144 would be a most formidable task and in my opinion it is not necessary to undertake it. I consider that the Privy Council has indicated the application of these articles in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi*[1], *Muhammad Amanulla Khan* v. *Badan Singh*[2] and *Dharani Kanta Lahiri* v. *Garbar Ali Khan*[3]. In *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi*[1], the plaintiffs had proved that formerly they were the proprietors of the land to which they alleged title, and from which they claimed to oust the defendants. They had, however, been dispossessed, or their possession had been discontinued, some years before the suit was brought by them and the land was occupied by the defendants, who denied their title. The

1. (1888) L.R. 16 I.A. 23: I.L.R. 16 Cal. 473 (P.C.).
2. (1889) L.R. 16 I.A. 148: I.L.R. 17 Cal. 137 (P.C.).
3. (1912) 25 M.L.J. 95 (P.C.).

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Judicial Committee held that in these circumstances the burden was on the claimants to prove their possession at some time within the twelve years next preceding the suit. It was not sufficient for them to show an anterior title without proof of their possession within twelve years to shift the burden on the defendants of showing that they were entitled to remain in possession. In the judgment under appeal the Subordinate Judge who tried the case observed:

"When I showed above that the plaintiffs are the rightful owners of the disputed land, it is for the ryot defendants to show that they are entitled to retain pos session of these lands."

Their Lordships' comment on this observation was this:—

"That, as a proposition of law, is one which hardly meets with the approval of their Lordships."

Their Lordships went on to say:

"This is in reality what in England would be called an action for ejectment, and in all actions for ejectment where the defendants are admittedly in possession and *a fortiori* where, as in this particular case, they had been in possession for a great number of years, and under a claim of title, it lies upon the plaintiff, to prove his own title. The plaintiff must recover by the strength of his own title, and it is the opinion of their Lordships that, in this case, the onus is thrown upon the plaintiffs to prove their possession prior to the time when they were admittedly dispossessed, and at some time within twelve years before the commencement of the suit, namely, for the two or three years prior to the year 1875, or 1874, and that it does not lie upon the defendants to show that in fact the plaintiffs were so dispossessed."

In *Muhammad Amanulla Khan* v. *Badan Singh*[1], the Privy Council pointed out that Art. 144 only gives the rule of limitation where there is no other article in the schedule specially providing for the case. Although the proprietary right would continue to exist until, by the operation of the law of limitation, it has become extinguished, where a claim comes within the terms of Art. 142, adverse possession is not required to be proved in order to maintain a defence. The plaintiffs' ancestors at the settlement in the Delhi District in 1843, declined to pay revenue in respect of a plot of land which had been held under rent-free tenure and had been resumed in 1838. The land was nevertheless assessed and the Government made an engagement with the villagers (the defendants in the suit) under which the villagers were to be put into possession. A revision of the settlement took place some thirty years later and the plaintiffs claimed possession on the strength of their title. According to

1. (1889) L.R. 16 I.A. 148: I.L.R. 17 Cal. 137 (P.C.).

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the judgment under appeal to the Privy Council the plaintiffs were undoubtedly the proprietors before 1838, but the land had been since 1842 in the possession of the defendants, who had exercised all the rights of proprietors. There was no possession of any description in the plaintiffs or their ancestors since the period of the engagement, and under those circumstances the Judicial Committee held that whether any proprietary right existed did not matter. The question was whether there was a dispossession or discontinuance, and clearly there was. The proprietary right would undoubtedly continue to exist until by the operation of the law of limitation it had been extinguished; but upon the question whether the law of limitation applied, it appeared to be clear that the case came within the terms of Art. 142. Therefore it was unnecessary to embark upon an inquiry whether there had been adverse possession.

The decision in *Dharani Kanta Lahiri* v. *Garbar Ali Khan*[1] was to the same effect. The suit was one for ejectment of persons who admittedly were at the date of suit in possession of the land. Their Lordships said:

"It lay upon the plaintiffs to prove not only a title as against the defendants to the possession, but to prove that the plaintiffs had been dispossessed or had discontinued to be in possession of the lands within twelve years immediately preceding the commencement of the suit. Their Lordships find that the plaintiffs failed to prove a title against the defendants to the possession of the lands in dispute or any part of them; they failed to prove that the lands, the possession of which they claimed, were not the lands covered by the sanad; and they failed to prove that they had been dispossessed or that their possession had been discontinued within twelve years before suit."

In view of these decisions of the Privy Council it cannot in my judgment be maintained that a person who proves title in a suit for ejectment has the right to the decree sought unless the defendant proves adverse possession for twelve years. The plaintiff is not entitled to succeed unless he shows in addition to title, that he has been in possession of the property within twelve years of the suit. The Privy Council has declared that to be the effect of the Art. 142 and that suits for ejectment come within that article. It may be a hardship that a person who proves a title to property should lose it to a trespasser unless he can also show that he has been in possession within twelve years of suit, but that is what the Limitation Act says and the Court must administer the law. And drafting his

1. (1912) 25 M.L.J. 95 (P.C.).

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plaint in a manner which disguises the real nature of the suit will not help a plaintiff. In *Gopal Chunder Chakerbutty* v. *Nilmony Mitter*[1], Garth, C. J., pointed out a mere allegation of a tenancy will not relieve a plaintiff from the burden of proving that he or those under whom he claims had been in possession within twelve years. If it did that device might always be resorted to for the purpose of evading the law of limitation.

I will now proceed to examine the decisions of this Court to which reference has been made in the course of the arguments. The first decision is that of Ayling and Venkatasubba Rao, JJ., in *Tanjore Palace Estate by its Receiver, Sundaram Aiyar* v. *Thiyagaraja Pillai*[2]. A mortgagee filed a suit to enforce a mortgage created in 1897 and obtained a decree for sale. At the auction sale held on the 5th September, 1906, the mortgagee purchased the property and obtained symbolical possession. A third party was in possession and the mortgagee did not institute a suit to recover possession until 4th September, 1918. The defendant who had been in possession from 22nd May, 1905, then claimed he had been in adverse possession for more than twelve years. The Court held that the possession of the defendant though adverse to the mortgagor did not affect the rights of the mortgagee or of the auction purchaser and consequently the suit was not time barred. This principle had been settled by a Full Bench of this Court (Wallis, C.J. and Sadasiva Aiyar and Srinivasa Aiyangar, JJ.) in *Vyapuri* v. *Sonamma Bai Ammani*[3], where it was held that the possession of a trespasser who has dispossessed a mortgagor, the mortgage being a simple one within the meaning of the Transfer of Property Act, is not adverse to the mortgagee. In the present case dispossession took place before the mortgage was created and therefore it differs materially from that decided by Ayling and Venkatasubba Rao, JJ. The learned Judges went on to express the opinion that Art. 142 does not apply

> "when upon the facts proved or admitted, dispossession cannot possibly have occurred before 12 years of the institution of the suit"

and to observe that:

> "The plaintiff is entitled to say that the allegation relating to his possession may be treated as superfluous and that he may be allowed to rest his case upon the footing that his suit is within 12 years of the accrual of his right."

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1. (1884) I.L.R. 10 Cal. 374. 2. (1922) 50 M.L.J. 183.
3. (1914) 29 M.L.J. 645: I.L.R. 39 Mad. 811 (F.B.).

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Madhavan Nair, J., discussed the applicability of Arts. 142 and 144 in *Periya Jeeyangarswami* v. *Mahomed Esoof Sahib*[1]. In that case a suit was brought by a dharmakarta of a devasthanam for possession of land which the devasthanam alleged had been leased to the defendants. The District Munsif who tried the suit found for the plaintiff, but his decision was reversed on appeal by the Subordinate Judge, who held that the alleged lease had not been proved and that Art. 142 applied. As the plaintiffs had failed to prove possession within twelve years of suit the Subordinate Judge allowed the appeal. On second appeal Madhavan Nair, J., held that the proper article to apply was Art. 144 and based his opinion on the judgments of the Privy Council in the *Secretary of State for India* v. *Chellikani Rama Rao*[2] and in *Kuthali Moothavar* v. *Peringati Kunharankutty*[3] and of that of the Allahabad High Court in *Jai Chand Bahadur* v. *Girwar Singh*[4].

In the *Secretary of State for India* v. *Chellikani Rama Rao*[2], the question was whether the Secretary of State in Council was entitled to incorporate into a reserved forest under the Madras Forest Act (V of 1882) certain islands which had been formed on the bed of the sea near the mouth of the river Godavari within three miles of the mainland. It was held that the islands belonged to the Crown and that the claimants had not proved adverse possession for a period sufficient to establish a right against the Crown. In the course of their judgment, their Lordships said:

"Nothing is better settled than that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say, 'I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions.' Such a singular doctrine can be well illustrated by the case of India, in which the right of the Crown to vast tracts of territory, including not only islands arising from the sea, but great space of jungle lands, necessarily not under the close supervision of Government officers, would disappear because there would be no evidence available to establish the state of possession for sixty years past. It would be contrary to all legal

1. (1924) 21 L.W. 398.
2. (1916) 31 M.L.J. 324: L.R. 43 I.A. 192: I.L.R. 39 Mad. 617 (P.C.).
3. (1921) 41 M.L.J. 650: L.R. 48 I.A. 395: I.L.R. 44 Mad. 883 (P.C.).
4. (1919) I.L.R. 41 All. 669.

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principles thus to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession."

In *Kuthali Moothavar* v. *Peringati Kunharankutty*[1], the Judicial Committee observed:

"Standing a title in '*A*' the alleged adverse possession of '*B*', must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. But the onus of establishing these things is upon the adverse possessor. Accordingly when the holder of title proves, as in their Lordships' view he does with some fulness prove in the present case, that he too has been exercising during the currency of his title various acts of possession, then the quality of these acts, even although they might have failed to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds."

I do not regard these pronouncements of the Privy Council as deciding the question of the effect of Art. 142. I regard them as laying down principles which have to be applied when the issue is confined merely to a plea of adverse possession in particular circumstances. As I have already pointed out the Privy Council had dealt with the application of Art. 142 in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi*[2], *Muhammad Amanulla Khan* v. *Badan Singh*[3] and *Dharani Kanta Lahiri* v. *Garbar Ali Khan*[4], which Madhavan Nair, J., did not consider.

The Allahabad High Court in *Jai Chand Bahadur* v. *Girdar Singh*[5], expressed the opinion that it was sufficient for the plaintiff in an ejectment suit to rest his case on title. There the plaintiff, who was a Zamindar, sued to eject the defendant from certain land which he alleged the defendant was in possession of as his licensee. The defendant denied the license and set up a claim of adverse possession. The claim of adverse possession failed and the Court held that the plaintiff was entitled to succeed on the title which he had proved as Zamindar. The question whether the license was ever granted or revoked was immaterial. This decision appears to be in direct conflict with the pronouncements of the Privy Council to which I referred at the outset.

The next decision of this Court is that of Phillips, J., in *Kuppuswami Mudaliar* v. *Chockkalinga Mudaliar*[6]. It was

1. (1921) 41 M.L.J. 650: L.R. 48 I.A. 395: I.L.R. 44 Mad. 883 (P.C.).
2. (1888) L.R. 16 I.A. 23: I.L.R. 16 Cal. 473 (P.C.).
3. (1889) L.R. 16 I.A. 148: I.L.R. 17 Cal. 137 (P.C.).
4. (1912) 25 M.L.J. 95 (P.C.).
5. (1919) I.L.R. 41 All. 669.
6. (1925) 49 M.L.J. 788.

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argued there that Art. 142 has no application to a suit for possession based on title but having considered the decisions in *Mohima Chunder Mozoomdar* v. *Mohesh Chunder Neoghi*[1], *Muhammad Amanulla Khan* v. *Badan Singh*[2] and *Dharani Kanta Lahiri* v. *Garbar Ali Khan*[3], Phillips, J., rejected this argument.

In *Ramanujachariar* v. *Sundarachariar*[4], Devadoss and Wallace, JJ., held that Art. 142 is applicable only to cases where the plaintiff alleges possession and dispossession in his plaint. They considered that notwithstanding that the plaintiff sets up a tenancy or license as the basis of the defendant's possession the article applicable is still Art. 144. The learned Judges did not however consider any of the authorities.

The latest decision of this Court is that of Venkatasubba Rao and Abdur Rahman, JJ., in *Alam Khan Sahib* v. *Karuppannaswami Nadan*[5]. In that case the plaintiff was a mutawalli of a Mohammadan trust. He sued for possession of immovable property and alleged that the defendants had been his tenants. It was held that the tenancy was not proved. The defendants did not appear at the trial, but the plaintiff's witnesses themselves stated that the property had never to their knowledge been in the possession of the plaintiff. It was held that the suit was governed by Art. 142 and not by Art. 144 and that it should be dismissed as the plaintiff had not proved his possession within the statutory period. The learned Judges, however, considered that on the facts of the case it was unnecessary to deal with the broad question whether in a suit in ejectment where the plaintiff's title is proved there rests any duty upon him of shifting the burden on the defendants to prove adverse possession under Art. 144.

I have said sufficient to indicate that in my opinion a plaintiff who is suing for possession of property in the occupation of another cannot rest his case on title alone. He must show that he has exercised rights of ownership by being in possession within twelve years of suit. It follows that in my opinion the observations which I have quoted from the judgment in *Tanjore*

1. (1888) L.R. 16 I.A. 23: I.L.R. 16 Cal. 473 (P.C.).
2. (1889) L.R. 16 I.A. 148: I.L.R. 17 Cal. 137 (P.C.).
3. (1912) 25 M.L.J. 95 (P.C.).
4. (1927) 25 L.W. 127.
5. (1938) 1 M.L.J. 113.

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In the present case the appellant and his predecessors in title have admittedly been out of possession since 1909 and this disposes of the appeal, but before I conclude it is necessary to deal with another argument advanced on behalf of the appellant. It is said that where the plaintiff is the purchaser at a Court auction held in execution of a mortgage decree his case does not fall within Art. 142. It is contended that that article only applies when the plaintiff is suing on his own title or on the title of the previous owner of the property and does apply when he is the representative of both the mortgagor and the mortgagee. In *Kunhiamma* v. *Kunhunni*[4] and *Maganlal* v. *Sankara Girdhar*[5], it was held that the purchaser at a Court auction in execution of a mortgage decree is the representative of the mortgagor and the mortgagee, having acquired both their interests in the property sold. But this cannot mean that he is outside Art. 142. When the owner mortgages his property part of his interest passes to the mortgagee, but when the property is sold at a Court auction the purchaser has vested in him the full title of the mortgagor as it existed before the mortgage and the law which applies to the mortgagor applies to him. S. 2 (8) of the Limitation Act defines the word 'plaintiff' as including any person from or through whom a plaintiff derives his right to sue. The appellant here derived his right to sue from the mortgagor. It is true that part of his interest in the property came to him from the mortgagor through the mortgagee but that does not warrant the assertion that different considerations apply when he is suing for the ejectment of a person in possession of the property which he has bought. In my judgment there is no substance in the last contention advanced on behalf of the appellant.

For these reasons I would dismiss the appeal with costs.

Mockett, J.

Mockett, J.—I agree.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I also agree.

K. S. *Appeal dismissed.*

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1. (1922) 50 M.L.J. 183.
2. (1924) 21 L.W. 398.
3. (1927) 25 L.W. 127.
4. (1892) I.L.R. 16 Mad. 140.
5. (1897) I.L.R. 22 Bom. 945.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Motam Kotayya *alias* Prakasam .. *Petitioner** (*Petitioner*)

v.

Singampalli Venkata Punnayya .. *Respondent* (*Respondent*).

Kotayya *v.* Venkata Punnayya.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 7, 8 and 9—"Decree"—Decree passed after the commencement of the Act—If liable to be scaled down.

On a promissory note executed on 29th October, 1929, a suit was brought on 3rd January, 1938, and the written statement filed on 30th January, 1938. Though Madras Act (IV of 1938) came into force when the suit was pending, the defendant failed to put forward a claim to have the debt scaled down in accordance with the Act and a decree was passed on 18th April, 1938, for the full amount claimed by the plaintiff. The defendant then applied for scaling down the debt on 29th April, 1938.

Held, reading the Act as a whole the word "decree" in Ss. 7, 8 and 9 must be taken to refer to decrees passed before the commencement of the Act and the decree passed after the commencement of the Act cannot be scaled down.

Kanakaraju v. *Achutaramanaraju*, (1940) 1 M.L.J. 600: 1940 M.W.N. 338, overruled.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif of Tenali dated 9th July, 1938 and made in C. M. P. No. 785 of 1938 in S. C. S. No. 4 of 1938.

A. Lakshmayya for Petitioner.

M. Subramanya Sarma for Respondent.

The Court delivered the following

Wadsworth, J.

JUDGMENTS. *Wadsworth, J.*—I agree with the conclusion and reasoning of the judgment which my learned brother is about to deliver. I only wish to add that after hearing a fuller argument and having the benefit of discussion with my learned brother, I am of opinion that my decision in *Kanakaraju* v. *Achutaramanaraju*[1], was erroneous.

Patanjali Sastri, J.

Patanjali Sastri, J.—The question that falls to be decided in this Revision Petition is whether a debt for the repayment of which a decree has been passed *after* the commencement of the Madras Agriculturists' Relief Act, 1938, is liable to be scaled down in accordance with S. 8 of the Act when the debt is one incurred before the 1st of October, 1932. The facts are simple

* C. R. P. No. 1317 of 1938. 26th April, 1940.

1. (1940) 1 M.L.J. 600: 1940 M.W.N. 338.

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and not in dispute. The respondent sued the petitioner in S. C. S. No. 4 of 1938 on the file of the Court below for recovery of the principal and interest due on a promissory note executed on 29th October, 1929. The suit was brought on 3rd January, 1938, and the petitioner filed his written statement on 30th January, 1938. Though the Act came into force when the suit was pending, the petitioner failed to put forward a claim to have the debt scaled down in accordance with the Act, and a decree was passed on 18th April, 1938, for the full amount claimed by the respondent. Soon after the passing of the decree, however, the petitioner applied to the Court on 29th April, 1938, to scale down the debt and the application was dismissed on the ground that there is no provision in the Act for scaling down a debt in respect of which a decree has been passed after the Act came into force. The petitioner has preferred this Revision Petition and contests the correctness of that view.

It is argued that the *non obstante* clause in S. 7 and the words "whether the debt or other obligation has ripened into a decree or not" in S. 8 indicate that all debts incurred before the commencement of the Act should be scaled down irrespective of any decrees passed in respect of them, whether such decrees were passed before or after the commencement of the Act. These provisions are not free from ambiguity and may, at first blush, appear to lend some countenance to the contention of the petitioner. But on a closer examination of these sections in the light of other provisions of the Act and the scheme revealed thereby, it is fairly clear that the reference to decrees is intended only to extend the benefit of scaling down to debts which had ripened into decrees before the Act came into force. The provisions appear to envisage the state of things on the 1st October, 1937, and the reference to contracts obviously relates to contracts made prior to that date. It is therefore reasonable to assume that the word 'decree' which occurs in the same context is also used subject to the same qualification. It is significant that the machinery provided in Ss. 19 and 20 for 'amendment' of decrees by scaling them down in accordance with the Act, and for stay of execution pending proceedings for such amendment, are made applicable only to decrees passed *before* the commencement of the Act and there are no similar provisions in respect of decrees passed *after* the Act came into

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force. Similarly, S. 18 provides for 'amendment' of decrees passed *before* the Act in suits instituted after 1st October, 1937, by a proportionate reduction of costs also. These provisions which, in the case of decrees passed before the Act, expressly supersede the finality which attaches to decrees under the general law seem to indicate that, in the contemplation of the Legislature, the relief which the Act provides for agriculturists should be claimed and obtained *before* decree, where such decree happens to be passed *after* the commencement of the Act, and that the principle of finality should operate unimpaired in such cases. Indeed, if the Legislature intended to exclude the operation of this principle in the case of all decrees against agriculturists whether passed before or after the commencement of the Act, the provisions of S. 19 and the latter part of S. 18, sub-S. (1) relating to 'amendment' of decrees passed *before* the commencement of the Act would be meaningless and otiose.

Nor is there any apparent reason to suppose that the Legislature intended to introduce into the Act such a startling departure from the basic principle of all judicial proceedings, namely, that all available pleas in answer to a claim should be made the subject of enquiry before the Court passes the decree. It is one thing to provide relief to agriculturists by way of scaling down their debts even when such debts had already ripened into decrees before such relief was thought of, but it is a different thing to declare that even if they failed to claim, when they could have claimed, such relief before a decree was passed, they should nevertheless be entitled to claim it at any time afterwards. It may be laudable to rehabilitate agriculturists by a compulsory scaling down of their debts but it could be no part of this object to condone, and thereby encourage, their laches in the conduct of legal proceedings. On the other hand, having regard to the ex-proprietary nature of the provisions, Courts should watch with a jealous eye attempts to have the scope of the Act extended, under colour of interpretation, beyond what its terms expressly warrant. I am therefore of opinion, reading the Act as a whole, that the word 'decree' in Ss. 7, 8 and 9 must be taken to refer to decrees passed before the commencement of the Act.

The petitioner's learned Counsel placed reliance upon the decision of my learned brother Wadsworth, J., in *Kanakaraju*

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v. *Achutaramanaraju*[1], as supporting his contention. The judgment is very brief and the question does not appear to have been fully argued and considered and my learned brother is now inclined, in the light of the fuller argument before us, to agree with the view expressed above. In *Somasundaram Chettiar* v. *Peria Karuppan Chettiar*[2], the suit was dismissed by the trial Court as barred by limitation but was decreed by this Court on appeal. An application for scaling down the debt was made to this Court before the decree was drafted and issued, along with another application to stop the drafting of the decree pending the disposal of the former application. This Court held that in those circumstances the judgment-debtor was entitled to have the debt scaled down. The broader question arising for decision in the present case was raised but the learned Judges observed that it was not necessary to deal with it on the facts before them. This decision therefore does not assist the petitioner. A decision of the Allahabad High Court in *Abdul Noor* v. *Brijmohan Saran*[3] was also brought to our notice but it relates to the construction of differently worded provisions in the United Provinces Agriculturists' Relief Act and has no bearing on the interpretation of the provisions of Madras Act IV of 1938.

This Revision Petition fails and is dismissed with costs.

K. S. *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—VISCOUNT MAUGHAM, LORD PORTER AND SIR GEORGE RANKIN.

Raja Bhagwan Baksh Singh .. *Appellant**

v.

The Secretary of State .. *Respondent.*

P.C.

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United Provinces Court of Wards Act (IV of 1912), Ss. 8, 10 and 11—Declaration by Local Government that proprietor of estate was incapable of managing his own property—Declaration not challengeable in Civil Courts—"Gross annual profits"—Meaning of for purposes of S. 8—Land revenue to be deducted in computing gross profits.

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1. (1940) 1 M.L.J. 600: 1940 M.W.N. 338.
2. (1940) M.W.N. 412.
3. I.L.R. (1938) All. 305.

* P. C. Appeal No. 6 of 1939. 4th March, 1940.
Allahabad Appeal No. 31 of 1937.

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A proprietor of an estate was declared by the Governor in Council acting under powers conferred by the United Provinces Court of Wards Act (IV of 1912) to be incapable of managing his property. In a suit for a declaration that such declaration was *ultra vires* and illegal,

Held, subject to the necessary limitation that good faith is essential to the validity of any declaration, the effect of S 11 is that no resort is left to the Court to any person desiring to challenge a declaration made under S. 8.

Held, further, that in arriving at the "gross annual profit" of a property for the purposes of S. 8 the amount of land revenue payable must be deducted, but no allowance must be made for any expenses of managing the estate.

Appeal from a decision of the High Court, Allahabad, dated 31st March, 1937 (Harries and Rachhpal Singh, JJ.), affirming a decree of the Subordinate Judge of Allahabad dated 14th May, 1934.

The facts are fully set out in the judgment.

J. D. Casswell, K.C., *R. K. Handoo* and *J. L. Roy* for Appellant.—We submit in the first place that this action is not barred by S. 11 of the Act. The words "gross annual profits" mean what they say and their natural and ordinary meaning is the gross annual rents accruing to an owner of property without any deductions whatsoever, whether in respect of land revenue or of expenses of managing the estate. If the land revenue chargeable on the estate is not deducted, the interest due on all the appellant's debts is less than one-third of his gross income. By erroneously, as we submit, deducting the land revenue, the authorities have made the necessary calculation under proviso (*a*) of S. 8 on a false basis. If they had not deducted land revenue they would have been faced with a figure which by the clear terms of the proviso left them without power to make the declaration now challenged.

The word "gross" has but one meaning in the business world and it is difficult to reconcile its use in the section with the contention of the respondent that a large item of annual expenditure is to be deducted in determining the "gross annual profits" of an estate.

In S. 141 of the United Provinces Land Revenue Act (III of 1901) land revenue is made payable out of the "rents, profits or produce" of property. Profits, therefore, are there regarded as *ejusdem generis* with rents or produce. The word 'profits' in the Act of 1912 ought therefore to be interpreted accordingly as similar to rent or produce; if the land revenue is stated in the one Act to be payable out of the profits it would seem to follow that that same word "profits" in the Act of 1912 must mean an income from property out of which land revenue has not yet been paid.

is not barred, it is submitted that no declaration by the Local Government founded on a mistake of law (as to the meaning of 'gross profits') can be made in accordance with the conditions precedent for such a declaration laid down in S. 8 (1), and if the Local Government are mistaken in their interpretation of 'gross profits' they have failed to establish the prerequisite set up by proviso (*a*) to S. 8 (1). The foundation for the jurisdiction to make a valid declaration is therefore lacking.

J. M. Tucker, K.C. and *W. Wallach* for Respondent.—It is submitted that the whole scheme of the Court of Wards Act shows that by "gross annual profits" is meant the income of the property after deduction of land revenue. The realities of the matter demand such an interpretation. The Act is concerned with the resources which an estate proprietor has with which to meet his obligations. It would not be likely to take those resources at a figure which must be necessarily diminished by the land revenue. Land revenue comes first and it is only when that has been paid that the remaining resources of the estate can be said to be available for interests on debts.

Even, however, if the Local Government were wrong in law in their interpretation of the Act, that would not mean that the essential prerequisite to the exercise of their jurisdiction to make a declaration was lacking. The prerequisite is, that the Local Government shall be satisfied that the conditions laid down by clauses (*a*) and (*b*) of the proviso to S. 8 (1) are fulfilled, not that they shall be fulfilled in fact. That prerequisite must necessarily have existed for the declaration complained of to have been made. Therefore the action is barred.

Cur. adv. vult.

4th March, 1940. Their Lordships' judgment was delivered by

Lord Porter.

LORD PORTER.—The appellant is the proprietor of the Amethi estate in the Sultanpur District of Oudh in the United Provinces of India. On the 7th March, 1930, he was declared by the Governor in Council of the United Provinces who claimed to be acting under the powers conferred upon him by the United Provinces Act, No. IV of 1912 (commonly called the United Provinces Court of Wards Act, 1912), to be incapable of managing his own property.

The appellant maintains that the declaration was *ultra vires* and on the 19th March, 1932, instituted a suit in the Court of the Subordinate Judge at Allahabad claiming a decla-

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ration that the declaration above mentioned was wholly illegal and of no effect against the plaintiff. His suit was dismissed on the 14th May, 1934, and this dismissal was confirmed by the High Court of Judicature at Allahabad on the 31st March, 1937. From this decision the appellant has appealed to His Majesty in Council.

The Governor's action was taken under Ss. 8 and 9 of the Court of Wards Act which are as follows:—

"8.—(1) Proprietors shall be deemed to be disqualified to manage their own property when they are—

(a) minors;

(b) females declared by the Local Government to be incapable of managing their own property;

(c) persons adjudged by a competent civil court to be of unsound mind and incapable of managing their own property;

(d) persons declared by the Local Government to be incapable of managing or unfitted to manage their own property—

(i) owing to any physical or mental defect or infirmity unfitting them for the management of their own property;

(ii) owing to their having been convicted of a non-bailable offence and being unfitted by vicious habits or bad character for the management of their own property;

(iii) owing to their having entered upon a course of extravagance;

(iv) owing to their failure without sufficient reason to discharge the debts and liabilities due by them:

"Provided that no such declaration shall be made under sub-clause (iii) or (iv) unless the Local Government is satisfied—

(a) that the aggregate annual interest payable at the contractual rate on the debts and liability due by the proprietor exceeds one-third of the gross annual profits of the property; and

(b) that such extravagance or such failure to discharge the said debts and liabilities is likely to lead to the dissipation of the property.

"(2) No declaration under clause (d) of sub-section (1) shall be made until the proprietor has been furnished with a detailed statement of the grounds on which it is proposed to disqualify him and has had an opportunity of showing cause why such declaration should not be made.

"9.—(1) The Local Government may direct the Collector or such other person as it may appoint, to make an inquiry into the circumstances of any proprietor and the extent of his indebtedness. . . ."

So far as they are relevant to this appeal the facts are as follows:—

On the 13th July, 1929, an enquiry under section 9 (1) of the Act of 1912 was instituted by the Local Government into the debts and liabilities of the appellant. After the enquiry the appellant received a letter from the Commissioner of Fyzabad, dated the 17th September, 1929, enclosing a

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statement of the loans contracted by the appellant, and a statement of the gross annual income, gross annual profits, and land revenue derived from his property. By the letter and statements the appellant was informed that his debts totalled Rs. 14,45,160-7-9 on which the annual interest at the contractual rates amounted to Rs. 1,22,110-9-0; that the gross annual income from his estates amounted to Rs. 5,71,626-10-9; that the amount payable in respect of land revenue, etc., was Rs. 2,65,117-14-4; that the gross annual profits from his estates (arrived at by deducting the amount payable as land revenue, etc., from the gross annual income) amounted to Rs. 3,06,508-12-5; and that therefore the annual interest payable at the contractual rates exceeded one-third of the gross annual profits. Further the letter charged the appellant with failure, without sufficient cause, to discharge his debts and liabilities and said that such failure was likely to lead to the dissipation of the property. Finally the appellant was informed that, under S. 8 (1) (*d*) (iii), (iv), provisoes (*a*), (*b*) of the 1912 Act, he was liable to be declared by the Local Government to be incapable of managing his property, but that, under S. 8 (2) of that Act, he could show cause against such a declaration being made.

As a result of this communication the appellant attempted to show cause why no declaration should be made but was unsuccessful and, as stated above, the declaration was made.

From the statement sent to him it is apparent that in calculating whether the annual interest at the contractual rates exceeded one-third of the annual profits of his property, the Local Government in order to ascertain the gross annual profits of the estate deducted the land revenue from the gross annual income. If this deduction was rightly made it was evident that the annual interest on the appellant's debts exceeded one-third of the gross annual profits—if on the other hand the land revenue should not have been deducted, the annual interest on the debts is less than one-third of the gross annual profits.

Though some question of the right of the Local Government to deduct certain cesses and annual charitable contributions was also raised, it is conceded that they were not of sufficient amount to have any bearing on the question at issue, and in argument consideration of them was put aside. The sole question considered was whether land revenue was or was not

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rightly deducted before ascertaining what sum was to be regarded as the gross annual profits.

Altogether apart however from the question whether the construction which he put upon those words was accurate or inaccurate the respondent maintained that the appellant was prohibited from challenging the action taken by reason of the provisions of S. 11 of the Court of Wards Act. That section is as follows:—

"No declaration made by the Local Government under S. 8 or by the Court of Wards under S. 10 shall be questioned in any Civil Court."

A number of other questions had been raised and argued before the Courts in India but before their Lordships the respondents rested their case solely upon the two points mentioned.

(1) It may be, as stated by Jessel, M.R. and repeated by Lord Bramwell in *Last* v. *London Assurance Corporation*[1], that of itself the phrase "gross annual profits" has no definite meaning. It must take its colour from its surroundings. In the present case therefore it is necessary to consider those surroundings by an examination of the scheme of the Court of Wards Act, the way in which land tax is regarded in India and any provisions of the Land Revenue Act which bear upon the matter, in addition to the exact wording of S. 8 itself.

The object of disqualification under S. 8 is no doubt threefold—it will protect persons incapable of managing their own affairs—it will prevent the splitting up or as the Act itself says "the dissipation of the property" and in either event it will enable land revenue to be more easily and more certainly collected.

That the collection of land revenue is an important consideration is apparent both from the objects aimed at and from the fact that by S. 4 of the Act the Board of Revenue is made the Court of Wards for the United Provinces. Indeed in earlier schemes in respect of the disqualification of proprietors, the necessary provisions were contained in the Land Revenue Acts themselves, and even in the present Act the definition of proprietor is only reached by reference to "Mahal" and its meaning in the Land Revenue Act from time to time in force.

Moreover though minors, certain females and lunatics—to take three of the classes mentioned in S. 8 of the Act—may

1. (1885) 10 App. Cas. 438 at 456.

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require protection whether their property be in land or personalty, it is to be observed that under that section only proprietors, that is, those beneficially interested in a mahal, are dealt with, and mahal primarily means a local area held under a separate engagement for the payment of land revenue.

No doubt when once a proprietor is made a ward, all his property is, under S. 16 (1) of the Act, put under the superintendence of the Court of Wards, but the original assumption of wardship is only possible in the case of proprietors or landowners paying Land Revenue.

In considering the way in which land revenue is regarded in India no comparison with tenures in England is of much (if any) assistance. Its universality, its quantum, and the tendency of the Indian outlook to regard the Government as a sharer in all the produce of the land are matters of importance.

By S. 58 of the Land Revenue (United Provinces) Act of 1901 it is provided

"58.—(1) All land, to whatever purpose applied and wherever situated is liable to the payment of revenue to the Government, except such land as has been wholly exempted by special grant of, or contract with, the Government or by the provisions of any law for the time being in force.

"(2) Revenue may be assessed on land, notwithstanding that that revenue, by reason of its having been assigned, released, compounded for or redeemed, is not payable to the Government.

"(3) No length of occupancy of any land, nor any grant of land made by the proprietor, shall release such land from the liability to pay revenue."

But not only is the incidence of the revenue universal, it is also generally fixed at a sum varying from 40 to 45 per cent. of the total income. If in addition to this percentage the proprietor has encumbered his estate to the extent of one-third of the income, between 70 and 80 per cent. of the total receipts would be removed from his control and from 20 to 30 per cent. only remain—a small margin from which to ensure the payment of revenue and the protection of the mahal against foreclosure or sale under any mortgages created by the proprietor.

In their Lordships' view these considerations inevitably lead to the conclusion that Land Revenue must be deducted in calculating the gross annual profit of a property.

Even apart however from these considerations the wording of S. 8 of the Court of Wards Act itself would lead their Lordships to the same conclusion.

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Under proviso (*a*) to sub-section (iv) of S. 8 the contrast is between the aggregate annual interest payable by the proprietor and the gross annual profits—a phraseology which would naturally point to a contrast between what the proprietor received and the interest which he owed, and would so point none the less though it is the profits of the property and not of the proprietor which have to be considered. Indeed to substitute the former consideration would bring into account a matter which is obviously extraneous to the considerations with which the Legislature was concerned, namely, the profit derived by the proprietor from his personal estate. Moreover the words are "annual profits"—not "annual rent" or "income," and seem to refer to some profits half way between the total income of the estate and the net profits remaining after the management expenses have been paid.

If the total produce or income of the estate had been intended it would have been easy enough to say so—indeed in S. 141 of the Land Revenue Act of 1901 land revenue is said to be a first charge on the rents, profits or produce of every mahal, as opposed to the phrase "gross annual profits" in S. 8 of the Court of Wards Act.

Moreover if land revenue is not to be deducted before the gross annual profits are arrived at in calculating the ratio of charges to profit land revenue would appear on neither side of the account, neither as a charge nor as a deduction from profits.

Therefore even accepting the view presented by the appellant that "gross profits" has of itself no definite meaning, their Lordships, bearing in mind the circumstances above mentioned, are of opinion that in the Court of Wards Act land revenue must be deducted but no allowance for any expenses of estate management must be made in arriving at the gross annual profit of the property.

This conclusion alone would involve the dismissal of the appeal, but the preliminary question whether any action in the Courts was possible having regard to the provisions of S. 11 of the Act was fully argued and is a matter of importance on which their Lordships think their decision should also be given.

Ss. 10, 11, 12 and 13 deal with the limitations of the jurisdiction of the Civil Court and are as follows:—

"10. A proprietor may apply to the Collector to have his property placed under the superintendence of the Court of Wards and the Court of

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Wards may, on being satisfied that it is expedient to undertake the management of such property, make a declaration to this effect.

"11. No declaration made by the Local Government under S. 8 or by the Court of Wards under S. 10 shall be questioned in any Civil Court.

"12.—(1) The Court of Wards shall assume the superintendence of the property of any proprietor disqualified under clause (*b*) or (*d*) of sub-S. (1) of S. 8 or in regard to whose property a declaration has been made under S. 10.

"(2) The Court of Wards may in its discretion assume or refrain from assuming the superintendence of—

(*a*) the property or person and property of any proprietor disqualified under clause (*a*) or (*c*) of sub-S. 1 of S. 8;

(*b*) the person of any proprietor disqualified under clause (*b*) or (*d*) of sub-S. 1 of S. 8.

"(3) The Court of Wards may assume the superintendence of the person of any minor who has an immediate or reversionary interest in the property—

(*a*) of any proprietor disqualified under S. 8; or

(*b*) of any proprietor in regard to whose property a declaration has been made under S. 10.

"13. If the right of the Court of Wards to assume or retain the superintendence of the person or property of any disqualified proprietor is disputed by such proprietor or, if he be a minor or of unsound mind, by some person on his behalf, the case shall be reported to the Local Government, whose orders thereon shall be final and shall not be questioned in any Civil Court."

It will be observed that S. 11 is only concerned with action taken under sub-S. (1) (*b*) or (*d*) of S. 8, and under S. 10, that is, those cases in which a declaration is made, leaving the other cases in which superintendence of the property is assumed (or possibly all cases after it has been assumed or in which it is retained) to be dealt with by S. 13.

In terms S. 11 appears to prohibit the bringing of an action disputing the validity of a declaration made by the Local Government under those sub-clauses of S. 8. Some limitation must no doubt be put upon the generality of the provision in as much as good faith at any rate is required. The appellant, however, goes further and says that the Court of Wards is without jurisdiction and can be declared to be without jurisdiction by the Civil Court in all cases in which the preliminary requirements of S. 8 have not been fulfilled. So far as sub-Ss. (1) (*b*) and (*d*) are concerned the primary requirement contained in those sub-clauses themselves is merely that the Governor in Council should declare the proprietors incapable or unfitted to manage their own property.

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Under (*b*) it seems impossible to put any limitation on that jurisdiction. Under (*d*) (*i*) (*ii*) (*iii*) and (*iv*) the matter again seems to be one for the discretionary judgment of the Local Government. It is conceivable that under (*d*) (*ii*) the jurisdiction only exists provided the proprietor has been in fact convicted of a non-bailable offence and that if this fact were non-existent the Local Government would be acting ***ultra vires*** in making a declaration, but it is difficult to imagine that in sub-Ss. (*i*) (*iii*) and (*iv*) and indeed in that part of sub-S. (*ii*) which concerns unfitness by reason of vicious habits or bad character, the Local Government should have an absolute discretion whereas in the final part of sub-S. (*ii*) its jurisdiction should be limited.

In argument before their Lordships however the allegation that the action of the Local Government was ***ultra vires*** was founded not upon the wording of the sub-clauses but upon the proviso to sub-clauses (*iii*) and (*iv*) and it was said that if the Governor in Council showed by his decision that he interpreted the phrase "gross annual profits" wrongly in law then he could be declared to have assumed an unjustified jurisdiction.

But in such an argument the same difficulty arises as is to be found on a consideration of the sub-clauses themselves. No logical distinction between fact and law was propounded to their Lordships and indeed it is difficult to see why a wrong calculation under proviso (*a*) should be unchallengeable, whereas a wrong view as to the meaning of "gross annual profits" should be open to question. Nor indeed is it easy to draw a distinction between fact or law on the one part and opinion on the other since proviso (*b*) by which the Local Government are equally governed is a matter of opinion alone.

Apart from a close analysis of S. 8 itself there are other reasons for thinking the decision of the Local Government to be unfettered. Under S. 8 (2) careful provision is made for a hearing of the proprietor's case before a decision is made, and in the case of sub-clauses (*a*) and (*c*) S. 13 expressly provides for the method which shall be followed if the right of the Court of Wards is challenged and the decision so attained is declared to be final.

Moreover the proviso itself expressly requires the satisfaction of the Local Government, not that of a Court and it is, in their Lordships' view, unlikely that a decision solemnly come to

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by the Governor in Council after full enquiry and when declared by the Act to be final, should thereafter be subject to review by the local Courts of the Province.

In coming to this conclusion their Lordships are in no way overlooking the importance of jealously scrutinizing the jurisdiction conferred on executive bodies or of giving no wider interpretation than is necessary to any limitation of the powers of the Court. But however carefully the liberty of the subject has to be guarded not only is there sound sense in making the decision of the Local Government final but it has also to be remembered that a right construction of the Act can only be attained if its whole scope and object together with an analysis of its wording and the circumstances in which it is enacted are taken into consideration.

From an examination of the Act alone their Lordships would have reached the conclusion that owing to the provisions of Ss. 11 and 13 of the Act no resort to the Courts was left in this case under S. 8, and the other circumstances to which their Lordships have referred so far from weakening have strengthened that conclusion.

Having reached a decision opposed to both the contentions put forward on behalf of the appellant they will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for Appellant: *Douglas Grant and Dold.*

Solicitors for Respondent: *Solicitor, India Office.*

R. C. C. *Appeal dismissed.*

K. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Oonna Mudali and others .. *Petitioners* (Accused 1 to 4).*

Oonna Mudali, *In re.*

Criminal trial—Case triable by Second Class Magistrate—Counter case to Preliminary Register case—Procedure.

Where the offences disclosed are triable by a Second Class Magistrate and it is not stated that he cannot deal with them, the fact that the case is counter to a Preliminary Register case which has to be committed to the Sessions is not a sufficient reason for treating it also as a Preliminary Register case.

In re *Mounaguruswami Naicker,* (1932) 64 M.L.J. 150: I.L.R. 56 Mad. 159 (F.B.), relied on.

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* Crl. R. C. No. 198 of 1939. 26th July, 1939.
(Crl. R. P. No. 182 of 1939).

Oonna Mudali, In re.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Second Class Magistrate of Polur dated 2nd February, 1939 and made in P.R. No. 5 of 1938.

A. S. Sivakaminathan for Petitioners.

K. Venkataraghavachari for *The Public Prosecutor* for the Crown.

The Court made the following

ORDER.—The offences disclosed are triable by a Second Class Magistrate and it is not stated that he cannot adequately deal with them. That the case is counter to Preliminary Register Case No. 4 of 1938 which has to be committed to the Sessions is not a sufficient reason for treating it also as a Preliminary Register case. *Vide* In re *Mounaguruswami Naicker*[1], and the order of the Sub-Magistrate converting the case into a Preliminary Register case cannot be sustained. It is therefore set aside and the case will be dealt with as a Calendar Case.

B. V. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

K. Munisami Chetti (died) and others ... *Appellants** [*1st Counter-Petitioner (died) and his L. Rs.*]

v.

Chenchu Naidu and another .. *Respondents* (*Petitioner and 4th Counter-Petitioner*).

Munisami Chetti v. Chenchu Naidu.

Co-operative Societies Act (II of 1912), S. 51—Rules under, r. 15—Award under—Execution as decree of Court—Assignee whether can apply.

An award under r. 15 of the Rules under S. 51 of the Co-operative Societies Act may, after it has been filed in the Civil Court for enforcement under r. 15 (7) (c) be executed as if it were a decree of Court on the application of an assignee from the person in whose favour the award was made.

Appeal against the order of the District Court of Chingleput dated 31st March, 1936 and made in A. S. No. 205 of 1935 preferred against the order of the Court of the District Munsif

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1. (1932) 64 M.L.J. 150: I.L.R. 56 Mad. 159 (F.B.).

* A. A. A. O. No. 108 of 1936. 31st July, 1939.

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of Tiruvallur dated 6th August, 1935 and made in E. A. No. 269 of 1935 in E. P. No. 371 of 1935 in Pondavakkam Co-operative Society Claim No. 2748 of 1930-31.

K. Rajah Aiyar for Appellants.

T. M. Krishnaswami Aiyar and *M. Natesan* for Respondents.

The Court delivered the following

JUDGMENT.—The only question in this appeal is whether an award under r. 15 of the rules under S. 51 of the Co-operative Societies Act may, after it has been filed in the Civil Court for enforcement under r. 15 (7) (*c*) be executed on the application of an assignee from the person in whose favour the award was made. No authorities have been cited. The rule itself says that the "Court shall enforce the award as if it was a decree of the Court". If it were a decree, an assignee could under O. 21, r. 16 of the Code of Civil Procedure apply for execution. I see no reason why this provision should not apply to a co-operative award which is enforceable as if it were a decree. The appeal is dismissed with costs.

B. V. V. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

V. Nadimuthu Pillai .. *Respondent (Assessee).*

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Commissioner of Income-tax, Madras v. Nadimuthu Pillai.

Indian Income-tax Act (XI of 1922), S. 4 (2)—Income from foreign country—Assessee receiving remittance in British India—Whether amount assessable as income—Amount representing loan or overdraft in the foreign country—Inference to be made in the circumstances.

Where an amount mentioned, represented a sum of money remitted to the assessee in British India from Saigon in French Cochin-China on a date which fell within the year of account, and the income-tax authorities included the remittance in the assessable income of the assessee on the ground that it

* O. P. No. 220 of 1937. 23rd February, 1940.

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represented foreign profits received in British India within the meaning of S. 4 (2) of the Indian Income-tax Act, 1922, but the questions for decision were, whether the objection of the assessee that the remittance was not of income liable to be taxed under the section but came out of capital, being the proceeds of a loan borrowed in Saigon was correct, and therefore whether the amount was to be excluded in the calculation of the assessable income of the assessee,

Held, that a person who has income accruing to him in a foreign country is at perfect liberty to keep it there, or to spend or utilise it in that or any other country in any way he thinks fit. His liability to tax arises not because he makes the profits, but because he brings or receives them here. It is not necessary that he should receive those profits in the exact form in which they were made, but he must receive them here substantially as profits. If the remittance is traceable, and is traced to the assessee's foreign profits there would be ground for holding that the provisions of the Act are attracted, though even here it is necessary to exercise caution so as to avoid the error pointed out by the Privy Council in *Income-tax Commissioner, Bombay* v. *Ahmedabad Advance Mills, Ltd.*, (1940) 1 M.L.J. 137: L.R. 67 I.A. 115 (P.C.). On the other hand, it is equally clear that the mere existence of an overdraft cannot save foreign income from liability to taxation, as money paid out of the overdraft and remitted to this country is not necessarily the money of the lender, and may be that of the recipient. The question in each case is, what is the correct inference to be drawn and the Court is entitled to get behind appearances in order to get at the truth.

(1935) 19 Tax Cases 683, followed.

Case-law reviewed.

Case stated by the Commissioner of Income-tax, Madras, under S. 66 (2) of the Indian Income-tax Act is as follows:—

2. The petitioner derives income from property, cloth trade, money-lending and other sources within the jurisdiction of the Income-tax Officer, Tanjore Circle. He also owns certain house property in Saigon outside British India.

3. For the year 1936-37 he was assessed on a total income of Rs. 19,947 which included a sum of Rs. 10,000 received during the previous year (1935-36) from Saigon. The Income-tax Officer held this to be a remittance of income from Saigon in the following circumstances.

4. As stated already the petitioner owns a number of houses in Saigon from which he derives rental income. He also incurs a large expenditure there in respect of these houses by way of house and water taxes, repairs, etc. Between the 1st April, 1935 and 30th November, 1935, his collections from rent amounted to $18,906 so that by the 1st December, 1935, his net income of the year 1935-36 from the Saigon properties had amounted to $10,184. On the 7th December, 1935, he remitted $5,719 (equivalent of Rs. 10,000) to British India and the Income-tax Officer assessed this as a remittance of income. The petitioner contended before the Income-tax Officer that this was not taxable. His reasons

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were (1) that he had no income at Saigon available for remittance and (2) that the remittance was made out of amounts borrowed from the Banque Franco-Chinoise at Saigon. The contention that there was no income available at Saigon was found by the Income-tax Officer to be untenable on the evidence of the accounts. The other contention tracing the origin of the remittance to a loan taken from the Bank was also examined with reference to the accounts. It was found that the petitioner had opened a current account with the said Bank on 22nd June, 1933 and that on 24th June, 1933, he secured an overdraft of a sum of 15,000 from the Bank which he utilised for the following objects:—

$8,000 for remittance to headquarters for expenses in connection with a marriage.

$3,000 for payment of fees to a notary for settling a partition dispute between the petitioner and his deceased brother's legal representative.

$3,700 for repairs to the houses and payment of taxes. From the 24th June, 1933, all the rents collected were being paid into the Bank and whenever money was required for meeting expenses such as cost of repairs, taxes, cost of litigation, commission for collection of rent and re-payment of prior debts, sums were withdrawn from the Bank. The amounts withdrawn from the Bank and paid into it during the years 1933-34, 1934-35 and 1935-36 (up to 30th November, 1935) were as follows:—

	Withdrawals.	Payments.
1933-34 ..	$52,637	$27,300
1934-35 ..	$40,067	$45,255
1935-36 (1—4—35 to 30—11—35)	$15,165	$23,150

On 30th November, 1935, the net debit balance against the petitioner in the Bank account was $12,165. On 7th December, 1935, a sum of $5,719 (Rs. 10,000) was withdrawn from the Bank and remitted to British India. It is with reference to these facts that the petitioner contended that the amount remitted was a loan taken from the Bank. The Income-tax Officer overruled the contention and held that it was a remittance of income. The Assistant Commissioner upheld the Income-tax Officer's finding. Extracts from the orders of the Income-tax Officer and the Assistant Commissioner are appended, marked Exhibits A and B respectively. From a translation of the contract for opening of credit in current account (copy appended marked Exhibit C) now produced before the Income-tax authorities for the first time it is found that the petitioner was permitted to start a current account with the Bank and to overdraw in that account provided that at no time should the debit balance against the petitioner exceed $50,000. No copy

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or translation of the mortgage guarantee deed referred to in Article III of this contract has been produced.

5. The petitioner now requires me to refer to the High Court the following alleged question of law:—

"Whether on the facts set out above the sum of $5,719 or Rs. 10,000 could be deemed to be a receipt of income assessable under S. 4 (2) or whether there is any evidence for the conclusion that the sum of Rs. 10,000 sent on 7th December, 1935, was not borrowed money but was remittance of profits."

A copy of the application for reference filed by the petitioner is appended, marked Exhibit D. I have reframed the question as below, and refer it for the decision of their Lordships:—

"Whether on the facts of this case the sum of Rs. 10,000 was properly assessed under S. 4 (2) as a receipt of foreign income in British India."

6. My opinion on the question is as follows:—

There is no doubt that the petitioner's income in Saigon on the date of the remittance was in excess of the amount remitted to British India. This income was deposited in the Bank, and it was from that deposit that the sum of Rs. 10,000 was withdrawn and remitted to British India. The argument on which the petitioner bases his claim is that the existence of an overdraft in his Bank into which his rental receipts had been deposited and from which the remittance has been made precludes the possiblity of any income being available for remittance. This argument is untenable as has been held in the case of *Fellowes Gordon* v. *Commissioners of Inland Revenue*[1], the facts of which are almost parallel to those of the petitioner's case.

The following observations of the Lord President at page 690 are in point:—

"A man may have an income in Ceylon and may receive remittances of that income in this country through an account in which he is debtor during the whole period in which the remittances are made. There is no difference between income arising from Ceylon and income arising from this country in that respect. A man may have an income and still be in debt, and the amount of his income may be remitted to him through the hands of his creditor."

In the light of these remarks, it is perfectly legitimate to hold that the amount received from Saigon was the petitioner's income which was available for remittance. I submit that the question should be answered in the affirmative.

K. V. Sesha Aiyangar for Petitioner.

T. R. Venkatarama Sastriar and *M. Subbaraya Aiyar* for Respondent.

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1. (1935) 19 Tax. Cases 683.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—The assessee derives income from immovable property, trade in cloth, money-lending and other sources existing within the jurisdiction of the Income-tax Officer, Tanjore Circle. He is also the owner of considerable house property in Saigon in Indo China. For some years he has kept an account with the Saigon branch of the Banque Franco-Chinoise and has the right to overdraw it to the limit of $50,000. On 1st April, 1935, his overdraft amounted to $20,149. It is unnecessary to embark on an inquiry into the purposes for which the $20,149 was used, but it is common ground that it was used in part for paying for repairs to the assessee's properties in Saigon and meeting taxes levied thereon. The period of account was the year from the 1st April, 1935, to the 31st March, 1936, and the assessee's net income from his Saigon properties during that year was $18,414. As the result of payments into his account of the income from these properties he had reduced his overdraft to $12,165 by the 30th November, 1935. On the 7th December, 1935, while the overdraft still stood at that figure, he withdrew from the account a further sum of $5,719 the equivalent of Rs. 10,000. The $5,719 represented a remittance which he made to British India, and the question which the Court is called upon to decide is whether this remittance represents a remittance of profits derived from his Saigon properties. After making the remittance the assessee continued to draw on the account for various purposes and to make payments in from the rents he received in Saigon. The payments in the account from the 7th December, 1935, to the end of the financial year amounted to $11,570 and the year closed with his overdraft standing at the figure of $9,441. It is conceded by the assessee that the $11,570 has been rightly treated as being net income. The assessee says, however, that the payments into his banking account both before and after the 7th December, 1935, should be treated as payments in reduction of the overdraft. He contends that inasmuch as throughout the year he was still overdrawn, in spite of his payments into the account from the income from his properties, the Income-tax authorities are bound to treat the remittance of $5,719 on the 7th December, 1935, as being a remittance of borrowed money. In the course of his argument Mr. Venkatarama Sastriar admitted that if the overdraft had been completely discharged by payments in of further profits

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after the new financial year commenced the position would have been different but the overdraft had not been paid off. On the other hand, the income-tax authorities say that the true position cannot be gathered by treating the payments into the account and the withdrawals as being entirely separate transactions. They maintain that the net result of the assessee's payments in and his withdrawals from the account is that he has reduced his overdraft by $12,695 and has remitted the balance of his total profits ($18,414 *less* $12,695) to British India.

I am unable to accept as being correct the contention of the assessee that payments into the account from his profits must be treated as separate transactions and regarded *in toto* as payments in reduction of the overdraft. I consider that the income-tax authorities are right in saying that the account must be examined as a whole and that when this is done the remittance cannot be treated merely as a remittance of the proceeds of a loan. The principles which govern this case are in my opinion to be found in the decisions in *V. V. R. Firm* v. *Commissioner of Income-tax, Madras*[1], *Commissioner of Income-tax, Madras* v. *S. K. M. S. P. Meyappa Chettiar*[2] and *Fellowes Gordon* v. *Commissioners of Inland Revenue*[3].

In *V. V. R. Firm* v. *Commissioner of Income-tax, Madras*[1], a Bench of three Judges of this Court considered the case of a Nattukottai Chetty firm which was carrying on a banking business in Rangoon and Saigon with headquarters at Karaikudi in the Madras Presidency. The assessee firm received in Rangoon, which was then in British India, a sum of Rs. 1,00,000 from its agent in Saigon. The agent had been instructed by the Office at headquarters to borrow and remit that amount to the Rangoon branch. The remitted sum was made up of borrowings amounting to $59,000 and the realisation of outstanding loans. The question was whether the $59,000 represented a remittance of foreign profits. It was found that the Saigon branch had accumulated profits which were more than sufficient to cover the remittance and that it had repaid the whole of the borrowed amount within 28 days. It was held that the $59,000 represented in these circumstances a remittance from profits and not from capital. In *Commissioner of Income-tax,*

1. (1932) 6 I.T.C. 54.
2. (1940) 1 M.L.J. 543: 8 I.T.R. 20.
3. (1935) 19 Tax Cases 683.

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Madras v. *S. K. M. S. P. Meyappa Chettiar*[1], this Court applied the same principle.

The facts in the case of *Fellowes Gordon* v. *Commissioners of Inland Revenue*[2] are very similar to the facts in the present case. The assessee there had plantations in Ceylon and during each of the years ending the 5th April, 1928, and the 5th April, 1931, was for more than six months resident within the United Kingdom. In the year ending the 5th April, 1928, he received from his agents in Ceylon for the credit of his account with the National Bank of India, Limited, in London, a total sum of £2,200, and in the year ending 5th April, 1931, a total sum of £1,400. His income from his plantations in Ceylon during these two years was more than sufficient to meet the cost of the remittances. During the whole of the time when the remittances were taking place the assessee was indebted to his agents in Ceylon with whom he had an account. The account started with a debit balance of some Rs. 35,000 and ended with a debit balance of some Rs. 7,000. In the interval between the commencement and the end of the account there were very great variations, some upwards and some downwards, but at all material times the assessee had an overdraft with his agents. There were other transactions which affected the amount of the balance from time to time, but in so far as the balance was reduced, the reduction were due to no other cause than the payment into the account of income from the assessee's possessions in Ceylon. The case was decided by the Court of session in Scotland and the Lord President (Lord Normand) stated that he was unable to understand on what principle the assessee was to escape income-tax "upon the income arising from his Ceylon possessions on the full amount of the actual sums being remittances received by him in this country and ultimately traceable to his income." The Lord President went on to observe:

"It is suggested that the mere existence of an overdraft precludes his liability to tax on the ground that any money paid out of an overdraft and remitted to this country is the money of the lender and not of the recipient. Learned Counsel for the appellant did not hesitate to say that that would apply although there was a very large income in Ceylon, and an overdraft was specially arranged for the purpose of bringing this alleged principle into play. I am quite unable to accept that proposition. A man may have an

1. (1940) 1 M.L.J. 543: 8 I.T.R. 20.
2. (1935) 19 Tax Cases 683.

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income in Ceylon and may receive remittances of that income in this country through an account in which he is debtor during the whole period in which the remittances are made. There is no difference between income arising from Ceylon and income arising from this country in that respect. A man may have an income and still be in debt, and the amount of his income may be remitted to him through the hands of his creditor. I can see nothing in the case of *Kneen* v. *Martin*[1], which is in any way inconsistent with what I have just said. It is perfectly true that it may not be sufficient to say that you had an income in Ceylon and you have received remittances of less amount than that income in this country. But here the reasonable inference is that what was received in this country was not derived from some realisation of capital or from some capital account, but was in truth derived from the income arising from possessions in Ceylon, and I think that the Commissioners, on the facts of the case, were entitled to arrive at the conclusion at which they did arrive, and that the appeal should be dismissed."

As in that case the assessee in the present case had a debit balance with his bankers at the beginning of the period and a debit balance of lesser extent at the end of the period and it is not suggested, nor can it be, that the inference may here be drawn that the remittance was from the realization of capital. The assessee had made profits in Saigon far in excess of his remittance to British India. By merely increasing his overdraft to pay for the remittance does not mean that the remittance was in substance a remittance of borrowed money. Having made the remittance the assessee paid into the account out of his profits from his properties in Saigon far more than was necessary to meet the cost of the remittance. The Court must look at the substance of the transaction, and if it does that, I consider the proper conclusion to be drawn is that there was here a remittance of profits. If the assessee's contention was to be accepted it would mean that by manipulating an overdraft account kept abroad and keeping it permanently in debt an assessee would be able to escape taxation of his remittances of profits. The test is from where did the money for the remittance come and in the words of Lord Normand it must be ultimately traceable to his income in Saigon. I can see no difference in principle between the two cases.

I would answer the question referred by saying that on the facts of this case the remittance was properly assessed under S. 4 (2) of the Indian Income-tax Act, 1922, as a receipt of foreign income in British India, and I would award the Income-tax authorities the usual costs granted by this Court in such cases, namely, Rs. 250.

1. (1935) 19 Tax Cases 33.

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King, J.—I agree.

Krishnaswami Aiyangar, J.—The question that has been referred for our decision is:

"Whether on the facts of this case the sum of Rs. 10,000 was properly assessed under S. 4 (2) as a receipt of foreign income in British India."

The amount mentioned represents a sum of money remitted to the assessee in British India from Saigon in French Cochin China on 7th December, 1935, a date which fell within the year of account 1935-36. The income-tax authorities have included this remittance in the assessable income of the assessee, on the ground that it represented foreign profits received in British India within the meaning of S. 4 (2) of the Indian Income-tax Act, 1922. The assessee objected that the remittance was not of income liable to be taxed under the section but came out of capital being the proceeds of a loan borrowed in Saigon; and he therefore claimed that it should be excluded in the calculation of his assessable income. This contention has been negatived by the Department, but at the request of the assessee, the Commissioner of Income-tax has referred the question set out above for the opinion of this Court.

The Commissioner's conclusion that the remittance was made out of profits available to the assessee in Saigon, is obviously in the nature of an inference drawn from facts proved, rather than a finding on a pure question of fact. There is no direct proof adduced to establish a connection between the profits available to the assessee in Saigon and the remittance in question, in the sense that it was wholly or in part identifiable with those profits. But such identification is not necessary, if in substance the remittance is shown to have come out of the profits, and is traceable to that source. The only question, which is of course a question of law is whether the inference drawn can be said legitimately to follow from the facts found.

The facts found are these: The assessee, a resident of the Tanjore District in this Province, owns extensive immovable properties in Saigon, in French Cochin China, from which he derives income in the shape of rents. In connection with these properties, he has to incur expenses, for taxes, repairs, etc. It also appears from the statement furnished by the Commissioner in response to the requisition contained in our Order dated 14th November, 1938, that the assessee also lends and borrows moneys in Saigon. His monetary transactions are

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carried on through the agency of the Banque Franco-Cinoise at Saigon which has allowed him an overdraft at first limited to $15,000 but subsequently increased to $50,000. Into his account with this Bank his receipts by way of income from his immovable properties are paid from time to time. Whenever the need arose he drew on the Bank, utilizing the money drawn mostly in Saigon but occasionally for remittance to this country for his use here. In the beginning of December, 1935, the assessee's account with the Bank shows that he had overdrawn his account by $12,165·23. The remittance in question was, as I have said, made by the Bank on 7th December, 1935 and appears as a debit in the account of $5,719·33 which is the equivalent of the Rs. 10,000. By reason of the remittances the overdraft swelled to $17,884. Further credits and debits followed according as the assessee paid in or withdrew monies, and the account shows that there was at the end of the account year, that is, on 31st March, 1936, a debit balance of $9,441·70 against the assessee.

It has been found as a fact, that the net income of the assessee from his Saigon properties during the account year amounted up till the date of remittance to $10,184, the total income at the end of the year being $18,184 so that whichever date is taken, there was an available income far in excess of the amount remitted. But from this circumstance alone however, it is not right to infer that what the assessee received was income and not capital. The decision in *Fellowes Gordon* v. *Commissioners of Inland Revenue*[1], most relied on by learned Counsel for the Income-tax Commissioner concedes this position. The Lord President has said in that case:

"It is perfectly true that it may not be sufficient to say that you had an income in Ceylon and you have received remittance of less amount than that income in this country."

Any other view would inevitably result in consequences which the Statute could never have intended. A person who has income accruing to him in a foreign country is at perfect liberty to keep it there, or to spend or utilise it in that or any other country in any way he thinks fit. His liability to tax arises not because he makes the profits, but because he brings or receives them here. It is not necessary that he should receive those profits in the exact form in which they were made, but

1. (1935) 19 Tax Cases 683.

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he must receive them here substantially as profits. If the remittance is traceable, and is traced to the assessee's foreign profits there would be ground for holding that the Act is attracted, though even here it is necessary to exercise caution so as to avoid the error pointed out by the Privy Council in *Income-tax Commissioner, Bombay* v. *Ahmedabad Advance Mills, Ltd.*,[1] where machinery purchased in a foreign country with profits made in that country and imported into British India was held not to give rise to a case of profits received within the meaning of S. 4 (2) of the Act. The illustrations given in the last paragraph of their Lordships' judgment are instructive, and indicate the danger of regarding traceability by itself as a conclusive circumstance. On the other hand, it is equally clear that the mere existence of an overdraft, cannot save foreign income from liability to taxation, as money paid out of the overdraft and remitted to this country is not necessarily the money of the lender, and may be that of the recipient. It is easy to imagine cases where under cover of an overdraft, income might in truth be remitted and received as such. A man might so manipulate his dealings with a Bank, as to leave a permanent debit balance against himself, and yet be held liable to be taxed on his remittances, if it appears that he took advantage of a banking facility as a convenient shield to conceal a receipt of profits. The position is not altered by the absence of deliberate intent, if the true nature and effect of the payments and withdrawals is such as to bring about the same result. There is no abstract rule of law to be applied generally to cases of this kind, and I do not understand the Court of Session to have laid down any such rule in the case cited. The question in each case is, what is the correct inference to be drawn and the Court is entitled to get behind appearances, in order to discover the truth.

A man with profits available in a foreign country and wanting to bring them into this country may find it necessary as a measure of convenience to obtain a temporary overdraft, or resort to a temporary borrowing which he proceeds to make good immediately out of his profits. In such a case, the remittance though in *forma specifica* is a remittance of capital, it is in truth a remittance of profits, and is taxable as such. The loan or the overdraft as the case may be and its repayment by

1. (1940) 1 M.L.J. 137: L.R. 67 I.A. 115: 8 I.T.R. 95 (P.C.).

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the assessee out of profits may be so connected together by proximity of time or otherwise, as to lead to the reasonable inference that the remittance was in substance a remittance of profits though to start with, it might appear or is made to appear as if it came out of a capital source. The decision of this Court in *V. V. R. Firm* v. *Commissioner of Income-tax*[1] and *Commissioner of Income-tax, Madras* v. *Meyappa Chettiar*[2] are illustrations in point. Granting that ordinarily a remittance of borrowed money is not to be deemed a remittance of profits, Beasley, C.J., in the former case held that the facts there present, namely, the existence of available profits, the fact of the money being borrowed and remitted on the instructions of the assessee, and its repayment within 28 days out of profits collected, justified the finding that it was a remittance not of capital but of profits.

In this connection it may be mentioned that learned Counsel for the assessee fairly conceded that a remittance out of borrowed money beginning in a capital source, would be turned into a remittance of profit, the moment profits were realised and applied to the discharge of the loan. Otherwise it would become possible for an assessee to evade, for ever the payment of tax on his foreign income again and again brought into this country by adopting the expedient every time of first borrowing and then utilizing his income for the repayment of the loan borrowed. The presumption underlying the decision in *Scottish Provident Institution* v. *Allan*[3], would come to the rescue of the department in such a case to prevent the Crown being cheated out of its revenue. If there are available profits more than sufficient to cover the remittance, the presumption to start with is that the remittances came out of the profits, though ultimately the question to a large extent is one of fact (19 Tax Cases 41). If I followed Mr. Venkatarama Sastriar aright, his only point was that the conversion of what was originally a capital remittance into a remittance of profits takes place not when the remittance is made but when the profits are applied to the discharge of the loan borrowed and remitted. In my judgment it is the proposition conceded, which I think was rightly conceded, that furnishes the true ground of decision in this case.

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1. (1931) 63 M.L.J. 227 (F.B.). 2. (1940) 1 M.L.J. 543: 8 I.T.R. 20.
3. (1901) 4 Tax Cases 409 at 591.

If we are to confine attention to the transactions of the assessee with the Banque Franco-Cinoise during the year of account only, the answer to the reference should in my view be in favour of the assessee. It should be mentioned at the outset that there is no suggestion in this case that the transactions with the Bank were other than what they purport on their face to be. There is no reason to think that the assessee has adopted a device or invented a scheme through the instrumentality of his banking account to find a way of escape from legitimate taxation. If an inference is to be drawn against him, it must be on a proper consideration of the transactions as disclosed in the account. That his ownership of the Saigon properties and his other affairs in that place rendered it genuinely necessary or expedient for him to spend or invest his money there is beyond question. As already mentioned he has had to incur expenses for repairs, taxes, etc., and has also lent and borrowed moneys in the foreign country. These are facts which have not been disputed, and indeed they plainly appear from the evidence before the Income-tax authorities. For these transactions he had drawn from his banking account in which all the withdrawals appear as debits against him. The debits amounted on 7th December, 1935, the date of the remittance, to the sum of $12,165. The whole of the assessee's income during the year, as found by the Commissioner, being less than this sum, why is it to be presumed or inferred that the profits did not go in reduction of the overdraft, but were in part remitted to this country? I can see at least two reasons against such an inference being drawn, but none in its favour. It was perfectly open to the assessee to apply his income to the discharge of his debts to the Bank on his overdrawn account, with the double advantage of saving himself from the payment of interest to the Bank, and Income-tax to the Crown. In the absence of evidence to the contrary, a man must be presumed to have done that which was to his advantage, rather than that would result in a detriment. In the second place, and again in the absence of anything to the contrary, when there are debits and credits in an account, the credits should be appropriated towards the discharge of the earlier debits *seriatim* in the order of dates. This is the rule of appropriation laid down in *Clayton's case*[1], and embodied in Ss. 59 to 61 of the Indian Contract Act, and if this rule is applied to the

1. (1816) 15 R.R. 161: 1 Mer. 605: 35 E.R. 781.

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assessee's account with the Bank, there would still remain a debit balance even after appropriating the whole of the year's income towards the debits prior to the remittance. On this footing there would be a total absence of profits from which the remittance could be deemed to have come.

With very great respect, I am unable to agree that *Fellowes Gordon's case* furnishes a parallel governing the decision of the present case. It was proved and found in that case as in this, that the assessee had derived profits in Ceylon in the years there in question to an amount in excess of the remittances. The account produced there unlike in the present case was of a fragmentary character, showing the debit balances on the various dates of the remittances against the assessee with no information regarding the dealings in the intervening periods. It does not appear from the statement of account there produced, whether or not the whole of the opening balance on 27th April, 1927 and 5th July, 1930, would be wiped out if the revenue receipts for those years had been appropriated in accordance with the rule in *Clayton's case*, whereas in the present case it is quite clear, it is the other way about. This difference in fact strikes me as a material one capable of affording a legitimate ground of distinction. It is also to be observed that the chief arguments on behalf of the assessee in that case were (*i*) that the account showed a debit balance at the date of each of the remittances and (*ii*) that it was not material to know from what source the advances made by his agent, were repaid. I may say at once that the first point affords insufficient basis for a correct inference. The second ignores what is to my view an essential source of material information. Against these arguments, the Crown contended, I think quite rightly, that the fact that his current account with his agent was overdrawn at the dates when the remittances were made was not *sufficient* evidence that the remittances were from a capital source. There are indications in the judgment of the Lord President that this insufficiency influenced the decision. He has drawn pointed attention to it by observing as follows:

"The account starts with a debit balance of some Rs. 35,000, and it ends with a debit balance of some Rs. 7,000. In the interval between the commencement and the end of the account there were great variations, some upwards and some downwards. *We are not exactly informed what other transactions took place in Ceylon which affected the amount of the balance from time to time*, but this much is certain, that, in so far as it was reduced,

the reductions were due to no other cause than the payment into the account of his agents, of income from the appellant's possessions in Ceylon. It therefore appears that the income in Ceylon was in excess on the whole, of the total amount of the remittances received in this country by the appellant. That being so, I am unable to understand on what principle he is to escape income-tax upon the income arising from his Ceylon possessions on the full amount of the actual sums, being remittances received by him in this country and *ultimately traceable to his income*." (The italics are mine).

There is no reference in this judgment to the principle of appropriation arising by reason of the rule in *Clayton's case* or the presumed intentions of the party, as the necessary material for the application of the principle was not available. In its absence it would be perfectly legitimate, to hold that the presumption arising from *Allan's case* had not been rebutted, and I think that this was the real basis of the Lord President's conclusion. Otherwise it will be difficult to reconcile the decision with what the Lord President himself stated lower down in his judgment where he pointed out that the existence of profits, and the fact of a remittance are by themselves insufficient.

If the matter stood there, I should be prepared to answer the question referred in favour of the assessee. But the matter does not rest there. From the additional information furnished by the Commissioner it appears that in the year 1933-34, the assessee received a remittance of $8,000 from Saigon through his Bankers and out of this amount debited in the account, a portion only, namely, $1,680 or Rs. 2,300 had been taxed in 1934-35 as a remittance of profit, leaving a balance of $6,320 untaxed in that year. According to the proposition of law conceded by Mr. Venkatarama Sastriar and referred to already, if this balance has been wiped out by the revenue receipts of the year 1935-36, it is automatically turned into a remittance from an income source though in origin it was from a capital source. The income during the account year was admittedly sufficient to discharge the whole of that balance and certainly to the extent of the whole of the remittance sought to be assessed to tax. It is this fact, which in my judgment turns the scale in favour of the Crown and I accordingly agree in the answer given by my Lord though as I have explained, I rest my decision on a different ground.

K. C. —— *Question answered in the affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Chidambaram Aiyar .. *Petitioner** (*Respondent-Plaintiff*)

v.

Manickavasagam Pillai and another .. *Respondents* (*Petitioners-Defendants*).

Chidambaram Aiyar *v.* Manickavasagam Pillai.

Madras Agriculturists' Relief Act (XV of 1938), S. 9 (1), proviso—Scaling down of debt—Whether proviso to S. 9 could be applied more than once in the process of scaling down.

There is nothing in the language of the proviso to S. 9 of the Madras Agriculturists' Relief Act to suggest that it can be applied but once in the process of scaling down. The section makes provision for scaling down debts incurred on or after the 1st of October, 1932, and directs that if any part of the debt sought to be scaled down is found to be a renewal of a prior debt, that part should be deemed to be a debt contracted on the earlier date scaled down accordingly, but in doing so, if it is itself a renewal in part or in whole of a still earlier debt, the proviso comes into operation again; for it is an integral part of the mode of scaling down prescribed under the section.

Where the petitioner obtained a decree in 1937 against the respondent on a promissory note of 1935 which was in renewal of an earlier debt incurred in 1933 which in turn was the result of a settlement of 1931 in respect of dealings between the parties, on the question whether the proviso to S. 9 could be applied more than once, until the debt is traced back to the principal amount originally arrived at after the settlement mentioned above,

Held, that the object of the Legislature in enacting this provision is plainly to require the Court to trace the debt back through various renewals to the principal sum or sums originally advanced and scale it down under S. 8 or S. 9 as the case may be.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Subordinate Judge of Tinnevelly dated 6th October, 1938, and made in I. A. No. 143 of 1938 in S. C. S. No. 447 of 1937.

R. S. Srinivasachari and *K. V. Rajagopalan* for Petitioner.

P. N. Marthandam Pillai for Respondents.

The judgment of the Court was delivered by

Patanjali Sastri, J.

Patanjali Sastri, J.—The main question arising for decision in this C. R. P. is whether in scaling down a debt under S. 9 (1) of the Madras Agriculturists' Relief Act, the proviso to that section can be applied more than once, until the debt is

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* C. R. P. No. 49 of 1939. 26th April, 1940.

traced back to the principal amount originally advanced. The petitioner obtained a decree against the respondents in S. C. S. No. 447 of 1937 on the file of the lower Court on a promissory note executed on the 9th of April, 1935. This promissory note was executed in renewal of an earlier debt incurred in April, 1933, which itself was the result of a settlement in respect of dealings which commenced in June, 1931.

The petitioner's learned counsel contends that in scaling down the decree debt in question under S. 9 (1) of the Act, the Court can have regard to the earlier debt of April, 1933, but it cannot go further back to the commencement of the dealings in 1931 and scale down the debt under S. 8 with reference to the principal sums then advanced. We are unable to accept this contention. There is nothing in the language of the proviso to suggest that it can be applied but once in the process of scaling down. The section makes provision for scaling down debts incurred on or after the 1st of October, 1932, and directs that if any part of the debt sought to be scaled down is found to be a renewal of a prior debt, that part should be deemed to be a debt contracted on the earlier date and scaled down accordingly but in doing so, if it is itself a renewal in part or in whole of a still earlier debt, the proviso comes into operation again, for it is an integral part of the mode of scaling down prescribed under the section. We are of opinion that the object of the Legislature in enacting this provision is plainly to require the Court to trace the debt back through various renewals to the principal sum or sums originally advanced and scale it down under S. 8 or S. 9 as the case may be.

It was next urged that when the last promissory note on which the suit was brought was executed, there was an allocation of the prior payments towards interest and the note was taken only for the principal amount then found to be due and that there could be no question therefore of scaling it down. The respondents however denied such appropriation at the time and alleged on the other hand that the amount of the promissory note represented nothing but interest due on the original dealings. This is a question of fact on which the respondents' case has been accepted by the Court below, and we are not prepared to interfere with its finding in revision.

The Civil Revision Petition fails and is dismissed with costs.

K. C. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Vennavilli Lakshminarasimha Rao .. *Petitioner** (*1st Petitioner-Judgment-debtor*).

v.

Garapati Muneyya .. *Respondent* (*Decree-holder-1st Respondent*).

Lakshminarasimha Rao v. Garapati Muneyya.

Madras Agriculturists' Relief Act (IV of 1938), S. 20—Property sold in execution and satisfaction entered—Delivery of property to purchaser—If can be stayed pending application under Ss. 19 and 23.

Merely because full satisfaction has been entered it does not mean that execution is at an end. If the property purchased by the decree-holder has not been delivered to him then execution is not at an end and S. 20 of Act IV of 1938 can therefore be applied to stay a delivery of possession.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Kovvur dated 14th December, 1938 and made in E. A. No. 820 of 1938 in O. S. No. 479 of 1933.

K. Ramamurti and *K. Someswara Rao* for Petitioner.

T. Satyanarayana for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition against the order of the District Munsif of Kovvur dismissing an application under S. 20 of Madras Act IV of 1938 praying for stay of delivery of property in execution of a decree.

A simple money decree had been passed against the petitioner and in execution of that decree certain property of his was brought to sale and the sale was confirmed. A petition was put in for delivery of the property and at the time when this application under S. 20 was made, no orders had been passed on the delivery petition. The District Munsif, without giving any reasons for his opinion, stated that no execution petition was pending and dismissed the petition.

There would be a very serious hiatus in Madras Act IV of 1938 if there was no provision to stay delivery pending an application under Ss. 19 and 23 of the Act; but I am satisfied that no such hiatus exists. The terms of S. 20 are wide enough to cover a case of this sort. Delivery of property is the most important stage of execution and merely because full

* C. R. P. No. 88 of 1939. 24th October, 1939.

Lakshmi-narasimha Rao v. Garapati Muneyya.

satisfaction has been entered up, it does not mean that execution is at an end. If the property purchased by the decree-holder has not been delivered to him, then execution is not at an end and S. 20 can therefore be applied to stay a delivery proceeding.

Some question has been raised whether in fact the petitioner has put in an application under S. 23 and whether, in case he has not, his proceedings under S. 19 would be infructuous. That question however does not arise at this stage, and the original petition under S. 19 asking the Court to stay the decree and set aside the sale and an amendment petition to make it clear that the application was also under S. 23 are still before the lower Court, and I do not wish to express any opinion on their merits.

The petition is therefore allowed and the interim order of stay passed at the time of admission made absolute pending disposal of the petitions in the Court below. The respondent will bear the costs of the petitioner in this Court.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Nimmagadda Ramaseshayya .. *Petitioner* (Petitioner)*

v.

Adusumilli Kutumba Rao and another .. *Respondents (Respondents 2 and 3).*

Ramaseshayya v. Kutumba Rao.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 8 and 9—Debt on promissory note incurred before 1st October, 1932, ripening into decree after 1st October, 1932—Whether original debt or the decree to be scaled down.

When there is a debt incurred before the 1st October, 1932, which has ripened into a decree after the 1st October, 1932, the pre-existing debt shall be regarded as the liability and the scaling down must be governed by S. 8 and not by S. 9.

Case-law discussed.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Masulipatam dated 9th August, 1939 and made in I. A. No. 737 of 1938 in O. S. No. 77 of 1935.

* C. R. P. No. 2543 of 1939. 9th April, 1940.

Rama-seshayya v. Kutumba Rao.

Wadsworth, J.

A. Lakshmayya for Petitioner.

D. Narasaraju for Respondents.

The judgment of the Court was delivered by

Wadsworth, J.—This revision petition raises the question of the meaning of words "debts incurred before the 1st October, 1932," in S. 8 of the Madras Act IV of 1938. The transaction with which we are concerned is a decree dated 21st August, 1936, which itself is passed on the basis of a promissory note of 1928 which promissory note was in renewal of an earlier promissory note of 1925. The learned Subordinate Judge has held that the debt to be scaled down is the decree itself and not the antecedent debt which formed the basis for the decree. He bases his decision on the definition of the word 'debt' in S. 3 of the Act which contains the words:

"'Debt' means any liability in cash or kind . . . . due from an agriculturist, whether payable under a decree or order of a civil or revenue court or otherwise."

He holds that since the definition of the word 'debt' covers one payable under a decree we must regard the decree as the starting point and since the decree was passed in 1936, it must be scaled down under S. 9 of the Act and not under S. 8. The learned Subordinate Judge has not, however, considered two provisions in the Act, which, in our opinion, render it impossible to hold the view which he expresses.

Firstly, we have the second part of S. 7 which says:

"No sum in excess of the amount as so scaled down shall be recoverable from him or from any land or interest in land belonging to him; nor shall his property be liable to be attached and sold or proceeded against in any manner in the execution of any decree against him in so far as such decree is for an amount in excess of the sum as scaled down under this Chapter."

This provision seems to contemplate the scaling down of the original debt notwithstanding a decree and it is difficult to give any meaning or purpose to this clause if the process of scaling down is to start with the decree. Secondly, we have the first clause of S. 8 which, in dealing with the way in which debts incurred before the 1st October, 1932, shall be scaled down, speaks of interest outstanding on the 1st October, 1937:

"Whether the same be payable under law, custom or contract or under a decree of Court and whether the debt or other obligation has ripened into a decree or not."

It seems to us impossible to give any effect to the words 'whether the debt or other obligation has ripened into a decree

or not' if the debt contemplated in the initial words of the section is the decree itself. On the other hand this first clause of S. 8 seems quite clearly to contemplate the debt incurred before the 1st October, 1932, as the original debt which ultimately ripened into a decree, and consequently it must be the date of the original debt which is the governing factor and not the date of the decree. The inclusion of a decree in the definition of 'debt' in S. 3 (*iii*) of the Act is quite consistent with this view. For obviously there are many debts which start with the decree, as for instance, when there is a decree for damages, which of itself creates a debt bearing interest and liable in certain circumstances to be scaled down. Clearly the idea underlying these provisions is that when the decree merely enforces the payment of a pre-existing debt bearing interest, that pre-existing debt shall be regarded as the liability, the date of which shall govern the section to be applied.

This subject has come already before this Court, though there is apparently no considered decision of a bench hitherto. In *Kanakaraju* v. *Achutaramanaraju*[1], there is a very brief judgment of one of us, adopting the view which we have just adumbrated though it deals with another point which does not arise here. In *Narayanaswami Naidu* v. *Rajamanickam Pillai*[2], Horwill, J., has taken the same view even with reference to a compromise decree. We are not now concerned with compromise decrees, which may possibly be affected by different considerations. But it is to be noted that the learned Judge definitely regards the debt incurred before the 1st October, 1932, as the original liability which has ripened into the decree and does not treat the decree itself as the starting point. Other cases have been quoted before us in which this view has been tacitly assumed to be correct without any argument or consideration of the point involved. (Vide *Anandam* v. *Muthukumaraswami*[3] and the decision of the bench in *Perianna* v. *Sellappa*[4].)

Unfortunately the respondent in the present case is not represented. But we have to express our gratitude to Mr. D. Narasaraju who has given us the benefit of his argument for the respondent as *amicus curiae*, he having gone into the subject with reference to another case posted for hearing by us

1. (1940) 1 M.L.J. 600. 2. (1940) 1 M.L.J. 225.
3. (1939) 2 M.L.J. 658.
4. (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218 at 222.

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in which a similar question arises. The only authority which he has been able to cite on behalf of the respondent is contained in a mere observation of Venkataramana Rao, J., in *Sreenivasachariar* v. *Krishniah Chetty*[1], where the learned Judge merely remarks that there is a good deal of force in the contention that when the decree has been passed after the 1st October, 1932, it is governed by S. 9 of the Act. He gives, however, no decision to this effect and the matter does not appear to have been argued at length before the learned Judge. We are clearly of opinion that when there is a debt incurred before the 1st October, 1932, which has ripened into a decree after the 1st October, 1932, the scaling down must be governed by S. 8 and not by S. 9.

We therefore allow the petition and remit the matter to the lower Court with a direction to scale down the debt in accordance with this decision. The petitioner is entitled to costs.

K. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Charapotta Kanur Kesavan Nayar .. *Petitioner** (*Respondent-Plaintiff*)

v.

Kummankuzhi Ezhuvan Kunchu's son Velu .. *Respondent* (*Petitioner-Defendant*).

Kesavan Nayar v. Velu.

Village Courts Act (I of 1889), S. 73—Decree by Village Court on promissory note—Lack of direct evidence of execution—Whether material irregularity justifying interference by District Munsif under S. 73 of Village Courts Act.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Alatur dated 5th November, 1936 and made in O. P. No. 112 of 1936.

K. Kesavan Nair for Petitioner.

K. V. Gopalakrishna Nair for Respondent.

The Court delivered the following

JUDGMENT.—I do not consider that the District Munsif is right in treating the lack of direct evidence of execution of the

1. (1940) 1 M.L.J. 860: 1940 M.W.N. 329.

* C. R. P. No. 534 of 1937. 1st May, 1940.

promissory note as a material irregularity sufficient to justify interference under S. 73 of the Village Courts Act. The village Court was satisfied by comparison of the signature with that found on an admitted document and by a consideration of the admitted circumstances that the promissory note was executed by the defendant. The mere fact that a decree was given on a lesser degree of proof than would have been required by the Court of a District Munsif is not sufficient to constitute a material irregularity justifying interference in revision. There has been no injustice. I set aside the order of the District Munsif and restore the decree with costs here and in the District Munsif's Court.

K. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Ranganayaki Ammal .. *Appellant** *(1st Plaintiff)*

v.

Rajagopalaswami Naidu and others .. *Respondents (Defendants).*

Provincial Insolvency Act (V of 1920), S. 28 (2)—Claim for arrears of maintenance by a mother and unmarried sisters of an insolvent—Debts provable in insolvency—Suit without leave of Court barred under S. 28 (2).

The claim for (1) marriage expenses, (2) arrears of maintenance, both past and future, (3) lump sum on account of residence, and (4) clothing expenses, is a claim for debts provable in insolvency. Hence a suit filed in respect of such a claim against the insolvent without the leave of the Insolvency Court is not maintainable.

Jayanti Subbiah v. *Alamelu Mangamma,* (1902) 12 M.L.J. 270: I.L.R. 27 Mad. 45 and *Suryanarayana Rao Naidu* v. *Balasubramania Mudali,* (1919) 38 M.L.J. 433: I.L.R. 43 Mad. 635: distinguished.

Appeal against the decree of the District Court of Coimbatore in A. S. No. 245 of 1936 preferred against the decree of the Court of the Subordinate Judge of Coimbatore in O. S. No. 20 of 1934.

Facts:—Briefly, this is a suit filed by the mother and unmarried sisters (appellants 1 to 3) of the insolvent (respondent 1) to recover arrears of maintenance on the charge of the family properties and also for recovery of future maintenance on the charge of the same family properties at certain specified rates which may be altered by the Court in its discretion according to the evidence

* S. A. No. 367 of 1937. 26th April, 1940.

Ranganayaki Ammal v. Rajagopalaswami Naidu.

adduced by parties. Before the suit of the appellants was filed in the lower Court the insolvent was adjudged an insolvent and as the properties of the insolvent were vested in the Official Receiver he was later made a party to the suit. The necessary leave of the Court was not obtained by the creditors for suing the insolvent. The main question for decision was whether the suit was maintainable without obtaining the leave of the Insolvency Court. Another incidental point in the lower Courts raised was whether S. 28 (2) of the Act applies to maintenance holders under the Hindu law.

V. C. Viraraghavachariar for Appellant.

M. Lakshman Nayak, M. R. Venkataraman and *T. K. Rajagopalan* for Respondents.

The Court delivered the following

JUDGMENT.—It cannot be disputed that the claim for (1) marriage expenses, (2) arrears of maintenance, (3) lump sum on account of residence and (4) clothing for first plaintiff was a claim for debts provable in insolvency. This together was over 90 per cent. of the claim put forward in the suit. Even as regards the claim for future maintenance I am not satisfied, having reference to the language of S. 34 (2) of the Provincial Insolvency Act, that it is not a debt provable in insolvency. If it is not, it would seem that no insolvency proceedings against a Hindu with female relations entitled to maintenance, could be taken effectively.

The plaintiff being a creditor to whom the insolvent was indebted in respect of a debt provable under the Act was forbidden by S. 28 (2) of the Act to bring any suit against him without the leave of the Insolvency Court. The cases reported in *Jayanti Subbiah* v. *Alamelu Mangammal*[1] and *Suryanarayana Rao Naidu* v. *Balasubramania Mudali*[2], have little if any bearing on the question now at issue. They were cases of sales in execution in which delivery was resisted by maintenance holders. Here we are concerned with the legality of the filing of the suit. I agree with the lower Courts that S. 28 (2) of the Provincial Insolvency Act was a bar to this suit. This appeal is dismissed with costs of third respondent. Court-fee to be paid by the appellant.

Leave to appeal is refused. *Appeal dismissed.*

K. C.

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1. (1902) 12 M.L.J. 270: I.L.R. 27 Mad. 45.
2. (1919) 38 M.L.J. 433: I.L.R. 43 Mad. 635.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE HORWILL.

Kuppu Govinda Chettiar .. *Appellant* (*Plaintiff*)

v.

Uttukottai Co-operative Society by its Liquidator .. *Respondent* (*Defendant*).

Kuppu Govinda Chettiar v. Uttukottai Co-operative Society.

Madras Co-operative Societies Act (*VI of 1932*), *S. 48—Liquidation of Society—Liquidator levying contribution from member—Suits by member for declaration of the illegality of liquidator's orders—Notice whether necessary to the liquidator under S. 80, Civil Procedure Code* (*V of 1908*)—*Whether liquidator, a Public Officer under S. 2* (*17*) *of the Code—Leave of Registrar of Societies necessary for maintenance of suits under S. 48 of the Act—Resignation of a member, when complete.*

The suits by the plaintiff-appellant, a member belonging to a Credit Co-operative Society, were for a declaration that certain orders made in 1933 and 1932 by the liquidator of the Co-operative Credit Society in question, determining the contribution payable by the plaintiff were illegal and void and of no effect whatever as against him. The suits were resisted on the grounds, namely, (1) that there was want of notice as required by S. 80, Civil Procedure Code, and (2) that the suits were not maintainable without leave of the Registrar as required by S. 48 of the Madras Co-operative Societies Act.

Held, that (1) the liquidator appointed by the Registrar of the Co-operative Societies to liquidate a private Co-operative Society is not an officer in the service of the Government; hence the suits would not be defeated on the plea of want of notice as required by S. 80 of the Code of Civil Procedure.

Liquidator, Yedha Society, Nimar v. *Prag*, A.I.R. 1934 Nag. 201, explained.

Liquidator of Society, Sanga Kheda Kalan Co-operative Bank, Hoshangabad v. *Ayodhya Prasad Shivales*, A.I.R. 1939 Nag. 232, dissented from.

(2) That the suits should be dismissed anyhow because of the absence of leave from the Registrar for the institution of the suits, which is required by the provisions of S. 48 of Act VI of 1932.

Vaikunta Bhat v. *Sarvothama Rao*, (1936) 70 M.L.J. 604 : I.L.R. 59 Mad. 895, distinguished.

Where the plaintiff, a member of a Co-operative Society, sent in his letter of resignation to the Secretary, but the resignation was not accepted by a resolution passed in a special meeting of the members of the society and when the reply containing the resolution was sent by post the member did not receive the letter, but he participated as a member in a meeting of the society held later also, on the question whether the resignation did take effect and whether he continued to be a member of the society,

Appeals Nos. 352 and 353 of 1937 and C.M.P. Nos. 2268 and 2269 of 1939. 5th April, 1940.

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Held, that the plaintiff ceased to be a member of the society immediately his letter of resignation reached the society; and there being no provision for withdrawal of any resignation in the Act or the bye-laws, he could become a member again only by complying with the provision relating to membership. The mere fact that he refused to receive a copy of the resolution and that he attended a subsequent meeting of the society could not possibly restore him to his membership or make him a member after he had ceased to be one.

Finch v. *Oake*, (1896) 1 Ch. 409 and *Glossop* v. *Glossop*, (1907) 2 Ch. 370, followed.

Sudarsana Rao v. *Christian Pillai*, (1923) 45 M.L.J. 798 and *Kuppu Govinda Chetty* v. *Secretary, Co-operative Central Bank, Conjeevaram*, (1932) M.W.N. 18, distinguished and referred to.

Appeals against the decrees of the District Court, Chingleput, in O. S. Nos. 1 and 12 of 1935 respectively and petitions praying that in the circumstances stated in the affidavit filed in C. M. P. No. 2268 of 1939, the High Court will be pleased to amend the cause title in O. S. Nos. 1 and 12 of 1935 on the file of the District Court, Chingleput, as follows: "Uttukottai Co-operative Society by its Liquidator" may be altered as "The Liquidator of the Uttukottai Co-operative Society" and paragraph 2 be altered as "The Liquidator of the Uttukottai Co-operative Society having his office at the office of the Deputy Registrar of Co-operative Societies, Madras."

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Appellant.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondent.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—These are appeals from the decree in two connected suits O. S. Nos. 1 and 12 of 1935, on the file of the District Court of Chingleput. The plaintiff was the same in both the suits and the defendant also was the same. The plaintiff is the appellant and the defendant, who is the respondent in these appeals, was described as the Uttukottai Co-operative Society by its Liquidator. The suits were for a declaration that certain orders made in 1933 and 1932 by the Liquidator of the Co-operative Credit Society in question determining the contribution payable by the plaintiff in the suits at Rs. 8,000 and Rs. 2,000 respectively were illegal and void and of no effect whatever as against the plaintiff. The suits were resisted on various grounds and they were tried together and disposed of in one and the same judgment by the District Judge. It is an unfortunate feature that in this case judgment was

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pronounced by the Court below more than a year after case had been closed.

On all the points except one, the findings of the Court below were in favour of the plaintiff. But the suits were dismissed, though without costs, on the sole ground that no notice had been given as required by S. 80 of the Code of Civil Procedure. In other words, it was only on the ground of want of notice that the suits were found to be not maintainable, and in other respects the findings were in favour of the plaintiff. The only point therefore argued in these appeals in the first instance, so to say, on behalf of the appellant is that the finding of the lower Court on the question of notice is wrong. S. 80 of the Code of Civil Procedure requires that unless notice is given at least two months before the suit, no suit can be instituted against the crown or against any public officer in respect of any act purporting to be done by him in his official capacity. In this case no notice whatever was given, and the contention on behalf of the plaintiff-appellant is that no notice is required because the defendant in the suit is not a public officer as defined in the Code of Civil Procedure [*vide* S. 2 (17)]. It has been contended that even assuming that the defendant in the suit is the liquidator and not the society, he cannot be regarded as a public officer within the meaning of the Code of Civil Procedure. In this connection perhaps it is desirable first to deal with two applications presented at a very late stage, namely, after the hearing of the appeal was over and just before judgment was to be delivered, one application in each appeal to amend the cause title so as to show the defendant as "the Liquidator of the Society" instead of "the Society by its Liquidator." It is enough to say as regards the oral application for permission to withdraw the suits, that it is not withdrawn, and there is no need to pass any other order on it except to dismiss it as it is withdrawn. As regards the first application for amendment of the cause title of the plaint, it would be highly undesirable from every point of view to allow applications of this kind which are made after the whole case is argued and the parties have an opportunity of knowing or at least guessing with some degree of accuracy what is going to happen to their case. It is not as if this objection to the maintainability of the suit in view of S. 48 of the Co-operative Societies Act was not raised in the trial Court, and the application to amend the cause

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title should have been put in much earlier. There is really no explanation forthcoming for the delay in making the present application. We are therefore not prepared to allow that application and it is accordingly dismissed. We may add, however, that the application to amend is absolutely contrary to what is alleged in the grounds of appeal, where it is contended that the defendant in the suit was the Co-operative Society and not the liquidator and therefore the question of notice did not arise at all. In other words, the main ground on which the finding of the Court below, which is against the appellant, was attacked was that the Court below failed to notice that the defendant in the suit was the Co-operative Society and not the liquidator, and of course, it was nobody's case that the Co-operative Society is a public officer. Apart from the fact that the suit is really directed against the society who is represented by the liquidator because the society has been ordered to be wound up and a liquidator has been appointed by the Registrar, the question remains whether even a liquidator appointed by the Registrar can be regarded as a public officer within the meaning of the Code of Civil Procedure. It is contended that he is a public officer because he is an officer in the service of the Crown. It is obvious, however, that *qua* liquidator he is not an officer in the service of the Crown, and it is not the case of either side that the liquidator as such receives any pay from the Crown or receives any remuneration for his duties as liquidator. The liquidator in this case is the Deputy Registrar of Co-operative Societies who, of course, in that capacity is a public officer. But that does not mean that when he is actually acting in the capacity of a liquidator of a Co-operative Society, he is an officer in the pay of the Crown or in the service of the Crown.

The only decision which has been relied upon by the Court below is the one reported in *Liquidator, Yedha Society, Nimar v. Prag*[1]. Apart from the fact that in that decision it is merely stated without any discussion that a liquidator should no doubt be considered a public officer within the meaning of S. 2 (17) of the Code of Civil Procedure, the actual facts of the case show that it was not necessary in that case to give any notice to the liquidator because the suit was not brought against the liquidator in respect of any action of his. In other words, the

1. A.I.R. 1934 Nag. 201.

observation was an *obiter dictum*. Another case which has been cited to us is the one reported in *Liquidator of Society, Sanga Kheda Kalan Co-operative Bank, Hoshangabad* v. *Ayodhya Prasad Shivale*[1], in which Pollock, J., refers to the earlier decision of the Nagpur Court as one in which it was assumed without discussion that a liquidator is a public officer as defined in S. 2 (17) of the Code of Civil Procedure. The reason given by Pollock, J., for holding that the liquidator is a public officer is that the liquidator was appointed by the Government and his duties are quasi-judicial. In other words, the proposition as put forward in the case is that as the liquidator is appointed by the Government and performs public duties, he is an officer in the services of the Government when acting as the liquidator and therefore a public officer as defined in the Code of Civil Procedure. In the present case the liquidator is not appointed by the Government but by the Registrar of Co-operative Societies. Even otherwise we find it difficult to accept the general proposition that because the liquidator is given quasi-judicial powers, the duties which he performs must necessarily be regarded as being public duties. Nor are we prepared to accept the proposition that every person who is appointed by the Government to perform public duties is a public officer. If that view were accepted it would follow that even a member or chairman of a local body appointed by Government would be a public officer. The word 'service' must necessarily mean something more than being merely subject to the orders of Government or to control by Government. We are unable to accept the view that a liquidator who is appointed by the Registrar of Co-operative Societies to liquidate a private Co-operative Society is an officer in the service of the Government, and this is the only ground on which it has been sought on behalf of the respondent to support the finding of the Court below. We are therefore of opinion that the present suits cannot be rightly defeated on the plea that no notice was given as required by S. 80 of the Code of Civil Procedure.

The decrees, however, of the Court below dismissing the suits have been supported on the ground that the findings on other points by the Court below in favour of the plaintiff-appellant are wrong. The main point is whether the suit is

1. A.I.R. 1939 Nag. 234.

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maintainable in view of the provisions of S. 48 of the Co-operative Societies Act, which runs as follows:

"Save in so far as is expressly provided in this Act, no Civil Court shall take cognizance of any matter connected with the winding up or dissolution of a society under this Act, and when a liquidator has been appointed no suit or other legal proceeding shall lie or be proceeded with against the society except by leave of the Registrar and subject to such terms as he may impose."

Considerable reliance is placed on behalf of the appellant on the Bench decision in *Vaikunta Bhat* v. *Sarvothama Rao*[1]. That, however, was a case which had to consider a similar provision in the Imperial Act, namely, S. 42 (6) which runs as follows:

"Save in so-far as is hereinbefore expressly provided, no Civil Court shall have any jurisdiction in respect of any matter connected with the dissolution of a registered society under this Act."

In construing that provision it was held by the learned Judges that the liquidator in the case before them acted without jurisdiction and that therefore the Civil Court's jurisdiction was not ousted by S. 42 (6) of the Co-operative Societies Act of 1912. That was a case which is otherwise on all fours with the present case, because there also the question arose whether a person who had once been a member of a Co-operative Society could be rightly made to pay a contribution by an order of the Liquidator when he had not admitted his liability. In the case before them the contention was that the appellants had ceased to be members five years before the liquidation and it was held that it cannot be said that they had no right to ask the Civil Court to decide whether they were under any liability to contribute at all. That decision as well as the other decisions which have been mentioned to us were all of them with reference to the Act of 1912 and S. 42 (6) thereof. As will be seen from the words of the provisions of the law with which we have to deal, namely, S. 48 of the Madras Act VI of 1932, the second clause thereof is far more precise in its language than the provisions in the earlier Imperial Act. For it says that when a liquidator has been appointed (as in this case) no suit or other legal proceeding shall lie or be proceeded with against the society except by leave of the Registrar. There was no provision of this kind in the earlier Imperial Act for a suit being filed with the leave of the

1. (1936) 70 M.L.J. 604: I.L.R. 59 Mad. 895.

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Registrar against a society after a liquidator was appointed. In this case it is admitted that the Registrar refused leave when leave was asked for, and we find it impossible to find any reason for ignoring the plain words of the provisions of law which are applicable to the present case and in particular, the second clause of S. 48 of the Act which is as clear as possible. It says that no suit can be instituted against a society when a liquidator has been appointed except by leave of the Registrar. This provision appears to us to stand in the way of the present suits, and though this point was not prominently placed before us in the argument and was certainly not referred to in the Court below, we are not able to find any out of the situation created by the new law. This finding, namely, that the suits are not maintainable in view of the provisions of S. 48 of Madras Act VI of 1932 is sufficient to dispose of these appeals. Nevertheless, as the other point, namely, the question of liability of the plaintiff-appellant has been argued at considerable length before us, it is perhaps desirable that we should briefly express our opinion thereon and all the more so because a special request has been made on behalf of the appellant that we should express our opinion on this point.

The point really is a simple one because the facts are practically undisputed. The plaintiff-appellant sent his resignation on the 4th June, 1930, to the Secretary of the Society and there is no doubt that that resignation was received by the Society and a meeting was held in the next month to consider the resignation. A copy of the letter of resignation appears also to have been sent to the Co-operative Department. The Society in its resolution dated 1st July, 1930 (*vide* Ex. II) resolved that the resignation should not be accepted. A copy of the resolution was sent to the plaintiff-appellant by registered post, but he appears to have declined to receive it. There can be no doubt that he was aware of the contents or at least of the fact that his resignation had not been accepted. On the 24th January, 1931, at a general body meeting of the Co-operative Society the plaintiff was present as a member and took part in it for some time, though he later on was asked to go out by the Chairman who presided at the meeting. It is argued on behalf of the respondent that these facts show that the resignation did not take effect and that the plaintiff-appellant really continued to be a member in spite of the letter of resignation sent by him on the 4th June, 1930. This

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argument assumes first that unless a resignation is accepted, it does not take effect in a case of this kind, and secondly, that the subsequent conduct of the plaintiff-appellant amounts to a withdrawal of his letter of resignation. As regards the first assumption, it appears to be really without foundation. In the case of an office in a private body like a Co-operative Society the law does not require that a resignation should be accepted by the Society or anyone else before it takes effect. The by-laws of the Society are altogether silent as regards the mode in which a member ceases to be a member and there is no reference to resignation in the Act or in the by-laws. There are one or two references in the Act to the withdrawal of members from the Society, and it is not contended that there can be no withdrawal or cessation of membership by means of resignation of membership. On the side of the plaintiff-appellant reliance has been placed on two English cases, *Finch v. Oake*[1] and *Glossop v. Glossop*[2]. *Finch v. Oake*[1] was a case which related to the membership of the Bermondsay and Totherhithe Licensed Victuallers and Beer Sellers' Trade Protection Association and though the member who had resigned wanted subsequently to withdraw his resignation, the Society declared that he had ceased to be a member by reason of the resignation and it was held that he had really ceased to be a member as soon as his letter of resignation had been received by the Committee of the Association. In that case also the rules of the Association contained nothing as to the right of members to retire, this matter being left to be governed by the ordinary principles of law. In those circumstances it was held that he could withdraw from the Association at any moment of his own pleasure and without the consent of his fellow members or the Association and, therefore, that immediately the letter of resignation reached the Association, the member who sent in his letter of resignation ceased to be a member and he could again become a member only by following the rules regarding election of members framed by the Association and not by any withdrawal. In the latter case *Glossop v. Glossop*[2], it was a director of a limited company who resigned his office as Managing Director. On the very day on which the letter of resignation came up for consideration before the special meeting of the Directors an attempt was made to withdraw the resignation. But the

1. (1896) 1 Ch. 409. 2. (1907) 2 Ch. 370.

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meeting resolved that the office of Managing Director had been vacated. In this case, however, the matter of resignation was provided for in two articles of the Company, which provided that the office of Managing Director should be vacated on the happening of any of the contingencies mentioned therein, whereby the office of Director should be vacated. The provision regarding the latter subject was to this effect:

"The office of director shall be vacated (*inter alia*)—if by notice in writing to the Company he resigns his office, provided that the vacation of office shall not take effect unless the directors shall pass a resolution to the effect that he had vacated his office within six months from the happening of the event whereby such director had vacated his office."

In these circumstances, it was held that the Managing Director could not withdraw his resignation without the consent of the company and that he had vacated his office by his letter of resignation and that the resolution of the Board at the special meeting was effective and valid. On the side of the respondent, reliance has been placed on two decisions, namely, those in *Sudarsana Rao* v. *Christian Pillai*[1] and *Kuppu Govinda Chetti* v. *Secretary, Co-operative Central Bank, Conjeevaram*[2]. The latter case does not contain any discussion of the question but is important in view of the fact that it deals with the very letter of resignation with which we are concerned in this case, though the decision therein was in respect of the resignation of the office of the President of the Society, the petitioner being also the President of the Society and the letter of resignation being in respect of both his office as president as well as his membership. We are not concerned in the present case with the office of president but only with the question of membership and therefore the decision in *Kuppu Govinda Chetti* v. *Secretary, Co-perative Central Bank, Conjeevaram*[2], is not very helpful. The discussion of the point is contained in *Sundarsana Rao* v. *Christain Pillai*[1], where the same learned Judge, namely, Sir Vepa Ramesam relies to a great extent on certain passages from the text books on elections. The case with which the learned Judge had to deal was one in which the question for decision was whether a certain person had ceased to be an Honorary Magistrate prior to a certain date on which he was elected as a member of a local body. In that case it was held that an Honorary Magistrate does not cease to hold his office by his resignation but only on the acceptance of his resignation. That

1. (1923) 45 M.L.J. 798. 2. (1932) M.W.N. 18.

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decision is certainly supported by the extracts from the text books on elections which relate to public offices or offices in local bodies in England which cannot be ordinarily given up without either the consent of some authority or the payment of a fine for non-acceptance. That case was one similar to *The Queen* v. *Corporation of Wigan*[1], which was decided in the light of the statutory provision in S. 36 of the Municipal Corporation Act, 1882, which provided that a person elected to a corporate office may, at any time, by writing signed by him and delivered to the town clerk, resign the office, on payment of the fine provided for non-acceptance thereof. The reasoning which would apply to resignation of a public office of this kind cannot be applied to resignation of the membership of a society with which we have to deal in the present case. We are therefore inclined to the view that the membership of the plaintiff-appellant ceased immediately his letter of resignation reached the Society, that is to say, early in June 1930. There was thus an immediate cessation of his membership, and there being no provision for withdrawal of any resignation in the Act or in the bye-laws, he could become a member again only by complying with the provisions relating to membership. The mere fact that he refused to receive the copy of the resolution sent to him in July 1930 and that he attended a meeting of the Society some six or seven months later has no legal effect so far as this question is concerned in the sense that these subsequent circumstances could not possibly restore him to his membership or make him a member after he had ceased to be one. It follows from this that the plaintiff-appellant ceased to be a member more than two years prior to the orders complained of in the present suits and to the liquidation.

The only other point which perhaps deserves some reference is the question whether the liquidator acted within his jurisdiction in these circumstances. So far as this point is concerned the decision of the Bench in *Vaikunta Bhat* v. *Sarvothama Rao*[2], appears to us to hold the field and, being a case clearly in point, has to be followed unless it is declared not to lay down the law correctly. Reliance has also been placed on two decisions of the Lahore High Court which are to the same

1. (1885) 14 Q.B.D. 908.
2. (1936) 70 M.L.J. 604: I.L.R. 59 Mad. 895.

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effect, namely, *Mukand Lal* v. *Liquidator, Malhotra Bank, Hafizabad*[1] and *Anjuman-i-Imdad-Qarza Bahami* v. *Mehr Din*[2]. In view of the fact that these decisions relate exactly to the present point, whereas the other cases, and in particular *Secretary of State for India* v. *Meyyappa Chettiar*[3] and cases of that description, deal with other enactments, it does not seem necessary for us to consider in detail the question whether the cases dealing with other enactments really affect the present question having regard to the decisions which deal with the exact point, which arises in these cases. On these points we are inclined to decide in favour of the plaintiff-appellant. Nevertheless his appeals must fail and the suits must stand dismissed because of the absence of leave from the Registrar for the institution of the suits which, in our opinion, is required by the provisions of S. 48 of the Madras Co-operative Societies Act VI of 1932. Having regard to the circumstances *of these cases,* we think the just course to follow with regard to costs is to direct the parties to bear their own costs in this Court, the appeals being dismissed and the memorandum of cross-objections also.

K. C. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Nithoor Thimmanna Bhat .. *Petitioner* (Plaintiff)*

v.

Aithappa Adyanthaya .. *Respondent (Defendant).*

Thimmanna Bhat v. Aithappa Adyanthaya.

Limitation Act (IX of 1908), S. 4—Applicability—Suit on promissory note—Courts being closed for summer recess—Assignment of note on reopening date—Suit filed on same day—Maintainability.

The promissory note on which the petitioner sued was dated 10th May, 1930. There was an endorsement of payment on 8th May, 1933, which gave a fresh period of limitation, and so the suit on the note had to be filed on or before 8th May, 1936. On that date, however, the Courts were closed for the summer recess. On the reopening day, namely, on 1st June, 1936, the payee under the promissory note assigned his rights in the promissory note to the petitioner, who filed the suit thereon the same day.

Held, that S. 4 of the Limitation Act was applicable to the case, and the suit was consequently saved from the bar of limitation.

Fatma Bi v. *Nagoorkhan,* (1931) 62 M.L.J. 256: I.L.R. 55 Mad. 630 (F.B.), considered.

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1. (1933) I.L.R. 14 Lah. 703. 2. (1937) I.L.R. 18 Lah. 649.
3. I.L.R. (1937) Mad. 211.

*C. R. P. No. 356 of 1937. 23rd April, 1940.

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Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of District Munsiff of Puthur in S. C. S. No. 208 of 1936.

P. Sridara Rao for Petitioner.

T. Krishna Rao for Respondent.

The Court delivered the following

JUDGMENT.—The promissory note on which the petitioner sued was dated 10th May, 1930. There was an endorsement of payment on 8th May, 1933, which gave a fresh period of limitation; and so the suit had to be filed on or before 8th May, 1936. On that date however, the Courts were closed for the summer recess. On the reopening day, 1st June, 1936, the payee under the promissory note assigned his rights in the promissory note to the present petitioner, and on the very same day the petitioner filed the suit. The District Munsif of Puthur, in whose Court the suit was filed, held that the suit was barred by limitation. He relied on the observation of the Chief Justice in the Full Bench decision of this Court in *Fatma Bi* v. *Nagoorkhan*[1], to the effect that S. 4 did not extend the period of limitation. He was of opinion that as at the time when the assignment was made the suit was barred, no rights passed to the assignee under the assignment. He therefore, although finding all the other points raised in favour of the petitioner, dismissed the suit.

All that happens after the lapse of three years after the creation of a debt is that the debt cannot be enforced in a Court of Law. The debt does not cease to exist; nor does the relationship of creditor and debtor. As Beasley, C.J., said in *Fatma Bi* v. *Nagoorkhan*[1], there was on the date of the reopening of the Court an enforceable debt. The question that arose in that appeal was whether a person who could have filed the suit on the reopening of the Court but was unable to do so because the debtor was adjudged an insolvent, could prove in insolvency; and S. 46 of the Presidency Towns Insolvency Act came up for consideration. That section says that all debts to which the debtor is subject when he is adjudged an insolvent shall be deemed to be debts provable in insolvency; and the Full Bench held that on the date of the insolvency, which was the day when the Court reopened, that is, more than three years

1. (1931) 62 M.L.J. 256: I.L.R. 55 Mad. 630 (F.B.).

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after the debt had been incurred, the debtor was still subject to the debt. If on the date of the assignment there was a debt, then there was nothing to prevent the creditor assigning it to some other person. A debtor might well pay his debt even though it were barred by limitation and one would expect an honourable debtor to do so. The lower Court is therefore clearly wrong in saying that on the date of the assignment there was no interest that could be assigned.

A decision of Beaman, J., in *Visram Vasudeo Thakoor* v. *Tabaji Balaji Waghi*[1] has been referred to by the learned advocate for the petitioner in support of his contention that the petitioner was entitled to sue; but that learned Judge, differing from a Bench decision of his own Court in *Bai Hemkore* v. *Masamalli*[2], adopted a reasoning which has since been held to be erroneous both in his own Court and in other Courts. As to the actual point that is raised here, Beaman, J., had very little to say. He argued on an analogy from a case where an acknowledgment took place during the Court recess after the period of limitation had expired. A decision on which some reliance has been placed by the other side is one of King, J., in *Chidambaram Chettiar* v. *Venkatasubba Naik*[3]. That was a case where an acknowledgment took place beyond the period of limitation but during the recess. S. 19, which saves limitation in the case of certain acknowledgments made within the period of limitation prescribed, says that

"Where before the expiration of the period prescribed for a suit .... in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing .... a fresh period of limitation shall be computed from the time when the acknowledgment was so signed."

The wording of S. 3 of the Limitation Act indicates that S. 4 does not lengthen the period of limitation prescribed; for it says

"Subject to the provisions contained in Ss 4 to 25 (inclusive), every suit instituted ... after the period of limitation prescribed therefor .... shall be dismissed."

So that suits to which S. 4 can be applied are therefore clearly not suits instituted during the period of limitation prescribed. S. 4 deals with one of the exceptions to the

1. (1912) 15 Bom. L.R. 348. 2. (1902) I.L.R. 26 Bom. 782.
3. (1937) 1 M.L.J. 262.

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general rule that a suit filed after the period of limitation prescribed shall be dismissed.

Whether, on the date of the reopening of the Court the petitioner could maintain the suit against the respondent would depend on the wording of S. 4, which permits of a suit being filed on the reopening of the Court beyond the period of limitation. S. 4 runs :

"Where the period of limitation prescribed for any suit . . . . expires on a day when the Court is closed, the suit . . . . may be instituted . . . . on the day that the Court reopens."

The period of limitation prescribed for the filing of the suit with which we are now concerned expired while the Court was closed; and S. 4 says that when that is the case, the suit may be instituted on the date when the Court reopens. S. 4 therefore directly applies to the present case and the suit was therefore maintainable, and should have been decreed in the petitioner's favour.

The petition is accordingly allowed and the suit decreed with costs.

The respondent has filed an application under S. 8 of the Madras Agriculturists' Relief Act for scaling down the debt. That application will be transferred to the lower Court for disposal; and the decree passed by this Court will be subject to the result of that application.

B. V. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Kulikarai Viswanathaswami Temple, by its trustee Bava C. Gopalaswami Mudaliar .. *Petitioner** (*Petitioner*)

v.

The Assistant Engineer for Surveys, Electricity Department, Trichinopoly and another .. *Respondents* (*Respondents*).

Kulikarai Viswanathaswami Temple v. Assistant Engineer for Surveys, Electricity Department, Trichinopoly.

Telegraph Act (*XIII of 1885*), *Ss. 10 (d), 16 and 18—Electric supply—Laying of new lines—Private trees which may be potential danger to the line—Order of magistrate for cutting trees and awarding compensation—When open to reconsideration by District Judge.*

Where a new electric line is laid it might be desirable that certain trees which prevent the laying of the line should be cut down and further it may

* C. R. Ps. Nos. 309 and 310 of 1937. 23rd April, 1940.

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be necessary to cut down other trees because they are so close as to be a potential danger to the line. In such cases, the engineer has no power to cut the trees himself. He may apply to the Magistrate for a decision as to what trees the owner is bound to clear away. Where trees are cut by exercising authority under S. 10 (*d*) the magistrate is bound to award compensation. The award is open to reconsideration by the District Judge under S. 16 (3). For trees cut after the line was erected the magistrate's award would be final.

Petitions under Ss. 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the order of the District Court of East Tanjore at Negapatam dated 5th October, 1936, and passed in O.P. Nos. 37 and 44 of 1935 respectively.

R. Sundaralingam for Petitioner.

The Government Pleader for Respondents.

The Court delivered the following

JUDGMENT.—In laying a line for the conveyance of electric power in connection with the Pykara scheme it was necessary to take it through a tope of the petitioner situated in Anavadapathi village. It appears that the engineer in charge of the scheme proceeded to cut down certain trees in the petitioner's tope and when he objected, the engineer applied to the Sub-Magistrate under S. 18 (1) of the Indian Telegraph Act, which Act applies also to electric power lines and the magistrate ordered the petitioner not to interfere with the engineer in the cutting down of the trees. Apparently acting under S. 18 (2), he passed an order which has been filed as Ex. IV, which evaluates all the trees which were cut by the engineer. The petitioner then applied to the District Judge under S. 16 (3) of the same Act with regard to the quantum of compensation awarded. The learned District Judge thought that S. 16 (3) did not apply; and held that the case of the petitioner was covered by S. 18, which says that the Magistrate's order is final and the District Judge had no jurisdiction to entertain any complaint about the inadequacy of the compensation awarded.

S. 18 contemplates action by a Magistrate on the application of the telegraph authority; but not direct action of cutting down trees by the telegraph authority itself. Moreover, S. 18 only applies to the cutting down of the trees after a line has been erected; because S. 18 (1) begins "if any tree standing or lying near a telegraph line". If a telegraph line does not exist, there can be no tree standing near a telegraph line. On the

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other hand, S. 10 (*d*) gives the telegraph authority power to lay a telegraph line upon any immovable property and to do necessary damage for the proper laying of the lines. It is authorised to pay full compensation to all persons interested for any damage sustained by them by reason of the exercise of those powers. Where a line is laid across a tope it would first of all be necessary to cut down certain trees in order that the line might be laid. It might then be desirable that certain other trees, which do prevent the laying of the line, should be cut down because they are so close as to be a potential danger to the line. In such cases, the engineer has no power to cut the trees himself. He must apply to the Magistrate, who presumably would have to exercise his discretion as to what trees the owner is bound to clear away. Admittedly, the engineer did cut down some trees without any application to the magistrate, and he could only have cut those trees by exercising authority under S. 10 (*d*). For that purpose he was bound to award compensation; and if we assume that the values of the trees which he considered to be proper is that set out in Ex. IV, then that award is open to reconsideration by the District Judge upon the present application under S. 16 (3). Any other trees that had to be cut down for the laying of the line would also be governed by S. 10 (*d*), even though the magistrate passed orders concerning them. Those trees which were cut down after the line was erected on the order of the magistrate would be covered by S. 18, and the magistrate's valuation would be final.

These petitions are therefore allowed and the petitions before the lower Court remanded for disposal according to law. Costs of these applications will be costs in the cause and provision will be made by the learned District Judge for them in his final order.

As the applications were dismissed on a preliminary point before the parties had any opportunity of letting in evidence, it of course follows that they will have to be given an opportunity to let in evidence on the relevant points raised.

K. S. *Petitions allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE SOMAYYA.

Katikineni Venkata Gopala Narasimha Rama Rao .. *Appellant** (*Defendant*)

v.

Chitluri Venkatramayya .. *Respondent* (*Plaintiff*).

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Evidence Act (I of 1872), Ss. 74 and 65 (e)—Statements by assessee in support of his return furnished under Income-tax Act, S. 22—Whether public documents within S. 74, Evidence Act—Certified copies of—Admissibility under S. 65 (e) of Evidence Act—Income-tax Act, S. 54—If a bar.

In a suit on a lost promissory note certified copies of statements filed by the plaintiff in support of his income-tax return, were tendered in evidence to prove the notes,

Held, it would be putting an unwarranted restriction on the words "Documents forming the acts or records of the acts" to say that they should be confined to those parts of an income-tax record which the Income-tax Officer has himself prepared and to exclude documents which he has himself called for or which have been admitted to the record for the purposes of the assessment. The statements would be public documents within the meaning of Evidence Act, S 74 and certified copies of the same would be admissible in evidence as secondary evidence under S. 65 (*e*) of the Evidence Act. There is nothing in S. 54, Income-tax Act, which prohibits a party from putting in evidence a certified copy of an income-tax return.

Anwar Ali v. *Tafozal Ahmed*, (1924) I.L.R. 2 Rang. 391 and *Devidatt* v. *Shriram Narayandas*, (1931) I.L.R. 56 Bom. 324, not followed.

Venkataramana v. *Varahalu*, (1938) 50 L.W. 681, referred and *Mythili Ammal* v. *Janaki Ammal*, I.L.R. (1940) Mad. 329, overruled.

Appeals respectively against the decrees of the Court of the Subordinate Judge of Ellore dated 29th March, 1937, in O. S. Nos. 14 of 1935 and 28 of 1936 and petitions praying that in the circumstances stated in the affidavit filed with C. M. P. No. 980 of 1940, the High Court will be pleased to scale down the decrees in O. S. Nos. 14 of 1935 and 28 of 1936 on the file of the Subordinate Judge of Ellore, respectively, under the provisions of the Madras Act IV of 1938.

P. V. Rajamannar, K. Subba Rao and *D. Suryaprakasa Rao* for Appellant.

Sir A. Krishnaswami Aiyar (*Advocate-General*), *Nugent Grant* and *V. Suryanarayana* for Respondent.

The judgment of the Court† (*Wadsworth* and *Patanjali Sastri, JJ.*) referring the question to a Full Bench was delivered by

Wadsworth, J.—These two appeals raise the question of the liability of the appellant on two missing promissory notes, one for Rs. 9,704 dated 16th February, 1932, and the other for Rs. 24,400

* Appeals Nos. 234 and 235 of 1937 and C. M. Ps. Nos. 980 and 981 of 1940. *15th April, 1940.

† 13th March, 1940.

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dated 13th February, 1933. The former promissory note formed the subject-matter of O. S. No. 14 of 1935 against which A. S. No. 234 is preferred. The execution of this promissory note was admitted but the defendant (appellant) pleaded that it was discharged except for a small amount. The second promissory note formed the subject-matter of O. S. No. 28 of 1936 (against which A. S. No. 235 is filed) and its execution is totally denied by the appellant. The promisee (plaintiff) was a well-to-do Vaisya money-lender and it is common ground that up to 28th March, 1934, he and the defendant, an important Mokhasadar, were on very friendly terms and had considerable dealings. On 1st February, 1934, the defendant made over the income from some of his lands to his wife for a term of years and it is said that this transaction made the respondent uneasy about his advances to the appellant. On 17th February, 1934, both the parties were at Ellore and it is alleged that the respondent accompanied by P. W. 2, who is admittedly a member of the same community and indebted to the respondent, visited a vakil (P. W. 3) who also belongs to the Vaisya community and who is the legal adviser of P. W. 2. That vakil was asked to draft a promissory note in renewal of previous debts due from the appellant to the respondent, the promissory note to be executed both by the appellant and his wife because of the alienation in the wife's favour already referred to. The plaintiff's case was that the vakil was shown both the promissory notes not only the note for Rs. 9,000 and odd but also the note for Rs. 24,400 and that he prepared a draft with reference to those two notes which were to be renewed by the joint promissory note. It is alleged that in the same evening the draft was handed over to the appellant in the shop of P. W. 2 and that an arrangement was made that the appellant should send word to the respondent, so that the latter might come to the appellant's house for the execution of the new promissory note. The respondent lives at Chintalapudi, the appellant at Pothapur some five miles away from Chintalapudi.

On 28th March, 1934, there was a meeting of the Chintalapudi Taluk Board of which both the plaintiff and the defendant were members. It is alleged that there was on that day some slight misunderstanding between them arising out of a vacancy on the District Educational Council. There is nothing to show, however, that there was any serious quarrel and the incident is only referred to on behalf of the appellant as indicating that the appellant would not be very likely to send an invitation on the following day to the respondent. It is by no means clearly established that any real misunderstanding did in fact arise. On 29th March, it is alleged that the appellant sent his servant, G. Sitayya, who has not been examined, to the respondent to ask him to come on the

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following day with the notes to Pothanur for the execution of the joint promissory note. On the same evening, it is alleged that the appellant himself visited the respondent and told him that he and his wife would execute a fresh promissory note and asked him to bring the prior notes. At the same time he is alleged to have borrowed a further sum of Rs. 300.

On 30th March, 1934, the respondent went to Pothanur accompanied by his brother Sitayya (who has not been examined) and a dependent (P. W. 22) in a cart driven by D. W. 2. D. W. 2 denies that he drove the cart and even denies that he knows how to drive a cart and there is reason to think that he has been won over. The party is said to have met P. W. 12 and P. W. 17 on the way to Pothanur and to have told them the purpose of their journey. P. W. 12 is indebted to the plaintiff and P. W. 17's evidence is contradicted by D. W. 1 with reference to the object with which he had gone out that day. Little importance can be attached to either of these witnesses. When they arrived at the appellant's house, the respondent and his companions were asked to go and get their food and return afterwards. They are alleged to have had a meal in the house of the village school master (D. W. 10) who has been examined to deny this occurrence. He is, however, obviously subject to the influence of the appellant and no weight can be attached to his denial. When the respondent and his companions returned to the appellant's house shortly after noon, it is alleged that the proceedings were witnessed by three independent witnesses. One is P. W. 4, a Christian, employed in a Chintalapudi tannery, who is said to have gone there accidentally when going on his rounds collecting skins. He is mentioned as an eye-witness in the report to the police made the same evening and there is no apparent reason for him to be introduced into the case unless he was actually present. He generally supports the respondent's story. Besides him three other persons belonging to the village of Ganicherla, four miles from Pothanur are said to have been present. They are P. Ws. 5 and 6 and another man who has not been examined. Their presence is not mentioned in the complaint to the police. The P. Ws. 5 and 6 are both indebted to the plaintiff. They are said to have gone to the respondent's house to buy timber. They support the respondent's version of the occurrence but the fortuitous presence of these persons who are indebted to the respondent at the time of this occurrence must necessarily be suspicious and the suspicion is enhanced by the omission of their names from the complaint to the police. No great weight can therefore be attached to their evidence.

The respondent's story of the occurrence at 1 P.M. on the 30th of March is briefly this:

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He and his party were sitting on the verandah. The appellant went inside to call his wife and came out saying that his wife was behind the door, she being a lady who does not appear in public. The appellant said that he would read the notes to his wife and asked the respondent for them. The respondent handed over the whole bundle of promissory notes. The appellant began reading out the note for Rs. 24,400 and suddenly rushed into the house with the notes in his hand and bolted the door from inside. He then called to his servant Subbayya, whose presence is spoken to by all the respondent's witnesses, and told him to drive the respondent's party away. Then some 25 or 30 of the appellant's servants came with sticks and drove them out. The respondent and his companions returned on foot to Chintalapudi, meeting P.W. 12 and another on the way. P.W. 12 is significantly another of the plaintiff's debtors and his evidence carried the matter little further.

At 10 P.M. on the night of the 30th, the respondent made a complaint to the Chintalapudi Police. This complaint (Ex. XIII) states that the appellant was indebted under the two promissory notes, the second of which was in respect of the respondent's wife's money, that as a result of the conveyance of the appellant's property to his wife, the respondent pressed for payment and on the invitation of the appellant went to Pothanur with his brother and P.W. 22 taking "the aforesaid promissory notes" and it mentions the cart driver D.W. 2. The appellant asked them to come back at noon so that all the old promissory notes could be read over to his wife. Ex. XIII then describes briefly the incident in the afternoon mentioning the presence of P.W. 4. There are certain significant omissions from Ex. XIII. The most important is that it says nothing about the respondent's brother Mallayya to whom the major portion of the money due under the promissory note for Rs. 24,400 is alleged to have been originally due. It does not mention the presence of P.Ws. 5 and 6 nor does it refer to the witnesses who are said to have met the respondent on his way to and from Pothanur.

This complaint was investigated by the police. On 4th April, 1934, the respondent made a statement to the police which is Ex. XVII. In that statement he says that the promissory note for Rs. 24,400 was executed in substitution for two debts due under promissory notes by the appellant to the respondent's wife and his brother Mallayya. The respondent was apparently asked if this larger promissory note was mentioned in his ledger and he said that he would search for the ledgers and then say and that he could not say if that amount was entered separately in another book or if it was entered in the usual book and he could not say if he had opened a ledger in his wife's name. He said that he had

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taken his account books on the first of April to show to his Vakil with reference to a civil suit and had handed them over to his younger brother and that he would make a fuller statement after sending for the books from Ellore. It must be conceded that the terms of the statement to the police do not suggest that the respondent at that time was confident that the details regarding this transaction for Rs. 24,400 would be found in his ordinary accounts.

The criminal case against the appellant failed and subsequent revisional proceedings were also unsuccessful. The respondent thereafter filed first a suit on the admitted promissory note for Rs. 9,000 and odd and it was only after this suit had made some progress that the further suit was filed on the promissory note for Rs. 24,400 and the two suits were clubbed together for trial.

There are numerous circumstances in this case which have made it very difficult to come to a confident conclusion. *Prima facie* the evidence adduced by the respondent regarding the occurrence at Pothanur is such as to give rise to suspicion. Nearly all the witnesses who speak to this occurrence are his castemen or demonstrably persons amenable to his influence. The delay in filing the criminal complaint was sufficient to permit of some exaggeration if the complainant had been so minded. The omission of reference to Mallayya's debt in Ex. XIII, the addition to the original story of several apparently interested witnesses and the non-committal attitude of the respondent on the 4th of April when questioned about his accounts, were also circumstances which would justify a suspicion that we had to deal with a story which was undergoing developments; and it may well have been that these suspicious factors led to the failure of the criminal case. On the other hand, there are many circumstances which prevent us from rejecting the respondent's story as a completely false story, though no doubt it was supported by a considerable volume of dubious evidence. It cannot be denied that something must have happened at Pothanur on the 30th of March which led to the complaint (Ex. XIII) and we see no reason to doubt that the incident which led to this complaint was witnessed by the tannery employee (P.W. 4). Otherwise, there is no apparent reason for including his name in that complaint. It was probably also witnessed by the cart driver, D.W. 2, who has been prevailed upon to deny all knowledge of the occurrence. The defence story is a complete denial of the whole occurrence coupled with a denial of the execution of the promissory note for Rs. 24,400 and the prior notes which led up to that transaction and also with a story of discharge of the earlier promissory note except for a sum of Rs. 500 and odd. Now, it seems to us clear that the defence evidence must be to a great extent, if not entirely, false evidence. It is

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common ground that the respondent and the appellant, both men of influence and position, were on very friendly terms up to the 30th of March, 1934. The slight incident on the 28th, even if true was admittedly not of such importance as to affect their generally friendly relationship. In such circumstances, it is incredible that the respondent, a rich Vaisya money-lender, would have invented out of nothing at all a completely false story of an outrageous crime whereby he could fasten upon his friend a liability for approximately Rs. 34,000, which was not true at all. It would of course be quite conceivable, if there had been a violent quarrel between the parties connected with the admittedly genuine promissory note for Rs. 9,000 and odd and resulting in the destruction or appropriation of this promissory note, that the respondent might have utilised the interval between this incident and his complaint to exaggerate the story and add to it a false claim for Rs. 24,400; and in such circumstances it is conceivable that the appellant might have retaliated by putting forward a false story of discharge of the admitted promissory note and have denied the whole occurrence in order to support his false story of discharge. Such a theory would explain the delay in the complaint and its omissions, the hesitations of the respondent in his first statement to the police and the anxiety of the respondent to add to his witnesses a number of persons subject to his control who would support the details of his story. It would also explain the anxiety of the appellant to repudiate the whole occurrence, his unwillingness to produce his own accounts and the not very convincing evidence adduced by him of the discharge of the earlier promissory note. But such a theory can only be entertained in the absence of reliable evidence that this promissory note for Rs. 24,400 was in existence before the 30th of March. If the respondent can prove that this large debt was evidenced by a promissory note which had been in his possession long before this alleged occurrence on the 30th March, 1934, it is incredible that he would have concocted a false story of the loss of this promissory note instead of simply filing a suit upon it. We are unable to accept the theory that there was no occurrence at Pothanur on the 30th of March, 1934 and unless it is possible to show that the respondent's story of what happened that day has been exaggerated, probably by the inclusion of a promissory note for Rs. 24,400 which did not exist amongst the documents lost on that day, the only possible inference from the appellant's denials, from the false evidence which he has adduced, from the suppression of his accounts and from the failure to examine his two servants Sitayya and Subbayya who are alleged to have taken part in this occurrence, is that the respondent's story must be substantially true.

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The main question in this case therefore becomes the question whether the existence of this promissory note for Rs. 24,400 before 30th March, 1934, has been satisfactorily demonstrated.

Now, the evidence of the earlier existence of this debt, apart from the statements of the plaintiff and witnesses interested in him, on which much reliance cannot be placed, consists of (1) the respondent's own accounts, (2) the evidence of the vakil (P. W. 3) regarding what he saw on 17th February, 1934, and (3) Exs. H and E, certified copies of the profit and loss statement attached to the respondent's income-tax return and the statement on which it was based, which were apparently filed on or before 17th May, 1933, before the income-tax Officer. The accounts show entries corroborating the story of the execution of the promissory note for Rs. 24,400 on 13th February, 1933, with corresponding credits in favour of the plaintiff's brother and wife relating to liabilities originally due from the appellant to them which the respondent had taken over in return for the execution of this note. The ledger entries are not signed and a good deal of attention has been devoted to the question whether the respondent always took in his ledger the signatures of persons executing promissory notes at his house. It seems to have been his usual practice to do so, but not his invariable practice. It has been pointed out that the adjustment entries relating to the credits to respondent's wife and brother are in isolated pages of the ledger and that all these ledger entries might well have been interpolated —an allegation which receives some confirmation from the respondent's own non-committal statement to the police (Ex. XVII). The entry in the day book finds its place in chronological order and is *prima facie* good evidence of the transaction, more especially as the general truth of the respondent's account does not appear to have been seriously attacked by the lower Court. But it is to be noted that the respondent maintains his day book in a loose leaf system similar to that ordinarily adopted by Marwaries; and any account maintained in loose leaf form must necessarily be less convincing than a similar account maintained in a bound book.

The evidence of the vakil (P. W. 3) was not seriously attacked in cross-examination except to the extent that his memory of the details of what he saw was challenged. He definitely says that he saw two promissory notes, one for more than Rs. 20,000 and the other for Rs. 10,000 and odd executed by some Mokhasadar of Pothanur. His evidence is not very precise or accurate. The vakil in question belongs to the same community as the respondent, but he does not appear to have had any previous connection with the respondent though respondent's debtor, P. W. 2, was his client. There is no apparent reason to conclude that P. W. 3 was not

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trying to speak the truth. He may, however, have honestly thought that he remembered details about which he had been subsequently told.

The most conclusive piece of evidence on this question of the previous existence of the promissory note for Rs. 24,400 is provided by Exs. E and H which are certified copies of the income statement and profit and loss statement, the latter purporting to have been signed by the plaintiff on 17th May, 1933, the former of which sets forth this debt of Rs. 24,400 as due to the respondent. There is, however, a serious difficulty with reference to the admissibility of this evidence. Objection was taken to it at the time when it was tendered and we deem it necessary to refer to a Full Bench the question of its admissibility in view of the decision of our learned brothers Burn and Stodart, JJ., in the case of *Mythili Ammal* v. *Janaki Ammal*[1]. In our opinion the evidential value of these Income-tax documents is such that if they are admitted, the correctness of the lower Court's conclusion is clear. If they are to be rejected, we shall have to decide hereafter whether the remaining evidence is sufficient to establish the pre-existence of this note for Rs. 24,400 which, if established, seems to us, in view of the defendant's denials and suppressions, to warrant the decree which has been given.

The legal difficulty may be briefly stated. Exs. E and H are both certified copies. If the original is a public document within the meaning of S. 74 of the Evidence Act, then the certified copies are good secondary evidence of that original under S. 65 (*e*). If these statements are not public documents, we are unable to see how the certified copies can be admitted into evidence under any other clause of S. 65 of the Evidence Act. S. 74 defines public documents as documents forming the acts or records of the acts (1) of the sovereign authority, (2) of official bodies and tribunals, and (3) of public officers, legislative, judicial and executive, and the term includes also public records kept in British India of private documents. The question is whether an income-tax return and the statements accompanying it form part of the record of the act of the Income-tax Officer who makes the assessment. In the case just referred to, the learned judges decided, without quoting any authority other than the statutory provisions, that it was the policy of the law that statements made in income-tax returns should not be used in evidence against the person making them or against any one else, that income-tax returns could not be proved by secondary evidence and that the income-tax return was not

1. I.L.R. (1940) Mad. 329.

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part of the record of the act of assessment and not a public document as defined in S. 74 of the Evidence Act. In coming to this conclusion, the learned judges appear to have been greatly influenced by the provisions of S. 54 of the Indian Income-tax Act which prohibits the disclosure by any public servant of particulars contained in an income-tax return or statement. Now quite clearly this section applies only to disclosures and does not prohibit the Income-tax Officer from giving to the person who made the return a copy of that return. In fact, we are informed that the departmental orders expressly provide for the giving of such a copy to the assessee on application. It seems to us that there is no ground of public policy which would prevent such an assessee from using in evidence such a copy when it has been granted to him. Nor are we convinced that the ground of public policy is a sufficient reason for excluding from evidence any document which is legally admissible under the Evidence Act and is not excluded by any statutory prohibition. This view has been adopted in the case of *Venkataramana* v. *Varahalu*[1], a decision of Varadachariar and Pandrang Row, JJ., anterior to the decision of Burn and Stodart, JJ., but apparently not brought to their notice. Varadachariar and Pandrang Row, JJ., were actually dealing with a copy of a statement recorded by the Income-tax Officer which clearly was a public document and they held that certified copies of such a statement were admissible notwithstanding the provisions of S. 54 of the Indian Income-tax Act. The learned Judges refer to a decision in *Anwar Ali* v. *Tafosal Ahmed*[2], wherein a single Judge held that income-tax returns being made confidential by S. 54 of the Income-tax Act, certified copies of such a return could not lawfully be given and if given could not be used in evidence. In *Devidutt* v. *Shriram Narayandoss*[3], a Bench of the Bombay High Court held that certified copies of an income-tax return could not be given in evidence, because the return is not a public document within the meaning of S. 74 of the Evidence Act and that the prohibition in S. 54 of the Indian Income-tax Act was sufficient to warrant the view that a certified copy could not be lawfully obtained and would not be admissible in evidence if obtained. It seems to us that these decisions raise a question of far-reaching importance. With all respect to the learned Judges who have held otherwise, we do not consider that the prohibition against the disclosure of the contents of an income-tax return can have any bearing on the admissibility of the contents of that return filed at the instance of the person who made it. If the income-tax return is a part of the record of the

1. (1939) M.W.N. 1028. 2. (1924) I.L.R. 2 Rang. 391.
3. (1931) I.L.R. 56 Bom. 324 at 329.

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act of the Income-tax Officer making the assessment, a certified copy of the document can lawfully be given, subject to the prohibition against disclosure in S. 54 of the Indian Income-tax Act. If it has been so given, then by the terms of S. 65 of the Evidence Act it is, no matter who produces it, good evidence of the original; provided that the original is a public document; and we do not think that considerations of public policy can warrant its exclusion from evidence. If an income-tax return is not a public document, as being part of the record of the Act of the assessing officer, it is difficult to see how a plaint or written statement in a civil suit or a complaint in a criminal case can be deemed to be public documents such as can be proved by the production of certified copies. It is the almost universal practice of the Courts to grant certified copies of such documents and to admit them in evidence, though the admissibility of a certified copy of a plaint appears to have been successfully challenged in one or two cases, not of this High Court. We are inclined to the view that an income-tax return being the basis of the Income-tax Officer's assessment, must be treated as part of the record of the act of assessment and must therefore be regarded as a public document of which a certified copy can be given in evidence. The matter, however, being the subject of somewhat conflicting rulings of Benches of this High Court, we refer to a Full Bench the following question:

"Whether a profit and loss statement and a statement showing the details of net income, filed by an assessee in support of his return of income furnished under S. 22 of the Indian Income-tax Act are public documents with reference to S. 74 of the Evidence Act of which certified copies would be admissible under S. 65 (e) of the Evidence Act."

This appeal coming on for hearing in pursuance of the aforesaid Order of Reference, the Court (*Sir Alfred Henry Lionel Leach, Chief Justice, Mr. Justice King* and *Mr. Justice Somayya*) expressed the following

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OPINION.* *The Chief Justice.*—Before proceeding to examine the provisions of the sections of the Indian Evidence Act mentioned in the question under reference it is desirable to state the effect of S. 54 of the Indian Income-tax Act, 1922, as in some cases where certified copies of the income-tax documents have been tendered in evidence its provisions have been misunderstood and misapplied. Sub-S. (1) of S. 54 of the Indian Income-tax Act states that all particulars contained in a state-

* 15th April, 1940.

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ment made, return furnished or accounts or documents produced under the provisions of the Act, or in evidence given in the course of proceedings under the Act other than proceedings under Chapter VIII (which relates to offences and penalties) or in a record of an assessment proceeding, or a proceeding relating to the recovery of a demand shall be treated as confidential, and, notwithstanding anything contained in the Indian Evidence Act, 1872, no Court shall be entitled to require a public servant to produce a document referred to in the section or to give evidence thereon. Sub-S. (2) provides for the punishment of a public servant who unlawfully discloses particulars of an income-tax matter. Sub-S. (3) sets out the occasions on which disclosure can lawfully be made. It is not necessary to set them out as the provisions of sub-S. (3) have no application here and have no bearing on the reported decisions which have relation to the application of S. 54.

While S. 54 prohibits the disclosure, except on specified occasions, of matters connected with an assessment to income-tax and prohibits a Court from requiring a public servant to produce the documents mentioned in the section or to give evidence in respect of them, it does not follow that the Court may not admit in evidence a document which falls within S. 54 (1). This will depend on whether the document is admissible under the provisions of the Indian Evidence Act. Paragraph 85 of the notes and instructions compiled by the Income-tax department for the guidance of its officers states that the following persons shall, in practice, be allowed to inspect or to receive copies: (1) In any case the person who actually made the return; (2) any partner (known to be such) in a firm registered or unregistered to whose income the return relates; and (3) the manager of a Hindu undivided family to whose income the return relates, or any other adult member of the family who has been treated as representing it. There is nothing in S. 54 to prohibit this practice and it is only right that a person who is concerned with an assessment should be allowed to obtain copies of the documents relating to his assessment to income-tax should he so desire, and if copies are supplied he may put them in evidence in a suit if the Evidence Act allows it.

I will now turn to the relevant provisions of the Indian Evidence Act. S. 74 says that the following documents are public documents:—

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(1) documents forming the acts or records of the acts,—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, whether of British India, or of any other part of His Majesty's dominion or of a foreign country;

(2) public records kept in British India of private documents.

S. 75 states that all other documents are private. S. 76 provides that every public officer having the custody of a public document, which any person has a right to inspect, shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of the copy that it is a true copy. S. 77 says that certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies. Therefore, if a document is a public document, it may be proved by means of the production of a certified copy. Private documents must be proved by primary evidence, except in such cases where secondary evidence is permitted under the provisions of S. 65. Clause (*e*) of that section allows secondary evidence to be given when the original is a public document within the meaning of S. 74. If an income-tax return or a statement filed in support of it is a public document within the meaning of S. 74, certified copies will be admissible under S. 65 (*e*). The answer to the question whether a document of this nature is a public document depends on whether it is a document forming an act or the record of an act or acts of an Income-tax Officer. Before stating my opinion on the question I will first refer to certain of the cases which have been quoted in argument.

In *Anwar Ali* v. *Tafosal Ahmed*[1], a single Judge of the Rangoon High Court held that income-tax returns being made confidential by reason of S. 54 of the Income-tax Act, and the disclosure of their contents being a punishable offence, certified copies cannot be admitted in evidence. The Court did not consider the effect of S. 74 of the Indian Evidence Act and decided against the admissibility of the certified copies submitted on the ground that S. 54 of the Indian Income-tax Act made the issue of copies unlawful and made the disclosure of the particular contents in the return an offence punishable with imprisonment. In my opinion there is here a misconception. S. 54 does

1. (1924) I.L.R. 2 Rang. 391.

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not make the issue of a certified copy of an income-tax return to an assessee unlawful. The return is a confidential document and cannot be disclosed to a third party, but there can be no objection to the maker of the return, having a copy for his own purposes if he so desires. So far as the assessee is concerned he is not bound to treat the document as confidential.

A Bench of the Bombay High Court considered the question of the admission of certified copies of income-tax returns in *Devidutt Ramniranjandoss* v. *Shriram Narayandas*[1] and held that they were not admissible, but the decision was based on a different ground from that given by the Rangoon High Court in *Anwar Ali* v. *Tafosal Ahmed*[2]. The reason given here was that the assessee had no right to inspect the original documents in the custody of the Income-tax Officer and the latter was not bound to give certified copies to the assessee on demand. It was considered that the words 'right to inspect' in S. 76 of the Evidence Act exclude all such documents as a Government officer has a right to refuse to show "on the ground of state policy or privilege, etc." But an Income-tax Officer would not be fulfilling his duty if he refused to allow an assessee to inspect his own return. If he did so he might be placing an assessee at a disadvantage when the assessee was objecting to an improper assessment. The Bombay High Court, however, considered that there was nothing in the terms of S. 54 of the Income-tax Act and the intention of the Legislature underlying it, prohibiting an assessee from giving secondary evidence of the contents of the return made by him or on his behalf or of the assessment order made upon him or his firm on that return, where such secondary evidence would be admissible under the Indian Evidence Act. Where the original cannot be produced the best secondary evidence must be a true copy.

A Bench of this Court (Varadachariar and Pandrang Rao, JJ.) held in *Venkataramana* v. *Varahalu*[3], that a certified copy granted to an assessee of a statement made by him on oath before an Income-tax Officer is admissible in evidence and there is nothing in S. 54 of the Income-tax Act or any of the provisions of the Evidence Act which precludes its admissibility. The statement was regarded as being a public document because it was a statement recorded by the Income-tax Officer and

1. (1931) I.L.R. 56 Bom. 324. 2. (1924) I.L.R. 2 Rang. 391.
3. (1938) 50 L.W. 681.

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therefore a document forming a record of his act. Though they did not accept the Bombay interpretation of S. 76 of the Evidence Act the learned Judges concurred in the opinion expressed by the Bombay High Court in *Devidutt Ramniranjandoss* v. *Shriram Narayandas*[1], that an income-tax return is not a public document. They did not say so, but it is to be gathered from their judgment that they did not regard an income-tax return as a public document, because it is prepared by the assessee.

The question whether an income-tax return is a public document was discussed at some length by a Bench of this Court (Burn and Stodart, JJ.) in *Mythili Ammal* v. *Janaki Ammal*[2] and the conclusion arrived at was that it is not a public document within the meaning of S. 74 of the Indian Evidence Act. The learned Judges considered that it was impossible to infer from the wording of the Act that a return made by an assessee is either part of the act of the Income-tax officer or part of the record of the act of that officer. In their opinion to allow a person who comes into possession of a certified copy of a return to produce it in Court and so prove the contents of the return would be defeating the express provisions of S. 54. I have said sufficient to indicate that in my opinion there is nothing in S. 54 which prohibits a party from putting in evidence a certified copy of an income-tax return if that return is a public document and that the learned Judges misunderstood the effect of that section. It only remains to be considered whether the opinion that an income-tax return is outside S. 74 of the Evidence Act is correct.

The judgments in *Venkataramana* v. *Varahalu*[3] and *Mythili Ammal* v. *Janaki Ammal*[2] indicate that in the opinion of the learned Judges who decided those cases a document on the record of an assessment proceeding cannot be deemed to be a public document within the meaning of S. 74 of the Evidence Act, unless it be a statement recorded by the Income-tax Officer himself or an order passed by him, and therefore does not include a document drawn up by the assesseee or under the assessee's directions. In my opinion this interpretation of S. 74 of the Evidence Act is too limited. S. 22 of the Income-tax Act empowers the Income-tax

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1. (1931) I.L.R. 56 Bom. 324. 2. I.L.R. (1940) Mad. 329.
3. (1938) 50 L.W. 681.

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Officer to call upon a person to submit a return of his income. S. 23 states that if the Income-tax Officer is satisfied that a return made under S. 22 is correct and complete he shall assess the total income of the assessee and shall determine the sum payable by him on the basis of the return. The submission of the return constitutes the fulfilment of a requirement of the Income-tax Officer; in other words, it is a document which he has caused to be prepared. Can it then be dissociated from his action in calling for the return? If the Income-tax Officer is not satisfied with the return he can call upon the assessee to produce evidence in support of it. If the assessee produces evidence the Income-tax Officer must consider it in determining the sum to be paid by the assessee. A profit and loss statement filed by the assessee is evidence in the matter and the Income-tax Officer may draw it up himself, if he thinks it expedient to do so. It is common ground, that an order of assessment is a public document within the meaning of S. 74 and the decision in *Venkataramana* v. *Varahalu*[1], that a statement recorded by an Income-tax Officer falls in the same category has not been questioned. Now, if a statement recorded by an Income-tax Officer in the course of his examination of the assessee is a public document it is difficult to see why a statement handed in by the assessee disclosing the basis of the return called for should not be similarly regarded. Surely, the test cannot be whether the profit and loss statement is actually drawn up by the Income-tax Officer.

As the learned Judges who have made this reference have pointed out, a plaint or a written statement has always been regarded by this Court as forming part of the record of a case and a public document of which an interested party may obtain a certified copy. If the argument, that an income-tax return is not a public document, but that the order passed thereon is, were carried to its logical conclusion, it would mean that no part of the record of a civil suit could be regarded as constituting a public document except evidence recorded by the Court or summonses or notices or interlocutory orders or the judgment in the case. In *Bhagain Megh Ranee Koer* v. *Gooroo Pershad Singh*[2], Garth, C. J. and Birch, J., expressly held that a petition which was the subject-matter of an order passed was part of the record in the suit, and I do not think that this can reasonably

1. (1938) 50 L.W. 681. 2. (1876) 25 W.R. 68.

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be doubted. In my judgment it would be putting an unwarranted restriction on the words "documents forming the acts or records of the acts" to say that they should be confined to those parts of an income-tax record which the Income-tax Officer has himself prepared and to exclude documents which he has himself called for or which have been admitted to the record for the purposes of the assessment. I consider that the record of an Income-tax case must be regarded as the record of the acts of the Income-tax Officer in making his assessment and therefore that any document properly on the record is just as much a public document as the final order of assessment. For these reasons I would answer the question propounded in the affirmative.

I would make the costs of this reference costs in the cause.

King, J. *King, J.*—I agree.

Somayya, J. *Somayya, J.*—I agree.

[These appeals and these petitions coming on for final hearing after the expression of the opinion of the Full Bench on the question referred to, the Court (*Wadsworth* and *Patanjali Sastri, JJ.*) delivered the following judgment.]

The judgment of the Court was delivered by

*Wadsworth, J.**—The Full Bench have decided that the certified copies Exs. E and H are admissible in evidence of the contents of the original statements. These statements are relevant both as corroborating the evidence of the plaintiff himself and as rebutting the contention that the promissory note was fabricated at a date subsequent to that on which the statements were made. They are not being used to impose a liability on the defendant but to rebut a contention of fabrication which is inconsistent with the existence of these statements. The appeals are therefore dismissed with costs, including costs of the reference to the Full Bench—Advocate's fee for the reference Rs. 150. The petitions under Act IV of 1938 are remitted to the trial Court for disposal.

K. S. *Appeals dismissed.*

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* 30th April, 1940.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Vendoor Thazhath Paravan *alias* Cheriad and another .. *Petitioners** (*Respondents-Decree-holders*)

v.

Venthrayil Tarwad Karnawan Gopalan Nair .. *Respondent* (*Petitioner-Judgment-debtor*).

Madras Agriculturists' Relief Act (IV of 1938), Ss. 8 and 9—Purchase money paid under abortive sale—Decree for refund with interest—Interest if in the nature of damages—"Debt" when 'incurred'—Scaling down—Principles.

Paravan v. Gopalan Nair.

On 20th September, 1931, *A* sold some trees to *B* who paid Rs. 400 but before he could cut and carry them away a third party successfully asserted a paramount claim to them and the sale failed to take effect. *B* obtained a decree on 4th November, 1936, for the amount with interest at 12 per cent. till date of the suit (20th August, 1934) and costs, and subsequent interest at 6 per cent. on the aggregate amount. *A* who was an agriculturist applied for scaling down this debt.

Held, whatever be the nature of the liability to pay the principal sum whether it originates in contract or tort the compensation awarded for wrongful withholding of its payment can appropriately be regarded as interest and is therefore liable to be scaled down. The suit was for recovery of money had and received and the sale having failed *ab initio* the liability to refund the purchase money arose when it was received by the vendor, that is, on 29th September, 1931 and falls under S. 8 of the Act.

Mottai Meera v. *Abdul Kadir*, (1939) 1 M.L.J. 528: I.L.R. (1939) Mad. 525 distinguished.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Subordinate Judge of South Malabar at Calicut dated 3rd September, 1938 and made in O. P. No. 20 of 1938 in S. C. S. No. 432 of 1934.

N. R. Sesha Aiyar for Petitioners.

T. K. Raman Nambisan for Respondent.

The judgment of the Court was delivered by

Patanjali Sastri, J.

Patanjali Sastri, J.—This is a petition to revise the order of the Court of the Subordinate Judge of South Malabar amending the decree obtained by the petitioner in S. C. S. No. 432 of 1934 on the file of that Court, under S. 19 of the Madras Agriculturists' Relief Act, 1938.

* C. R. P. No. 95 of 1939. 26th April, 1940.

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Patanjali Sastri, J.

The respondent sold some trees to the petitioner on 29th September, 1931, for Rs. 400 but before the petitioner could cut and carry them away, a third party successfully asserted a paramount claim to them and the sale to the petitioner therefore failed to take effect. The petitioner thereupon sued for the recovery of the amount of Rs. 400 "with interest at 24 per cent. per annum from 29th September, 1931." The Court, however, allowed interest at 12 per cent. only and passed a decree for Rs. 538-5-3 for principal and interest till 20th August, 1934, the date of the suit and Rs. 94-9-4 on account of costs with further interest at 6 per cent. on the aggregate amount from 4th November, 1936, the date of the decree. The respondent applied to the Court below under S. 19 of the Act claiming to be an agriculturist for scaling down the decree debt aforesaid in accordance with the provisions of the Act. There is no dispute that the respondent is an agriculturist as defined by S. 3 (*ii*) of the Act. But it was contended for the petitioner that there was no relationship of debtor and creditor created between the parties when the sum of Rs. 400 was paid by the petitioner as the price of the trees, that no interest was payable on that sum, and the Court having allowed interest only as damages, it was not 'interest' which could be scaled down under the Act. It was said therefore that the only relief that the respondent would be properly entitled to was, under S. 9 of the Act, in respect of the interest that was payable from the date of the decree, namely, 4th November, 1936. Alternatively, it was also urged that S. 8 was not in any case applicable as the liability in question must be deemed to have been incurred only when the consideration for the sale failed, that is to say, when the third party claiming paramount title to the trees successfully prevented the petitioner from cutting and carrying them away by obtaining an injunction from the Court, which was admittedly some time after the 1st October, 1932; so that, even assuming that the interest awarded under the decree prior to the date of suit was liable to be scaled down under the Act, it should be scaled down in accordance with the provisions of S. 9 and not S. 8. We are of opinion that both these contentions are unsustainable.

Learned counsel urged that no interest would be payable under the law in respect of the plaintiffs' claim for refund of the purchase money and the liability to pay the sum awarded as

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interest arose only on the date of the decree. It is unnecessary, in our view, to consider whether interest could be awarded on a claim for recovery of purchase money where a contract of purchase fails to take effect, as in this case a decree has been passed awarding interest and it is no longer open to the petitioner to question such award. It must therefore be taken that the petitioner's claim for the purchase money was a claim in respect of which interest was payable. The fact that the Court awarded interest as 'damages' cannot, in our opinion, exclude the operation of the provisions of the Act. The Act nowhere defines 'interest' and it must be remembered that 'interest' is sometimes payable even where there is no agreement to pay it. The Interest Act provides for 'interest' being allowed, subject to certain conditions, as damages for wrongful withholding of payment of sums due, and Illustrations (*n*) and (*r*) to S. 73 of the Indian Contract Act contemplate 'interest' being awarded as compensation for loss or damage caused by a breach of contract in certain cases. It seems to us, therefore, clear that whatever be the nature of the liability to pay the principal sum —whether it originates in contract or in tort, the compensation awarded for wrongful withholding of its payment can appropriately be regarded as 'interest' and is thus liable to be scaled down under the Act.

The petitioner's learned Counsel cited *Mottai Meera* v. *Abdul Kadir*[1], as being contrary to this view. We are however clear that the case has no bearing on the question we are now considering. That was a case where a co-owner in possession of common funds had realised interest by their investment, and, in a suit for partition, he was directed to pay to the other co-owners their shares of such funds including the interest earned. An application having been made for relief under Act IV of 1938, the Court held that the liability enforced by the decree was not a 'debt' within the meaning of the Act. It was pointed out that the interest awarded in such cases could be regarded either as an accretion to the fund liable to be divided or compensation for breach of trust payable under S. 23, read with Ss. 90 and 95, of the Trust Act, the application of Act IV of 1938 being excluded in either case. It is obvious that the position here is entirely different. The petitioner's suit for recovery of the purchase money paid under an abortive sale

1. (1939) 1 M.L.J. 528: I.L.R. (1939) Mad. 525.

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was one for money had and received to his account. (See *Hanuman Kamat* v. *Hanuman Mandur*[1]) and it cannot be disputed that the basis of such an action is an implied or imputed contract, at all events in circumstances like those of the present case which plainly exclude any hypothesis of tort or trust. The decision cited has therefore no application here.

As regards the alternative contention that S. 8 does not apply to this case because the liability to refund the price must be held to have arisen only after the 1st October, 1932, when an injunction was obtained against the petitioner, it is to be observed that this is not a case where the petitioner got anything under the sale of which he was subsequently deprived. It is not denied that before the petitioner could cut any of the trees, the person claiming paramount title intervened and successfully prevented the petitioner from doing so by obtaining an injunction from Court. The case is thus one where there never was any consideration and the sale failed *ab initio*. The liability to refund the purchase money therefore arose when it was received by the respondent, that is, on 29th September, 1931 (see *Hanuman Kamat* v. *Hanuman Mandur*[1], already referred to) and falls under S. 8 of the Act.

The Revision Petition is dismissed with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Surisetti Seethayyamma, minor by father and next friend Boddeda Sahebunaidu and another .. *Appellants** (*Plaintiffs*)

v.

Surisetti Venkataramana and another .. *Respondents* (*Defendants*).

Seethayyamma v. Venkataramana.

Husband and wife—Husband found not entitled to restitution of conjugal rights—Right of wife to maintenance—Legal cruelty—If essential.

It is not necessary that a wife should prove actual cruelty in order to entitle her to a decree for separate maintenance. On the other hand it is logical that if the husband is found to be not entitled to a decree for restitution of conjugal rights (because he had virtually abandoned her) the wife should be held entitled to a decree for separate maintenance.

Venkatapathi Nayani Varu v. *Puttamma Nagith*, (1936) 71 M.L.J. 499, relied on.

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1. (1891) L.R. 18 I.A. 158: I.L.R. 19 Cal. 123 at 126 (P.C.).

* S. A. Nos. 149 and 185 of 1937. 16th February, 1940.

Seethayyamma v. Venkataramana.

Second appeal against the decrees of the District Court of Vizagapatam in A. S. Nos. 242 and 222 of 1935 preferred against the decree of the Court of the Subordinate Judge of Vizagapatam in O. S. Nos. 9 and 26 of 1934.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Appellant in S. A. No. 149 of 1937 and Respondent in S. A. No. 185 of 1937.

S. Parthasarathy and *V. K. Thiruvenkatachari* for Respondent in S. A. No. 149 of 1937 and Appellant in S. A. No. 185 of 1937.

The Court delivered the following

JUDGMENT.—These are cross-appeals. The appellant in S. A. No. 149 of 1937 is the wife of the appellant in S. A. No. 185. In O. S. No. 9 of 1934 on the file of the Subordinate Judge of Vizagapatam the wife sued her husband and his father for separate maintenance alleging abandonment and cruelty. In O. S. No. 26 of 1934 the husband sued the wife for restitution of conjugal rights alleging that she was staying away from him without proper cause. The learned Subordinate Judge tried both the suits together and came to the conclusion that the husband was not entitled to restitution of conjugal rights because he had virtually abandoned his wife and because his offers to maintain her were not genuine or *bona fide*. The learned Subordinate Judge therefore dismissed the husband's suit and gave the wife a decree for maintenance at the rate of Rs. 10 per mensem with Rs. 130 for arrears of maintenance. The unprofitable character of this litigation is sufficiently shown by the fact that the learned Subordinate Judge felt himself compelled to order the plaintiff who had sued in *forma pauperis* to pay to the Government Rs. 269-15-0 for Court-fee due on the plaint. On appeal to the District Judge, the husband's appeal against O. S. No. 26 of 1934 was dismissed but his appeal from the decree in O. S. No. 9 of 1934 was allowed and the decree for maintenance in favour of the wife was set aside. The memorandum of cross-objections filed by the wife regarding the rate of maintenance was also dismissed by the learned District Judge.

Mr. Ramachandra Rao for the wife has laid strong emphasis upon the unsatisfactory result of the decision pronounced by the learned District Judge. He contends that the learned District Judge having found in agreement with the

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learned Subordinate Judge that the husband was not entitled to a decree for restitution of conjugal rights ought thereupon to have confirmed the decree in favour of the wife for separate maintenance. This contention appears to me to be correct. It is not, as has been frequently stated, necessary that the wife should prove actual cruelty in order to entitle her to a decree for separate maintenance. On the other hand, it is logical that if the husband is found to be not entitled to a decree for restitution of conjugal rights, the wife should be held entitled to a decree for a separate maintenance—*see* the case of *Venkatapathi Nayani Varu* v. *Puttamma Nagith*[1]. It seems to me therefore that the appeal of the wife S. A. No. 149, must be allowed and the decree of the Subordinate Judge in her favour restored. The District Judge found that the rate of maintenance Rs. 10 a month, awarded by the learned Subordinate Judge was suitable and I have not been asked to say that the learned District Judge was wrong in that respect.

The appeal of the husband must, on the facts found, be dismissed. It is found that he did abandon his wife and that he did not genuinely want her back.

The appellant in S. A. No. 149 will be entitled to her costs from the respondents in this Court and in the lower Appellate Court. S. A. No. 185 is dismissed but without costs.

Leave to appeal is refused.

K. S. *S. A. No. 149 of 1937 allowed and S. A. No. 185 of 1937 dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE ABDUR RAHMAN.

Midde Sampathirayudu .. *Appellant* (Plaintiff)*

v.

Sonti Venkataratnam .. *Respondent (Defendant).*

Sampathirayudu v. Venkataratnam.

Government Securities Act (X of 1920), S. 5—Beneficial ownership of Government securities—If affected by S. 5.

The provisions of S. 5 of the Government Securities Act are only for the protection of the Government who can get a due discharge from the person who is the holder of the note. The question as to the beneficial ownership of Government promissory notes and securities is not affected by S. 5.

1. (1936) 71 M.L.J. 499.

* Appeal No. 230 of 1936. 28th August, 1939.

Sampathirayudu v. Venkataratnam.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatam dated 22nd April, 1936 and passed in O. S. No. 11 of 1932 (O. S. No. 35 of 1930, District Court, Kistna).

P. Satyanarayana Rao for Appellant.

Ch. Raghava Rao for Respondent.

The judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.—This is an appeal from the judgment and decree of the learned Subordinate Judge of Masulipatam dismissing the plaintiff's suit. The plaintiff claimed two reliefs in the suit (1) an account of a certain arrack business alleged to have been carried on by the plaintiff in the name of the defendant and (2) a declaration that the plaintiff is the owner of certain war bonds and Government promissory notes described in the schedule to the plaint. The case for the plaintiff is that the defendant was his son-in-law and therefore he allowed the arrack business to be carried on in his name and as security for the said business he had the Government promissory notes and war bonds deposited therefor. The learned Subordinate Judge is of opinion that the plaintiff has not made out his case that the defendant was only a *benamidar* in respect of the arrack business. In regard to the war bonds and Government promissory notes the learned Judge is of opinion that by virtue of S. 5 of the Government Securities Act, the defendant being the holder of the promissory notes and bonds by virtue of the transfer in his favour, he must be deemed to be the owner. The plaintiff preferred this appeal and he claimed both the reliefs again in his memorandum of appeal. He valued the relief as to account at the sum of Rs. 1,000 on the ground that he was entitled to put his own valuation on the strength of the ruling in In re *Venkatanandam*[1], of Ramesam and Mockett, JJ., which has since been overruled by a Full Bench case which is reported in In re *Dhanukodi*[2]. Under the latest ruling *Narayanan* v. *Periappan*[3], the plaintiff is bound to stamp his memorandum of appeal according to the full amount of the valuation in the plaint. If this ruling is given effect to,

1. (1932) 64 M.L.J. 122: I.L.R. 56 Mad. 705.
2. (1938) 1 M.L.J. 628: I.L.R. (1938) Mad. 598 (F.B.).
3. (1938) 2 M.L.J. 557: I.L.R. (1938) Mad. 1031 (F.B.).

Sampathi-rayudu v. Venkata-ratnam. — Venkata-ramana Rao, J.

the plaintiff ought to have paid the duty on Rs. 10,000 not on Rs. 1,000. When confronted by this ruling Mr. Satyanarayana Rao under instructions from his client is not prepared to pay the deficit court-fee and abandoning the claim in respect thereof. Therefore the appeal so far as the relief for account is concerned must be dismissed with costs.

He has only pressed the claim with regard to the relief relating to war bonds and Government Promissory notes. The war bonds are evidenced by Exs. C, D, E, F and L series and the Government promissory notes by Exs. M series. The documentary evidence in support thereof completely bears out the plaintiff's case. In respect of every one of these war bonds and promissory notes the plaintiff has paid money and become the owner thereof but he deposited them in 1929 as security for the arrack business which was being carried on by the defendant having regard to the relationship with him. Therefore there can be no question that the beneficial ownership in the suit bonds and promissory notes is in the plaintiff and the defendant in his deposition admitted that these bonds and promissory notes belonged to the plaintiff but he set up a claim that he became the owner thereof by virtue of a transfer from the plaintiff in consideration of a sum of Rs. 3,000 paid by the defendant to the plaintiff. As remarked by the learned Subordinate Judge, there is no evidence to prove that the defendant paid the sum of Rs. 3,000. Therefore if this story of transfer is not to be believed, the plaintiff's title to the suit war bonds and Government promissory notes remains. In our opinion S. 5 of the Government Securities Act has no bearing on the case, because that section was enacted only for the protection of the Government who can get a due discharge from the person who is the holder of the note. The question as to the beneficial ownership is not affected by S. 5. The plaintiff's appeal with regard to the suit war bonds and promissory notes has therefore to be allowed. We therefore set aside the decree of the learned Subordinate Judge in regard thereto and give the declaration asked for. The respondent will pay the costs of the appellant so far as this claim is concerned.

K.S. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

P. R. Govindaswami Naicker .. *Appellant** (*Plaintiff-Petitioner*)

v.

Pukhraj Sowcar and another .. *Respondents* (*Respondents*).

Govindaswami Naicker *v.* Pukhraj Sowcar.

Transfer of Property Act (IV of 1882), Ss. 52 and 69—Suit by mortgagor against mortgagee for declaration not to bring to sale the property and for an injunction—Sale and purchase of property by a third person—Application to amend plaint by impleading purchaser also—Refusal of Court—Joint suit whether could lie.

A mortgagor brought a suit for permanent injunction restraining the second mortgagee, the first defendant, from bringing the suit properties to sale on the ground that he was an agriculturist entitled to have his debts scaled down and that until it was done the property should not be brought to sale. Owing to failure on his part to comply with certain terms imposed by Court, the property was brought to sale and purchased also by a third person. The mortgagor, plaintiff in the suit, thereupon sought to amend his plaint by impleading the purchaser also and by seeking a relief against him on the ground that he was the nominee of the mortgagor and that the purchase of the property was fraudulent. On refusal of that plea for impleading the purchasers and the amendment of the plaint,

Held, (1) that the suits against the mortgagee and the auction purchasers were entirely on different causes of action and they could not form subjects of a joint suit against the mortgagee and the purchasers.

(2) that the doctrine of *lis pendens* would not apply so as to vitiate the sale because the matter in dispute between the mortgagor and the mortgagee was the amount of mortgage debt remaining due.

Appeal against the order of the Court of the City Civil Judge, Madras, dated 16th January, 1939 and made in C. M. P. No. 3859 of 1938 in O. S. No. 815 of 1938 and petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act, 1935, praying the High Court to revise the order of the Court of the City Civil Judge, Madras, dated 16th January, 1939 and made in C. M. P. No. 3950 of 1938 in O. S. No. 815 of 1938.

S. Krishnamachariar and *K. Subba Rao* for Appellant.

V. S. Arunachalam for Respondents.

The Court delivered the following

JUDGMENT.—The appellant in Civil Miscellaneous Appeal No. 21, who is also the petitioner in Civil Revision Petition

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* A. A. O. No. 21 of 1939 and C. R. P. No. 127 of 1939. — 8th November, 1939.

Govindaswami Naicker v. Pukhraj Sowcar.

No. 127, brought a suit for a permanent injunction restraining the second mortgagee, the first defendant, from bringing the suit property to sale without the intervention of Court in accordance with the terms of the mortgage bond, on the ground that he was an agriculturist, that the debt had to be scaled down, and that until that was done the property could not properly be brought to sale. An application was also put in for a temporary injunction during the pendency of the suit. The first defendant contended that an injunction could not properly be granted and that the remedy of the mortgagor was by way of an application under S. 69 of the Transfer of Property Act. This contention met with approval in the trial Court; but this Court held in appeal that the appellant (petitioner) had a right to have his debt scaled down and to be protected from having his property sold until that was done, and that it was not a sufficient answer to the plaintiff's objection to tell him that he would have some remedy if a wrong by way of sale was done to him. A temporary injunction was granted on terms, but the terms were not fulfilled; and so the first defendant brought the property to sale and the respondents in the Civil Miscellaneous Appeal were the purchasers. The plaintiff thereupon sought to amend his plaint by impleading the purchaser and by seeking a relief against him on the ground that he was the nominee of the first defendant and that the property was purchased collusively and fraudulently. The trial Court rejected this application; and an appeal has been preferred against the order refusing to implead the purchasers and a Civil Revision Petition has been filed against the order refusing an amendment of the plaint.

S. 69, Transfer of Property Act, says that when a sale has been made in the professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale or that due notice was not given or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized or improper or irregular exercise of the power shall have his remedy in damages against the person exercising the power. So that it is clear that unless there was fraud, the only remedy of the appellant (petitioner) is by way of damages against the mortgagee who brought the property improperly to sale. If there was fraud, then there may be a cause of action against the respondents in the appeal to have the sale declared void or

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to have it set aside on the ground of fraud. But it will be clearly improper to club together a suit against the purchasers on the ground of fraud and a suit against the mortgagee on the question of the amount still due on the mortgage. The suits against the mortgagee and the auction purchasers would have entirely different causes of action and the subject-matter of the two suits would be altogether different; they could not possibly form the subject of one joint suit against the mortgagee and the purchasers.

One additional ground for impleading the purchasers is said to be that they would be bound by the doctrine of *lis pendens.* I doubt very much whether the doctrine of *lis pendens* would apply, because the matter in dispute between the mortgagor and the mortgagee is the amount of the mortgage debt remaining due; but even if it be considered that there was some right in immovable property in question, to apply the doctrine of *lis pendens* would only mean that the auction purchaser would be bound by the finding of the Court with regard to the mortgage amount remaining due. That would not affect his rights; because S. 69 of the Transfer of Property Act would still give the purchasers a right to retain the property.

The lower Court's order refusing to allow an amendment of the plaint and to implead the purchasers was therefore a proper one. The appeal is dismissed with costs and the Civil Revision Petition without costs.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Roopchand Merlacha .. *Petitioner** (*Respondent*)

v.

Sha Motaji Mokanaji .. *Respondent* (*Petitioner*).

Roopchand Merlacha *v.* Sha Motaji Mokanaji.

Madras Debt Conciliation Act (XI of 1936), S. 25—Stay under—Procedure—Duration of stay—If can be fixed by the Court—Rejection of application to Board for formal defect under S. 7—Effect on stay—Re-presentation—Effect.

When an application to the Debt Conciliation Board is rejected for a formal defect under S. 7, the stay granted under S. 25 will cease to operate but when that application is re-presented it becomes once more a subsisting application under S. 4 and the provisions of S. 25 will come into force and the

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* C. R. P. No. 462 of 1940. 1st May, 1940.

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executing Court will be obliged when the fact of this re-presented application is brought to its notice to stay proceedings in execution. That stay will operate until the application is dismissed subject of course to the legal requirement that the application shall be disposed of within one year. It is not open to the Court to order stay for any particular period. The duration of the stay is fixed by Statute and out of the hands of the Court altogether.

Petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act, 1935, praying the High Court to revise the order of the Court of Principal City Civil Judge, Madras, dated 23rd February, 1940 and made in C. M. P. No. 606 of 1940 in O. S. No. 155 of 1939.

R. Narasimham for Petitioner.

P. S. Kothandapani for Respondent.

The Court delivered the following

JUDGMENT.—This petition raises a question under Madras Act XI of 1936. The petitioner was the judgment-debtor under a compromise decree. On 27th October, 1939, a sale was ordered under that decree. At some date in November the petitioner presented an application to the Debt Conciliation Board, which application was not in proper form and was consequently rejected on 2nd December, 1939, under the provisions of S. 7 of the Act. At the time of the rejection an application for stay of execution of proceedings under S. 25 of the Act was pending before the executing Court and on 8th December, 1939, the Court ordered a stay of the sale for two months. It is to be observed that at the time of this order there was in fact no application pending and if there had been an application pending, the limitation of the period of stay to two months seems to be not in accordance with the provisions of S. 25 of the Act which makes it obligatory upon the Court to stay proceedings until the Board has dismissed the application, subject to the limitations imposed under S. 17 of the Act. The Court may, of course, when staying proceedings under S. 25, fix a date on which the matter shall be called in order to prevent it being lost sight of. But as I read S. 25 the Court has no power to go on with the proceeding when the application is still pending, subject to the proviso that the Board is required to deal with the application under S. 17 within one year. This order for stay for two months was questioned by the respondent on 19th December, 1939, when he applied to

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vacate the stay on the ground that there was no pending application before the Debt Conciliation Board. On 20th December, 1939, the petitioner re-presented his application to the Board, as he is empowered to do under S. 7. He also applied again for a stay to the executing Court. On 21st December, 1939, the learned Judge directed the previous stay order to continue to operate, dismissing both the application of the respondent to vacate the stay and the application of the petitioner for a fresh stay. This stay order in terms provided for only two months' stay which would cease to operate on 8th February, 1940. Consequently on 14th February, 1940, the respondent applied for the issue of the directions to the Commissioner to proceed with the sale and the Judge ordered accordingly, and it is against this order the present revision petition is filed.

My attention has been drawn to a decision of Stodart, J., in *Ellappa Chettiar,* In re[1], where the learned Judge held that when one of several joint defendants had made an application to the Debt Conciliation Board and the other joint defendants had participated in that application though they were not named as applicants and the application had been dismissed, it was not open to one of those other judgment-debtors to file a fresh application and get a fresh stay under Ss. 4 and 25 of the Debt Conciliation Act, the reasoning being that this would permit an almost indefinite series of applications really by the same person for a relief which had already been refused and an indefinite series of stays on the applications which really were not sustainable. It is not necessary for me to go into the merits of that decision, for it seems to me that it has little bearing on the facts of the present case. I am of opinion that the word "dismissed" in S. 25 of the Act must include a rejection under S. 7, for obviously a stay order can have no basis when there is no pending application. At the same time when an application is rejected under S. 7, the Act itself expressly provides for a fresh application after remedying the defects, so that there can be no question of the rejection being a bar to further proceedings and the fresh application cannot be deemed to be an abuse of the process provided by statute such as was the case before Stodart, J. The position is that when a defective application is presented, it cannot provide the basis for a stay after it has been

1. (1939) 2 M.L.J. 727.

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rejected; but there is no reason why it should not provide a basis for a stay when the defect has been remedied and the application has been re-presented in the manner allowed by S. 7. The learned Judge of the Court below has evolved the theory that an application presented under the powers given by S. 7 is not an application under S. 4. This seems to me to be clearly erroneous. All that S. 7 provides is that when an application under S. 4 has been rejected for a formal defect, there is no bar to a fresh application being made. This fresh application when made must be made under the only section which provides for a substantive application to the Debt Conciliation Board, namely, S. 4 and must be made in the form prescribed by S. 4. It seems to me to follow that when an application is rejected for a formal defect under S. 7, the stay will cease to operate, but that when that application is re-presented, it becomes once more a subsisting application under S. 4 and the provisions of S. 25 will come into force and the executing Court will be obliged, when the fact of this re-presented application is brought to its notice, to stay proceedings in execution. That stay will operate until the application is dismissed, subject of course to the legal requirement that the application shall be disposed of within one year. In the view, which I take, it is not competent to the Court to go on with the proceedings in execution while this application is pending and though the Court may fix a date on which the matter shall be called as a matter of convenience, the Court has no power to say "I will order stay for two months and no more". The duration of the stay is fixed by statute and is out of the hands of the Court altogether. In this view I hold that the lower Court's directions to the Commissioner to proceed with the sale while the application before the Debt Conciliation Board is pending are contrary to law and must be set aside.

The petition is therefore allowed with costs here and in the Court below and the lower Court is directed to stay proceedings pending the disposal of the application before the Debt Conciliation Board.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Maddipati Narasimhamurti (minor) and others .. *Appellants** (*Defendants 1 to 3*)

v.

Hayat Khan and others .. *Respondents* (*Plaintiff and 4th Defendant and Nil*).

Narasimhamurti *v.* Hayat Khan.

Civil Procedure Code (V of 1908), O. 41, r. 27 (2)—Admission of fresh evidence in appeal—Admission of documents not necessary for remedying some inherent lacuna or defect but for providing corroboration for oral testimony which was disbelieved by trial Court—Legality.

The lower appellate Court admitted some fresh documents in evidence. The admission of those documents was not for the purpose of remedying some inherent lacuna or defect but for the purpose of providing corroboration for oral testimony which had been disbelieved by the trial Judge. The oral evidence was complete and if it had been believed, it would have substantiated the first respondent's case. The additional evidence was not necessary for the Court to appreciate the first respondent's case or to pronounce judgment on it.

Held, that the lower appellate Court was wrong in admitting such evidence and the case must be decided on the evidence tendered in the trial Court.

Appeal against the decree of the Court of the Subordinate Judge of Ellore dated 19th September, 1934 and made in A. S. No. 150 of 1933, preferred against the decree of the Court of the District Munsif of Kovvur in O. S. No. 342 of 1930.

V. Govindarajachari for Appellants.

P. Somasundaram for Respondents.

The judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—The first respondent filed this suit in the Court of the District Munsif of Kovvur for the redemption of a usufructuary mortgage created on the 20th April, 1877, in respect of 2·61 acres of land. The first respondent's case was that this property was mortgaged by his great uncle, one Sujayat Beg, in favour of the predecessors in title of the appellants, that the period for which the mortgage was created expired in 1927 and that he was entitled to three quarters of Sujayat Beg's estate, to the extent of a quarter as the result of succession and to the extent of a half as the result of a purchase

* S. A. No. 341 of 1935. 1st May, 1940

Narasimhamurti v. Hayat Khan.

Leach, C.J.

made by his mother. In order to establish a right to any portion of the property, it was incumbent upon the first respondent to prove his mother's relationship to the mortgagor and that the persons who sold their interests to his mother were also heirs of Sujayat Beg. The appellants, in addition to denying the relationships set out by the first respondent, averred that they had acquired title by adverse possession. The District Munsif held that the first respondent had not proved the relationships with Sujayat Beg which were necessary to support his case and he also found against him on the issue of adverse possession. The District Munsif found that the appellants had perfected their title to the land by adverse possession for the statutory period. On appeal to the Subordinate Judge of Ellore both these findings were reversed. In deciding that the first respondent had established the relationship with Sujayat Beg he relied on documentary evidence which was not tendered in the trial Court but was produced while the appeal was pending. The first question which has to be decided in this appeal is whether the Subordinate Judge was entitled to have regard to this further evidence. For reasons which will be stated presently it is clear that he adopted a wrong course both in admitting and in acting upon this additional evidence.

O. 41, r. 27 (1) states that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate Court; but if (*a*) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or (*b*) the appellate Court requires any document to be produced or any witnesses to be examined to enable it to pronounce judgment, or for any other substantial cause, the appellate Court may allow such evidence or document to be produced, or witness to be examined. The Privy Council has in two cases laid down the scope of this rule. In *Kessowji Issur* v. *G. I. P. Railway Co.*[1], Lord Robertson in delivering the judgment of the Board observed that the legitimate occasion for the application of S. 568 of the Code of Civil Procedure of 1882 (which corresponds to O. 41, r. 27) was when on examining the evidence some inherent lacuna or defect became apparent, not where a discovery was made to import it. In *Parsotim Thakur*

1. (1907) 17 M.L.J. 347: L.R. 34 I.A. 115: I.L.R. 31 Bom. 381 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Thota Varahalayya (dead) and others .. *Petitioners** (*Petitioners and 1st Petitioner's L. R.*)

v.

Mattapalli Raju and others .. *Respondents* (*Respondents 2 to 12*).

Thota Varahalayya *v.* Mattapalli Raju.

Madras Agriculturists' Relief Act (IV of 1938)—Usufructuary mortgage—Suit by mortgagee to recover possession—If a suit to enforce the debt to which scaling down provisions apply—Right of subsequent lessee under mortgagor to raise question as to scaling down of debt.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Cocanada dated 30th August, 1938 and made in I. A. No. 902 of 1938 in O. S. No. 54 of 1926.

P. Somasundaram for Petitioners.

V. Viyyanna for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner claims to be a lessee under the mortgagor the third defendant in the suit and seeks to file an additional written statement raising the plea that the debt due to the plaintiff is liable to be scaled down under the provisions of Act IV of 1938. The Court below has refused to grant leave to file the additional written statement on the ground that the suit by the plaintiff as usufructuary mortgagee to recover possession was not one to enforce the debt and so no question of scaling it down could arise. Mr. Somasundaram for the petitioner however points out that he is entitled to redeem the plaintiff's usufructuary mortgage by virtue of the lease alleged to have been obtained from the mortgagor subsequently to the plaintiff's mortgage and is thus interested in raising the question as to the true amount payable to the plaintiff. This contention is correct and must be upheld. It follows that the petitioner's additional written statement must be admitted and the questions arising thereon must be determined. This Civil Revision Petition is therefore allowed with costs here and below.

K. S. *Petition allowed.*

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* C. R. P. No. 1581 of 1938. 29th March, 1940.

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v. *Lal Mohar Thakur*[1], the Judicial Committee re-affirmed this statement of law, and went on to observe:

> "It may well be that the defect may be pointed out by a party, or that a party may move the Court to supply the defect, but the requirement must be the requirement of the Court upon its appreciation of the evidence as it stands."

Now, what is the position here? In the first place the Subordinate Judge has not recorded his reasons for admitting the evidence which he is required to do by O. 41, r. 27 (2). An application by the first respondent for the admission of these documents was made before the appeal was heard, but it was not considered until the appeal itself was being argued. Having heard the arguments the Subordinate Judge said that he was inclined to admit them for reasons to be mentioned in his judgment. But his judgment contains no reasons for the admission of the documents. This may be an oversight, but it is an oversight which involves failure to comply with mandatory provisions of the Code of Civil Procedure. But assuming that the Subordinate Judge had given his reasons, it would not affect the result of this appeal because it is quite clear that the admission of these documents was not for the purpose of remedying some inherent lacuna or defect but for the purpose of providing corroboration for oral testimony which had been disbelieved by the trial Judge. The oral evidence was complete and if it had been believed, it would have substantiated the first respondent's case. Therefore there was no question of any lacuna or inherent defect. The additional evidence admitted in this case was not necessary for the Court to appreciate the first respondent's case or to pronounce judgment on it. As the result of the admission of additional evidence the Subordinate Judge has disposed of the appeal on a wrong basis.

The appeal will be allowed and the case remanded to the Subordinate Judge with direction to examine the evidence which was tendered in the trial Court and to decide the case according to law. The appellants are entitled to their costs in this Court and will be entitled to a refund of the court-fee paid on the memorandum of appeal.

K. S. *Appeal allowed and case remanded.*

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1. (1931) 61 M.L J. 489. L R. 58 I.A. 254: I.L.R. 10 Pat. 654 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Dharba Sooryanarayana and another .. *Petitioners** (*Petitioners-Defendants 7 and 12*)

v.

Meduri Ramamma .. *Respondent* (*Respondent-Plaintiff*).

Sooryanarayana *v.* Ramamma.

Madras Agriculturists' Relief Act (IV of 1938), S. 21—Original mortgagor insolvent—Purchasers of hypotheca (judgment-debtors) long after adjudication—Whether judgment-debtors entitled to the benefits of the Act—Limits of application—Interference in Civil Revision Petition possible.

Clearly the object of S. 21 of the Act IV of 1938 is to prevent a double scaling down of the debt of an individual. If that debt has been subjected to the scaling down process of the insolvency law and dividends have been paid on the basis of that scaling down, it should not be subject to a fresh scaling down at the instance of the same person who has already had the benefit of one process of reduction. There is no reason to refuse these benefits to an entirely different person who has not had the benefit of the insolvency law and who is an agriculturist otherwise entitled to have his debts scaled down. Neither under the wording nor under the objects of the section can it be said that the exclusion of the debts of the insolvents should be extended to the same debts when due by another person who is not an insolvent.

Vasantha Rao Sahib Bhonsle v. *Narayanaswami Aiyar*, (1939) 2 M. L. J. 745, distinguished.

Held, further, that the lower Court's decision that the petitioners were not competent to apply for the benefits of the Act was in effect a refusal to exercise the jurisdiction which was invoked and hence wrongly refused. Therefore a Civil Revision Petition would lie to the High Court.

Sundaram v. *Mausa Mavuthar*, (1921) 40 M.L.J. 497: I. L. R. 44 Mad. 554 (F. B.), relied on.

Petitions under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Masulipatam dated 11th April, 1939 and made in I. A. No. 1082 of 1938 in O. S. No. 34 of 1934.

K. Kottayya for Petitioners.

P. Somasundaram and *G. Balaparameswari Rao* for Respondent.

The Court delivered the following

JUDGMENT.—These two petitions raise a question under S. 21 of Act IV of 1938. In each of the petitions the petitioners are purchasers of parts of the hypotheca and defendants in the suit on the mortgage which has been decreed. The mortgage

* C. R. P. Nos. 1178 and 1179 of 1939. 22nd April, 1940.

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was one of 1922. The original mortgagor became an insolvent in 1929 and it is said that a dividend was declared before the commencement of Madras Act IV of 1938. The purchases by the petitioners in C. R. P. No. 1178 of 1939 were long after the adjudication. The purchase by the petitioner in C. R. P. No. 1179 of 1939 was after the presentation of the insolvency petition and before the adjudication. The Court below has held that by reason of the insolvency of the original mortgagor, S. 21 of Madras Act IV of 1938 applies to the decree debt as a whole and none of the judgment-debtors can have the benefit of the Act. It would appear that the original mortgagor was an agriculturist, but now that he has become an insolvent he is clearly disentitled to the benefits of the Act. It has been held by the Bench which decided *Perianna* v. *Sellappa*[1], that purchasers of the hypotheca in possession are debtors under the mortgage entitled to the benefits of the Act. That was a case in which the mortgagor himself was admittedly an agriculturist; but it seems to me that this does not affect the decision, for by the definition of 'debt' any liability, whether secured or unsecured, due from an agriculturist, is included and surely a debt secured on the land of an alienee will be a debt due from that alienee even though his liability is limited to his interest in the land. In *Vasantha Rao Sahib Bhonsle* v. *Narayanaswami Aiyar*[2], Pandrang Row, J., held that the exclusion of the debts of an insolvent from the benefits of the Act under S. 21 was limited to those debts in so far as they were due from the insolvent himself and that the son of the insolvent liable to pay the same debts was, if an agriculturist, entitled to claim that the debts be scaled down. That decision seems to me precisely to apply to the facts of this case; and I respectfully agree with the reasoning upon which the decision is based. Clearly the object of S. 21 is to prevent a double scaling down of the debt of an individual. If that debt has been subjected to the scaling down process of the insolvency law and dividends have been paid on the basis of that scaling down, it should not be subject to a fresh scaling down at the instance of the same person who has already had the benefit of one process of reduction. There is no reason to refuse these benefits to an entirely different person who has not had the benefit of the insolvency law and who is an agriculturist otherwise entitled to have his debts

1. (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218. 2. (1939) 2 M.L.J. 745.

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scaled down. Neither under the wording of S. 21 nor under what I conceive to be the object of the section can it be said that the exclusion of the debts of the insolvent should be extended to the same debts when due by another person who is not an insolvent.

It has been contended for the respondent by Mr. Somasundaram that this is not a matter for interference in revision, that the Court below had jurisdiction to decide whether or not the petitioners were agriculturists entitled to the benefits of the Act and that having so decided, the decision is a mere decision of law and not a refusal to exercise jurisdiction. It seems to me that this question is covered by authority. Apart from the decision of Pandrang Row, J., just referred to, which was itself a decision in revision, I may cite the decision of the Full Bench in *Sundaram* v. *Mausa Mavuthar*[1], where it was held that when the Court below dismissed an application under O. 21, r. 89, Civil Procedure Code, on the ground that the person who applied was not entitled to apply, the decision of the lower Court consisted in fact in a refusal to deal with the petition and to exercise its jurisdiction and it was not a mere conclusion of law in which the question of jurisdiction was not involved. The same reasoning seems to me to apply to the present case. The Court below has held that these petitioners are not competent to apply for the benefits of the Act. In effect the lower Court has refused to exercise the jurisdiction which they invoked, and in my opinion has wrongly refused to exercise that jurisdiction.

The petitions are therefore allowed and the matter will be remitted to the trial Court for disposal in the light of this judgment. The petitioners are entitled to their costs (one set).

K. C. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Budiredla Ramamurti .. *Petitioner** (*Petitioner*)

v.

Matta Sitaramayya .. *Respondent* (*Respondent*).

Ramamurti v. Sitaramayya.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 7, 8, 9 and 19—Compromise decree—When can be scaled down on the basis of the original debt—

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1. (1921) 40 M.L.J. 497: I.L.R. 44 Mad. 554 (F. B.).

* C. R. P. No. 2010 of 1939. 11th April, 1940.

Ramamurti v. Sitaramayya.

Uncertified payments towards decree—How far can be proved for purposes of scaling down.

When there is a decree passed before the 1st October, 1932, in terms of a compromise, which is itself demonstrably a renewal of an anterior debt, the Court must scale down the debt under S. 8 of the Madras Act IV of 1938, treating as the principal the amount originally advanced together with the amount of any sums, subsequently advanced. Whether a compromise is or is not a renewal of a pre-existing liability must to a large extent be a question of fact in every case. When a judgment-debtor applies under S. 19 of Madras Act IV of 1938, to scale down a decree he can prove payments which have not been certified for the purpose of satisfying the decree regarding costs. For other purposes the debtor would have to establish those payments in the ordinary way under the Civil Procedure Code, by getting them certified in Court if he wants them to be taken into consideration as payments towards the decree.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Cocanada dated 6th September, 1939 and made in I.A. No. 1321 of 1938 in O. S. No. 44 of 1931.

V. Viyyanna for Petitioner.

D. Narasaraju for Respondent.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This Civil Revision Petition raises the question of the power of a Court to scale down a compromise decree under S. 8 of the Madras Agriculturists' Relief Act, IV of 1938.

The relevant facts may be briefly stated. The petitioner is the judgment-debtor. He and the respondent had dealings on account starting in 1922. On 26th March, 1928, the petitioner executed a promissory note in settlement of that account. On 3rd April, 1928, he executed a second promissory note for a fresh advance. On 20th July, 1929, he executed a promissory note for Rs. 4,600 comprising the amounts due on the two previous notes and a small amount in cash advanced at that time. It was alleged that on the 27th September, 1930, there was an arrangement whereby the petitioner undertook to pay the amount due on this promissory note within a given time or to execute a mortgage over certain properties. No payment having been made and no mortgage having been executed, the respondent filed a suit O.S. No. 44 of 1931 on the promissory note of 1929, claiming a charge over the properties covered by the alleged agreement to mortgage. He also obtained an attachment before judgment of the properties in respect of which the charge was claimed. On 8th August, 1932, a decree was passed in terms of a

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compromise. The compromise recited that the transactions between the parties had been examined by mediators who had decided that the whole of the debt claimed should be recovered from the family properties of the defendants, and that the defendants had agreed that the suit debt, costs and subsequent interest calculated at Rs. 7,150 in all should be a charge on the properties mentioned in the plaint and it was agreed that the defendants were to be given time till 1st October, 1932, to pay the amount so settled. It is to be noted that this compromise does not appear to have dealt with matters extraneous to the suit and that it provided for the payment of the full amount claimed by the plaintiff with interest. The lower court following the decision of Pandrang Row, J., in C.R.P. No. 86 of 1939 held that in scaling down the decree, the starting point must be the decree itself and that it was not open to the Court to go behind the compromise and treat the original debt as the debt which is to be scaled down.

Now, we have held in a very recent decision, *Ramaseshayya* v. *Kutumba Rao*[1], that in the simple case of a decree on a debt, the Court must with reference to the terms of S. 8 (1) of Act IV of 1938 look to the debt upon which the decree is passed and not regard the decree itself as the debt which has to be scaled down. A decree embodying a compromise is in one respect different from a decree merely directing payment of the debt which forms the subject-matter of the suit. The effect of the compromise is the substitution of a new contract for the contract sued on, which new contract itself forms the basis of the decree. When we come to apply Ss. 8 and 9 to such a decree, we must have regard to the provisions of S. 7 which lays down that

"Notwithstanding any contract or decree of Court to the contrary, all debts payable by an agriculturist at the commencement of this Act, shall be scaled down in accordance with the provisions of Chapter II of the Act."

The decree in terms of the compromise is in fact a decree on a contract superseding the original debt upon which the suit is laid. To the extent to which that contract can be proved to be in whole or in part a renewal of the debt upon which the suit was laid, clearly Ss. 8 and 9 of the Act provide that the principal of the debt liable to be scaled down must be the principal sum originally advanced together with any sums subsequently advanced. On the facts of the present case, it is clear

1. Since reported in (1940) 2 M.L.J. 235.

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that we are concerned with a very simple compromise dealing only with the suit debt and agreeing that the said debt with interest at the contract rate and costs shall be payable by the defendants and shall be charged in a particular way. There can therefore be no doubt that the compromise agreement upon which the decree was based is substantially a renewal of the suit debt together with an agreement to pay the costs and to submit to the charge. It seems to us that clearly this debt is liable to be scaled down under S. 8 having regard to the principal originally advanced by the creditor together with such sums as have been subsequently advanced as principal.

It is not necessary for the purpose of this case to decide what would be the position in a more complicated case when the compromise is the result of mutual concessions and advantages which together make up an agreement from which it would be extremely difficult to disentangle that part which is a renewal of the original debt. We may, however, observe that the question whether the compromise forming the subject of the decree is or is not a renewal of a pre-existing liability must, to a large extent, be a question of fact in every case.

We have been referred to the decision of Horwill, J., in *Narayanaswami Naidu* v. *Rajamanikkam Pillai*[1], which on the facts of the particular case decided that when there was a decree on a compromise, the date on which the debt was incurred must with reference to S. 8 or S. 9 of the Act be the date of the original debt and not the date of the compromise decree. It is not necessary for the purpose of this case to consider the correctness of our learned brother's decision on the facts before him. We confine ourselves to holding that when, as in the present case, there is a decree passed before the 1st October, 1932, in terms of a compromise, which itself is demonstrably a renewal of an anterior debt, the Court must scale down the debt under S. 8 of Madras Act IV of 1938, treating as the principal the amount originally advanced together with the amount of any sums subsequently advanced.

A further question has been raised with reference to the terms of S. 19 of Act IV of 1938, whether the petitioner in applying for the scaling down of the decree can prove uncertified payments made towards that decree, having regard to the

1. (1940) 1 M.L.J. 225.

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terms of O. 21, r. 2, Civil Procedure Code. S. 19 lays down that on the application of the judgment-debtor or the decree-holder, the Court which passed the decree shall apply the provisions of the Act to that decree and notwithstanding anything contained in the Code of Civil Procedure shall amend the decree accordingly or enter satisfaction as the case may be. Then follows a proviso with which we will deal separately. So far the section is concerned merely with the amendment of the decree in accordance with the terms of Act IV of 1938 and with the addition of a power to the Court to enter satisfaction, presumably when the scaling down process under the Act itself results in the extinction of the decree. So far, the section is not concerned with execution, nor is it concerned with payments made in execution or payments made subsequent to the decree. Then follows the proviso that all payments made or amounts recovered, whether before or after the commencement of the Act, in respect of any such decree shall first be applied in payment of all costs as originally decreed. This proviso expressly contemplates the appropriation of payments made after the decree by the Court which passed the decree. We find it difficult to hold that in making these appropriations, the trial Court is acting as an executing Court. If the Court is not a Court executing the decree, then the provisions of O. 21, r. 2 (*iii*) would not bar the petitioner from proving payments which have not been certified in the manner necessary for establishing them in an executing Court. If this view is correct, it follows that when a judgment-debtor applies under S. 19 to scale down a decree, he can prove payments which have not been certified, for the purpose of satisfying the decree regarding costs. For any other purpose, there is no express provision allowing the petitioner to prove payments made after the decree and not recorded by the Court and it seems to follow that he would have to establish those payments in the ordinary way by getting them certified in Court, if he wants them to be taken into consideration as payments towards the decree.

In the result, therefore, we hold that this decree is liable to be scaled down under S. 8 treating as the principal of the debt the amount originally advanced and any subsequent sums lent to the extent to which the original debt can be said to have been renewed by the agreement of compromise embodied in the decree and that the petitioner is entitled under the proviso to S. 19 to

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prove uncertified payments for the purpose of appropriating those payments if established towards costs of the decree. The petition is therefore remitted to the trial Court for disposal in the light of this judgment and the petitioner is entitled to his costs in this Court.

K. S. *Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KRISHNASWAMI AIYANGAR AND MR. JUSTICE SOMAYYA.

Ambu Bai Ammal .. *Appellant** (*Defendant*)

v.

Soni Bai Ammal .. *Respondent* (*Plaintiff*).

F.B. — Ambu Bai Ammal v. Soni Bai Ammal.

Hindu law—Maintenance—Destitute widowed daughter—Legal right to be maintained out of father's estate in the hands of his heir.

A father is under a moral obligation during his lifetime to maintain out of his properties his widowed indigent daughter, who is unable to get support from her husband's estate. This moral obligation ripens into a legal obligation on the death of the father, when his property is inherited by his heir. The widowed daughter is entitled to a decree for maintenance against such heir, payable out of the properties inherited.

Hindu law text and case-law reviewed.

Observations of Ranade, J., in *Bai Mangal* v. *Bai Rukhmini*, (1898) I.L.R. 23 Bom. 291, dissented from.

Remarks of Sadasiva Aiyar, J., in *Venkatarasu* v. *Kotayya*, (1912) 23 M.L.J. 223, held to be somewhat wide.

Janki v. *Nand Ram*, (1888) I.L.R. 11 All. 194 (F.B.) and *Rajanikanta Pal* v. *Sajani Sundaree Dasee*, (1933) 66 M.L.J. 148: L.R. 61 I.A. 29: I.L.R. 61 Cal. 221 (P.C.), relied on.

Appeal against the decree of the District Court, Tinnevelly in A. S. No. 323 of 1935 preferred against the decree of the Court of the District Munsif of Tinnevelly in O. S. No. 411 of 1934.

A. Swaminatha Aiyar and *S. Tyagaraja Aiyar* for Appellant.

E. Vinayaka Rao for Respondent.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice*.—The question which the Court is called upon to decide in this appeal is whether a Hindu widow is bound to maintain out of her husband's estate her

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* S. A. No. 1152 of 1936. 23rd April, 1940.

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husband's widowed daughter when the daughter is without means and her husband's family is unable to support her. The appellant is the widow of one Sadasiva Rao, who died on the 13th January, 1930. The respondent is the daughter of Sadasiva Rao by his first wife, who pre-deceased him. The respondent married one Rama Rao, who died in the month of May, 1932. Sadasiva Rao was a man of considerable property, but Rama Rao was entirely without means and in consequence Sadasiva Rao was compelled to maintain the respondent and her husband from the time of her marriage up to the time of his death. Rama Rao never acquired property and his family had none. In 1934 the respondent filed a suit in the Court of the District Munsif of Tinnevelly for a decree for maintenance against her step-mother on whom had devolved her father's estate. The District Munsif held that the widow was bound to maintain her step-daughter out of Sadasiva Rao's property and gave a decree for maintenance at the rate of Rs. 10 per mensem, but he directed that if the parties lived together the respondent should receive only a sum of Rs. 5 per mensem. This decree was confirmed by the District Judge on appeal. The widow has now appealed to this Court.

The ancient texts of Hindu law do not place upon a father a legal obligation to maintain his married daughter, but they do indicate that he is under a moral obligation to support her if she is in want. The original texts are all collected in the late Golap Chandra Sastri's work on Hindu Law (8th Edition, page 522) but it is not necessary to quote them all. The following are sufficient to show that from the earliest times Hindu Law has recognized that there is a moral obligation on a father to support his offspring:—

(1) "The father, the mother, the Guru (an elderly relation worthy of respect), a wife, an offspring, poor dependents, a guest, and a religious mendicant are declared to be the group of persons who are to be maintained —Manu cited in Srikrishna's commentary on Dayabhaga."

(2) "It is declared by Manu that the aged mother and father, the chaste wife, and an infant child must be maintained even by doing a hundred misdeeds—Manu cited in the Mitakshara while dealing with gifts."

(3) (A widow inheriting her husband's estate) should honour with food and presents (for their benefit) the husband's paternal uncle (and the like) venerable elderly relation, daughter's son, sister's son, and maternal uncle, as well as aged and helpless persons, guests and females (of the family)—Vrihaspathi cited in Dayabhaga, xi, i. 64."

These translations are accepted as being correct. The texts carry the moral obligation far beyond the limit which could be

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accepted in modern times, but it cannot with reason be said that there is no moral obligation on a father to support a daughter who has no other means of support, even when she has left his family on marriage. A mere moral obligation cannot, of course, be made the basis of a suit, but here the estate of the person on whom there was a moral obligation to support the respondent has passed to the appellant and the Court is called upon to decide whether the principle laid down in *Janki* v. *Nand Ram*[1], extends to the case of a widowed daughter who has no means of subsistence.

In *Janki* v. *Nand Ram*[1], a Full Bench of the Allahabad High Court held that a father was under a moral, though not a legal, obligation to maintain his widowed daughter-in-law during his lifetime and to make provision out of his self-acquired property for her maintenance after his death and that the moral obligation became by reason of his self-acquired property having come by inheritance into the hands of his surviving son a legal obligation, enforceable by suit against the son and against the property which he had inherited. The basis of this decision was that the son took the estate, not for his own benefit, but for the spiritual benefit of his father. This principle developed out of the discussions which had taken place in *Rujjomoney Dossee* v. *Shibchunder Mullick*[2] and *Khetramani Dasi* v. *Kashinath Das*[3]. The principle enunciated by the Allahabad High Court has been accepted by other High Courts of India and was regarded as settled law by the Privy Council in *Rajanikanta Pal* v. *Sajani Sundaree Dasee*[4]. The doctrine that a moral obligation becomes a legal obligation when the estate of a person on whom the moral obligation lay comes into the possession of his heirs may be open to criticism, but it is too late in the day to indulge in it and the Court must confine itself to the question whether the principle should extend beyond the case of a widowed daughter-in-law.

There are two cases reported in Strange (the Edition published in 1830, pages 83 and 90) and one in Macnaghten which support the respondent in her contention that she has a legal right to maintenance out of her father's estate. In the first of the two cases reported by Strange a Hindu left two

1. (1888) I.L.R. 11 All 194 (F.B.).
2. Hyde, Vol. 2, p. 103.
3. (1868) 2 B.L.R. App. Civ. 15.
4. (1933) 66 M.L.J. 148: L.R. 61 I.A. 29: I.L.R. 61 Cal. 221 (P.C.)

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widows, a widowed sister who had lived with him after the death of her husband, and his mother. The question was to whom should his estate go. The answer given was that the mother must be maintained and so must the sister, if left destitute by her husband. In the second case the answer was given by the Pundit. There the deceased left two wives, his mother and a sister. The answer of the Pundit was that the mother of the deceased, being otherwise unprovided for, sufficient allowance must be set apart from his estate for her maintenance and that if the deceased's sister derived nothing from her husband, the widows should jointly contribute towards her support. Both these cases were decided in 1803.

The case reported in Macnaghten, Vol. II, pages 117 and 118 was decided some fifteen years later in Bengal. The question there propounded was this:

> "A person died, leaving two sons by one wife (who died before him), and a widow and her two daughters, and subsequently to his death one of the sons died. There are now surviving a son of his first wife, and a widow and her two daughters; and supposing the widow to have received no portion of the property from her step-son, in this case, is she entitled to any share of the estate; and if so, what is the extent of her right?"

The answer was in these terms:

> "The widow is only entitled to a proper maintenance from her step-son; and if her two daughters have not been disposed of in marriage, they will also have some share of their father's wealth to defray their nuptial expenses. Should they, after marriage, be in want of maintenance, in consequence of their husband's inability to support them, they must be provided with food and raiment by their half-brother. This is conformable to the Dayabhaga and other authorities."

If the sister of a deceased Hindu is entitled to maintenance out of his estate it is impossible to imagine on what principle maintenance can be denied to his daughter, and the case reported in Macnaghten directly supports the proposition that the daughter is entitled to maintenance, though married, when her husband is unable to support her.

In *Venkatarasu* v. *Kotayya*[1], Sadasiva Aiyar, J., expressed himself strongly in favour of the view that there is a legal obligation on a Hindu father and his family to support his destitute widowed daughter when she has not received sufficient from her deceased husband's family for her maintenance. After expressing his dissent from the decision of the Bombay

1. (1912) 23 M.L.J. 223 (at p. 234).

F.B.

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Leach, C.J.

High Court in *Bai Mangal* v. *Bai Rukhmini*[1], to which I shall presently refer, Sadasiva Aiyar, J., went on to say:

"I concur in the opinion of J. C. Ghose, West and Buhler, Macnaghten and Strange that there *is* a legal obligation on the father and his family to support a destitute daughter (though she had been married away) if she could not *get* sufficient provision from her deceased's husband's family for her maintenance. Bhattacharya also says (page 400) that under the Hindu Law texts, widowed daughters are entitled to maintenance and 'justice requires that their right should be recognized.' The argument that by marriage she becomes a member of another family and becomes so to say, 'dead' to her own family is merely carrying legal fictions to absurd lengths. A wife is half her husband's body but you cannot on that account give double rations to the husband for his meals and give none to his wife; nor does the daughter lose her consanguineness, blood relationship to her father and her right of inheritance to him and other s m lar rights, simply because she becomes attached by Pinda, Gotra and Sootaka to her husband's family by marriage."

I am not prepared to go to the extent of concurring in the opinion here expressed that there is under Hindu Law a legal obligation on a father to support a daughter who has left his family and gone into another by reason of marriage, but I see no difficulty in extending the principle embodied in *Janki* v. *Nand Ram*[2], to such a case, when she is in want.

It will be convenient here to consider the decision of the Bombay High Court in *Bai Mangal* v. *Bai Rukhmini*[1]. There a Bench of the Bombay High Court, consisting of Parsons and Ranade, JJ., held that under Hindu Law only the unmarried daughter had a legal claim for maintenance out of her father's estate and that the married daughter must look to her husband's family for maintenance. If the husband's family is not able to maintain the widowed daughter and she returns to live with her father or brother, there is, it was said, a moral and social obligation on her father or brother, but not a legally enforceable right by which her maintenance can be claimed as a charge on her father's estate in the hands of his heir. The judgment of the Court was delivered by Ranade, J., who did not consider the principle laid down in *Janki* v. *Nand Ram*[2]. This principle was accepted by Ranade, J., sitting with Parsons, J., in *Yamunabai* v. *Manubai*[3], which is reported in the same volume of the Indian Law Reports as *Bai Mangal* v. *Bai Rukhmini*[1]. The principle in *Janki* v. *Nand Ram*[2], has certainly an important bearing on the question.

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1. (1898) I.L.R. 23 Bom. 291.
2. (1888) I.L.R. 11 All. 194 (F.B.).
3. (1899) .L.R. 23 Bom. 608.

F.B.

Ambu Bai Ammal v. Soni Bai Ammal.

Leach, C.J.

There are two Calcutta cases lo which reference should be made. In *Kamini Dassee* v. *Chandra Pode Mondle*[1], Banerjee, J., having accepted the principle in *Janki* v. *Nand Ram*[2], went on to observe:

"Each particular case, no doubt, has to be determined upon its own merits; in each case it will have to be determined whether having regard to the relationship, the means and various other circumstances of the party claiming maintenance, the late proprietor was, according to the principles of the Hindu law and to the usages and practice of the Hindu people, morally bound to maintain that party. It is not necessary for me to lay down any general rule on the point in this case. All that I am called upon to decide is whether the plaintiff in this case is a person whom, having regard to the circumstances of this case, her late father-in-law was morally bound to maintain."

In *Mokhoda Dossee* v. *Nundo Lall Haldar*[3], Amir Ali, J., held that a sonless widowed daughter in indigent circumstances is not entitled to separate maintenance out of the estate of her father in the hands of his heirs, but he added:

"There may be cases, however, where a father maintains the daughter and the daughter's husband in his own house, and does so up to the end of his life. Under those circumstances the fact of his marrying her to a person not possessed of means to maintain his wife would cast upon him the moral obligation of maintaining both her and her husband, and in the case of a widowed daughter of maintaining her and her children. If that moral obligation rested upon him in his life time, upon his death the moral obligation would, in my opinion, become a legal obligation on the part of those taking his property."

This case certainly falls within the exception which Amir Ali, J., had in mind. His decision was approved of on appeal—*Mokhoda Dassee* v. *Nundo Lall Haldar*[4], but his reservation was not discussed.

The Lahore High Court has held that a sister is bound to be maintained out of her deceased brother's estate in the hands of his heirs; *Musammat Bholi Bai* v. *Dwarka Das*[5]. The Court accepted a statement in Mulla which I shall quote in a moment as correctly representing the law.

The text books on Hindu Law with two exceptions support the respondent. In addition to quoting the two cases in the second volume of his work Strange expressly states that widowed sisters, not otherwise provided for, are entitled to be maintained. (Sir T. Strange's Hindu Law, Vol. I, p. 173.) Macnaghten's view is to be gathered from the case which I have already quoted. Mulla says:

1. (1889) I.L.R. 17 Cal. 373.
2. (1888) I.L.R. 11 All. 194 (F.B.).
3. (1900) I.L.R. 27 Cal. 555.
4. (1901)) I.L.R. 28 Cal. 278 (F.B.).
5. (1924) I.L.R. 5 Lah. 375.

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"An heir is legally bound to provide, out of the estate which descends to him, maintenance for those persons whom the late proprietor was legally or morally bound to maintain. The reason is that the estate is inherited subject to the obligation to provide for such maintenance." (Mulla's Principles of Hindu Law, 9th Edition, p. 582).

Mulla also says:

"A father is bound to maintain his unmarried daughters. On the death of the father they are entitled to be maintained out of his estate. A daughter on marriage ceases to be a member of her father's family, and becomes a member of her husband's family ...... If she is unable to obtain maintenance from her husband, or after his death from his family, her father, if he has got separate property of his own, is under a moral, though not a legal obligation to maintain her." (Mulla's Principles of Hindu Law, 9th Edition, p. 584).

Ghose states that a female is entitled to be maintained by her father's family, if her husband's family is extinct, or incapable on account of extreme poverty, to support her. (Ghose's Principles of Hindu Law, 10th Edition, p. 305.) He also points out that the sonless widowed daughter and grand daughter and sister come back to the family of the father according to Medhatithi. (Ghose's Principles of Hindu Law, 10th Edition, p. 310.) As Mayne observes Medhatithi's work is the earliest commentary extant on Manu and is frequently referred to as of high authority and mentioned in the Mitakshara and Smritichandrika. (Mayne on Hindu Law and Usage, 10th Edition, p. 43.) Sircar expresses the opinion that a married daughter is ordinarily to be maintained in her husband's family, but if they are unable to maintain her, she is entitled to be maintained in her father's family. (Sircar's Hindu Law, 8th Edition, p. 534). West and Buhler quote with approval the decisions in the two cases reported by Strange. (West and Buhler's Hindu Law, 4th Edition, p. 241). Before the decision in *Bai Mangal* v. *Bai Rukhmini*[1], Mayne was of the same opinion but the learned author of the next edition accepted that decision as being correct and altered his opinion accordingly. This view has been maintained in the latest edition. (Mayne's Hindu Law and Usage, 10th Edition, p. 825.) Gour's Hindu Code also accepts the Bombay case as deciding the point (4th edition, page 322).

The decision in *Janki* v. *Nand Ram*[2] must now be accepted as embodying a rule of Hindu Law and as there is a moral obligation on a father to support his daughter, whether married

1. (1898) I.L.R. 23 Bom. 291.
2. (1888) I.L.R. 11 All. 194 (F.B.).

F.B.

Ambu Bai Ammal v. Soni Bai Ammal.

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or unmarried, I can see no valid reason for refusing to apply the rule to a widowed daughter who is penniless. The only distinction between a widowed daughter-in-law and a widowed daughter is that on her marriage the daughter passes into another family, but the moral obligation of the father to support her when in want still remains and the same reasoning which led to the rule in *Janki* v. *Nand Ram*[1], being laid down applies. The decisions reported in Strange and Macnaghten provide additional reasons for applying it and most of the learned authors of works on Hindu Law have accepted it. The right to maintenance which was claimed in the cases reported in Strange and Macnaghten was not based on the reasoning to be found in *Janki* v. *Nand Ram*[1], but the right was clearly recognised. It is not necessary to consider how far the rule extends, but obviously it could not be extended to the Guru, guest, religious mendicant, or an aged and helpless person who is in no sense a member of the family and could only be the object of charity. There is, however, ample authority for applying the rule in this case. Consequently I hold that a widowed daughter in the position of the respondent in this case is entitled to maintenance out of her father's estate in the hands of his widow and I would dismiss the appeal with costs.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I agree.

Somayya, J.

Somayya, J.—I agree.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Sistla Saraswatamma .. *Appellant** (*1st Respondent*)

v.

Paruvada Maki Naidu and others .. *Respondents* (*Petitioner and Respondents 2 to 6*).

Saraswatamma v. Paruvada Maki Naidu.

Civil Procedure Code (V of 1908), S. 47 and O. 21, r. 58—Scope and applicability—X an alienee of an item of mortgaged property impleaded in mortgage suit—Application for personal decree against mortgagor not impleading the alienee X—Execution against personal property of mortgagor—Claim by alienee X to property attached in execution of personal decree alleging purchase of that property after personal decree—Claim, whether by a "stranger" or "party to suit".

1. (1888) I.L.R. 11 All. 194 (F.B.).

* A. A. O. No. 25 of 1938. 8th August, 1939.

Saraswatamma v. Parnvada Maki Naidu.

In a mortgage suit, X the respondent was impleaded as a subsequent purchaser of one of the items mortgaged. The sale of the hypotheca did not realise the full amount of the mortgage decree, and an application for a personal decree was made to which the respondent was not a party. When the mortgagor attached part of the personal property of the mortgagors, there was a claim preferred by X the respondent on the ground that the property attached was his property by virtue of a sale executed after the passing of the personal decree. The claim was drafted as a claim by a stranger under O. 21, r. 58 and was dismissed as respondent was found not to have been in possession.

Held, the personal decree arising out of a mortgage suit is a decree passed in the mortgage suit and though the respondent was not given notice of the application for a personal decree, he was a party to the suit in which the decree was passed and the question is one relating to the execution of that decree and S. 47, Civil Procedure Code, governs the investigation of the claim and the question of title of he claimant must be gone into.

Difference in the relative scope of investigations into claims under S, 47 and O. 21, r. 58 pointed out.

Appeal against the order of the Court of the Subordinate Judge of Chicacole dated 22nd November, 1937 and made in A. S. No. 166 of 1937 preferred against the order of the Court of the District Munsif of Parvatipur in E. A. No. 1422 of 1935 in E. P. No. 678 of 1935 in O. S. No. 548 of 1932.

P. Somasundaram and *S. Ramamurty* for Appellant.

N. Vasudeva Rao for *V. Govindarajachari* for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal against an order of remand in a matter arising out of a claim in execution of a personal decree passed in a mortgage suit. The appellant is a mortgage decree-holder; the respondent is the eighth defendant impleaded in the mortgage suit as a subsequent purchaser of one of the items mortgaged. After the sale of the hypotheca had not realised the full amount of the mortgage decree, an application was made for a personal decree against the mortgagors and to this application the present respondent (eighth defendant) was not made a party. When the decree-holder came to attach part of the personal property of the mortgagors, there was a claim preferred by the present respondent on the ground that the property attached was his property by virtue of a sale executed after the passing of the personal decree. Now, the claim preferred by the respondent was drafted as a claim by a stranger to the decree under O. 21, r. 58 and it was investigated on that basis and though the learned District Munsif does go to some

Saraswatamma v. Paruvada Maki Naidu.

extent into the validity of the title claimed by the respondent, he expressly says that the only point for determination is, who was in possession of the attached land at the time of the attachment. He found that the respondent herein was not in possession and he dismissed the petition. Thereupon, the respondent instead of filing a suit to contest the correctness of this order, discovered that the order was one under S. 47 of the Civil Procedure Code he having been a party to the suit; and he filed an appeal. The learned Subordinate Judge hearing the appeal agreed with the contention that the matter was one falling under S. 47 and remanded the suit for a fresh hearing on the ground that the lower Court erred in disposing of the claim summarily.

It seems to me quite clear that the learned Subordinate Judge is right in holding that S. 47 covers the dispute between the parties. It is contended on the strength of certain observations in *Palaniappa Chettiar* v. *Narayanan Chettiar*[1] that the proceeding for obtaining a personal decree is a separate proceeding from the trial of the suit and that the decree is a distinct decree and that therefore any person who is not a party to the personal decree proceedings but claims property attached under the personal decree is a stranger claimant to whose claim O. 21, r. 58 will apply. This contention seems to overlook the wording of S. 47 with reference to which the governing factor is not whether the disputants were parties to the decree, but whether the disputants were parties to the suit in which the decree was passed. There can, I think, be no question that the personal decree arising out of a mortgage suit is a decree passed in the mortgage suit; and though the respondent was not given notice of the application for a personal decree, he was a party to the suit in which the decree was passed and the question is one relating to the execution of that decree. S. 47 therefore governs the investigation of the claim.

Now, the learned Subordinate Judge ordered a remand on the ground that the trial Court was wrong in disposing of the claim summarily. It seems to me that this statement does not quite indicate the difference between proceedings under O. 21, r. 58 and those under S. 47. For the purpose of deciding a claim under O. 21, r. 58, the Court is bound to find who was in

1. (1935) 69 M.L.J. 765: I.L.R. 59 Mad. 188 (F.B.).

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possession at time of the attachment. It is not bound to find who had the title to the land attached and can refer parties to a suit for determining title. For the purpose of deciding a claim under S. 47, it is necessary to go into all the contentions of the parties including the contention as to title. The scope of the enquiry cannot be restricted merely to the question of possession at the time of the attachment. The difference between the two enquiries is, therefore, not a difference in procedure so much as a difference in the scope of the enquiry. It is suggested that the trial Court in this case has taken all the evidence that was available and has really gone into the question of the title of the claimant. It seems to me probable that the evidence was recorded as fully as was necessary. But undoubtedly the learned District Munsif has considered himself bound only to decide the question of possession. It follows therefore that the remand for an enquiry under S. 47 into the claim of the respondent was necessary. But it seems to me that the learned Subordinate Judge was quite wrong in ordering costs up to the date of his order to abide by the result. The respondent himself was entirely to blame for the way in which the matter proceeded in the trial Court and it was owing to his own error that the appeal and the remand became necessary. He took the position of a stranger claimant and asked the Court to investigate his claim under O. 21, r. 58 which was done without any question as to the propriety of the provision of law under which investigation was sought Then when an adverse decision was given, respondent took advantage of his own error in order to claim a right of appeal and get that decision set aside. The result is that all the time and money spent both in the original enquiry and the lower appellate Court have been wasted owing to the error of the respondent.

The proper order is therefore that the respondent here (eighth defendant) do pay all the costs of the appellant up to and including the stage of the order of remand by the lower appellate Court. In other respects, the appeal is dismissed and I think it proper that the appellant should pay the respondent's costs in second appeal since she has failed on the substantial grounds.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

Sankamma Hengsu .. *Petitioner* (Plaintiff)*

v.

H. Anantha Kamath and others .. *Respondents (Defendants).*

Sankamma Hengsu v. Anantha Kamath.

Companies Act (VII of 1913), S. 179—Liquidator—Power-of-attorney agent of—Authority to endorse promissory notes—Ratification by liquidator—Permissibility.

The power given to the liquidator under S. 179 (*f*) of the Companies Act to indorse a promissory note is a statutory power and it cannot be delegated in the absence of a statutory provision permitting such delegation.

Held, that the indorsements of certain promissory notes by the agents appointed by the liquidators conveyed no title in law to the assignees.

Held, further, that no subsequent ratification of such indorsements by the liquidator could make them valid as they were void *ab initio*.

Petitions under S. 25 of Act IX of 1887 praying the High Court to revise the decrees of the Court of the Subordinate Judge of South Canara, dated 24th June, 1936 and passed in S. C. S. Nos. 98 and 149 of 1933.

B. Sitarama Rao and *T. Krishna Rao* for Petitioner in both.

K. P. Sarvothama Rao for Respondent in C. R. P. No. 1041 of 1936.

A. Narayana Pai for Respondent in C. R. P. No. 1042 of 1936.

The Court delivered the following

JUDGMENT.—These connected Revision Petitions arise out of two connected Small Cause Suits instituted by two different persons claiming to be assignees or indorsees of two different promissory notes under indorsements purporting to have been made by Rao Saheb P. U. Narayana Aiyar and P. Ramayya Alva as joint holders of a power-of-attorney granted to them by the liquidators of the National Livestock Registration Bank, Ltd., Madras. The suits were dismissed mainly on the ground that the indorsements were not valid and conveyed no interest to the assignees. In one of these revision petitions, namely, C. R. P. No. 1041 of 1936, the only question that arises is whether the indorsement by the agents of the Liquidators is valid in law. This very point arose in connection with a similar case in C. R. P. No. 22 of 1934 in which it was held by Sir

* C. R. Ps. Nos. 1041 and 1042 of 1936, 7th August, 1939.

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Owen Beasley, C.J., that the liquidators had no power whatever to delegate their powers to any one else. The power of the liquidators themselves is derived from S. 179 of the Indian Companies Act and so far as indorsements of promissory notes are concerned, from clause (*f*) of that section. In other words, the power given to the liquidator to indorse promissory notes is a power given by the statute, and it is a well-established principle that a statutory power cannot be delegated in the absence of a statutory provision for such delegation. It is not pretended that there is any such statutory provision for delegation in a case of this kind, and it is clear, as was held in C. R. P. No. 22 of 1934, that the indorsement by the agents appointed by the liquidators conveys no title in law to the assignees. It follows from this that C. R. P. No. 1041 must fail as no question of ratification, such as is raised in the other revision petition, arises in this case.

The question of ratification also can be disposed of briefly. It is said that on the 15th May, 1932, all the previous indorsements made by the power-of-attorney agents were ratified by the sole liquidator, the other liquidator having resigned his office. Mr. Sitarama Rao relied on *Irvine* v. *Union Bank of Australia*[1] and particularly on the observations at page 375. I am however of opinion that those observations really do not bear on the present case. They show that though the original act would have required the sanction of a majority of the entire body of shareholders, nevertheless, an act done by a Director in excess of his authority may be ratified by a majority vote of the shareholders actually present at an extraordinary meeting conveyed with the express object of ratifying the act that was done in excess of authority, due notice of which having been given. In other words, that case is an authority for the proposition that in every case it is not necessary that the very authority which could have validly authorised the act at its inception could alone ratify such act. It does not in any way take away the force of the general rule which is embodied in Art. 25 in Bowstead on Agency at page 47, eighth edition, to the effect that it is only an act which is capable of being done by means of an agent that can be ratified by the person in whose name or on whose behalf it was done. In other words, if, as in this case, the liquidator could not validly in law

1. (1877) 2 A.C. 366.

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appoint an agent to assign promissory notes by means of a general authority, no subsequent ratification of what was *ab initio* void could make that act valid. It has been argued that a distinction must be drawn between this case and a case where the principal himself has decided the matter or in oth erwords, decided to make the particular assignment or indorsement, and merely leaves it to his power-of-attorney holder to sign the indorsement on his behalf. But in this case there is nothing to show that at the very inception the liquidator had decided to assign the promissory note in question and merely employed his power-of-attorney agents to sign on his behalf. If that was the case, there would have been no necessity to plead ratification at all because the original act itself would have been valid, the mere affixing of signature on behalf of the principal being a mere ministerial act the validity of which does not rest on any statutory provision. No such case was set forth by the petitioner in the lower Court, and there is certainly no material available which would justify a finding to the effect that before the assignment by the agents the liquidators themselves had applied their minds to the question and had decided to make the assignment. It follows therefore that this revision petition (1042 of 1936) also must fail. Both the revision petitions are accordingly dismissed with costs.

B. V. V. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Mooriantakath Ammoo .. *Appellant** (*Petitioner*)

v.

Matathankandy Vatakkayil Pokkan.. *Respondent* (*Respondent*).

Mooriantakath Ammoo v. Matathankandy Vadakkayil Pokkan.

Compromise decree—Variance—Consent of parties necessary—Stipulation as to deposit of money—Recovery of possession made conditional—Mode of enforcement.

Where there is a decree based on an agreement between the parties, an essential term of that agreement embodied in the decree cannot be changed by an act of the Court on the application of one only of the parties, but the consent of both parties to the original agreement would be necessary for its modification. The Court in such a case is doing nothing more than give judicial force to a contract and there is no basis for the decree other than the contract. This principle is app icable to a provision in the compromise

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*A. A. A. O. No. 88 of 1936. 25th July, 1939.

Moorian-takath Ammoo v. Matathan-kandy Vatakkayil Pokkan.

decree which fixes a definite period for the performance of an obligation as an essential part of the contract, such as the deposit of a sum of money by one party as a condition of his recovering possession of properties. And the Court cannot permit such a decree to be put in execution as if it were an ordinary decree where the condition as to deposit has not been satisfied.

Venkataramanna v. *Gurappa*, (1915) 28 M.L.J. 488 and *Jogamma* v. *Ramalakshmi*, (1915) 2 L.W. 635, considered.

Appeal against the order of the District Court of North Malabar dated 12th October, 1935 and made in A. S. No. 71 of 1935 preferred against the order of the Court of the District Munsif of Cannanore in R. E. P. No. 1021 of 1934 (O. S. No. 14 of 1931).

C. Achuthan Nambiar for Appellant.

D. A. Krishna Wariar and *K. Govindan* for Respondent.

The Court delivered the following

JUDGMENT.—This appeal is preferred by the decree-holder against the dismissal of his petition for the execution of a compromise decree. The decree is dated 10th December, 1931 and it arose out of a suit for the eviction of a tenant under a Malabar Marupat. The terms of the compromise decree may be summarised as follows: The amount due from the defendant for arrears of rent was fixed at Rs. 89-3-5, the plaintiff agreeing to relinquish the balance of his claim. The amount settled as due from the plaintiff for the value of improvements was Rs. 325-11-5. It was agreed that on the plaintiff depositing in Court before the 31st August, 1932, the sum of Rs. 236-8-0 (that is, Rs. 325-11-5—Rs. 89-3-5) the defendant should surrender the property and should thereafter up to the date of surrender pay rent at a stipulated rate; any arrears of rent to be adjusted against the amount due for improvements. There was also a term regarding the settlement of a promissory note dispute between the parties.

Instead of making the deposit within the nine months allowed by the terms of the compromise decree the plaintiff did nothing until just before the date on which the decree would become barred under the ordinary law of limitation, the deposit being actually made in December, 1934. Without any explanation for the delay or any application to extend the time he sought to execute the decree just as if it were an ordinary decree in an eviction suit passed after a full trial. The executing Court held that this was permissible. The lower appellate Court has dismissed the petition.

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It seems to me a self-evident proposition that when there is a decree based on an agreement between the parties, an essential term of that agreement embodied in the decree cannot be changed by an act of the Court on the application of one only of the parties, but the consent of both parties to the original agreement would be necessary for its modification. The Court, after all, is doing nothing more than give judicial force to a contract and there is no basis for the decree other than the contract. It follows that the decree cannot be varied except by the consent of the contracting parties. It seems to me that this principle must apply to the terms of contract which fixes a definite period for the performance of an obligation as an essential part of the contract. So much has been recognised in an English case, *Australasian Automatic Weighing Machine Co.* v. *Walter*[1]. But two Indian cases have been quoted under the impression that they embody a different principle. The earlier case *Venkataramanna* v. *Gurappa*[2], related to a compromise according to the terms of which a sum of money was to be deposited in Court, promissory notes which were then in Court were to be cancelled and both these things were to be done within a certain time. The deposit was made within time but there was some delay in cancelling the promissory notes. The Court held that the provision for the cancellation of the promissory notes was intended merely as a safeguard against fraudulent negotiation. This was in fact prevented by their being in the custody of the Court and therefore the time fixed for the cancellation of the promissory notes must not be regarded as being part of the essence of the contract but a mere penal clause and the Court could relieve against the penalty. The later case *Jogamma* v. *Ramalakshmi*[3], was also a case in which it was held that the Court could relieve against the enforcement of a penal clause in a contract which had been embodied in a decree of Court. Neither of these decisions purports to lay down any general rule that when under a compromise decree a certain time is fixed for the performance of an obligation under the decree the Court has by virtue of S. 148 of the Code of Civil Procedure power to vary the terms of the decree by granting an extension of time. I am of opinion that the Court has no such power and that if the time stipulated is an essen-

1. (1891) Weekly Notes Chan. p. 170. 2. (1915) 28 M.L.J. 488.
3. (1915) 2 L.W. 635.

Moorian-takath Ammoo v. Matathan-kandy Vatakkayil Pokkan.

tial part of the terms of the contract embodied in the decree and not a mere threat of a penal nature, there is no power in the Court to make a new contract for the parties fixing some other time than that which has been stipulated.

Looking at the actual contract embodied in this decree we find that a very generous time is given to the landlord for the deposit of the value of improvements, that value being fixed at a definite figure without any provision made for it being varied in case the value of the improvements increases before the actual eviction. Any delay on the part of the tenant in surrendering possession is met by the provision that the landlord can adjust the arrears of rent subsequently accruing due towards the amount of his deposit. But there is no corresponding provision for adjustment in case of delay on the part of the landlord resulting in an alteration in the amount due for improvements. It is suggested that the tenant has the right under S. 6 of the Malabar Compensation for Tenants' Improvements Act to demand a revaluation as on the date of actual eviction and to recover the excess value. But that amounts to importing into this contract which contemplates a fixed valuation of improvements, a statutory provision which really operates only when the value of improvements is left to be finally determined as on the date of eviction. Moreover under the prevailing view of this Court any claim of revaluation by the tenant would not bar the immediate eviction of the tenant when compensation at the rate fixed in the decree has been deposited. The position would therefore be that the plaintiff could utilise this compromise for his own purposes, that is to say, he might deposit only the amount originally fixed for improvements less the amount originally fixed as due for arrears of rent less subsequent rents accrued due, the tenant being left to take proceedings through Court to recover any additional improvements the value of which would be payable owing to the delay on the part of the plaintiff. That is to say, the whole idea underlying the compromise whereby the plaintiff should pay a fixed sum and the defendant should forthwith surrender possession is thrown overboard and the plaintiff seeks to execute the compromise so far as it is favourable to himself and to throw the defendant back upon the statutory remedy in order to recover anything additionally due owing to plaintiff's own laches. It seems to me that having regard to the terms of

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the compromise fixing the value of improvements at a certain figure and allowing the plaintiff nine months to deposit the value, it must be inferred that the parties contemplated that the deposit must be made within the time fixed and that the defendant is entitled not to be prejudiced by a prolonged delay on the part of the plaintiff. To hold otherwise would amount to making out a fresh agreement between the parties the terms of which would be very largely inconsistent with the original basis upon which the suit was decreed. I find therefore that the date fixed for the plaintiff's deposit was an essential term of the compromise, that the Court has no power to vary it and that the plaintiff not having made the deposit within the time allowed cannot execute the decree.

The appeal is therefore dismissed with costs.

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Pattammal, *In re* .. *Appellant** (*Accused*).

Pattammal, *In re.*

Indian Penal Code (XLV of 1860), S. 201 (1)—Giving false information with intent to screen real offender—Gist of offence—Information voluntary and to persons other than police or magistrate—Effect.

The accused a dancing girl on her paramour being reduced to an unconscious condition by throttling (as a result of which he later on died) gave information to the neighbours and a doctor who was called in, that while herself and her paramour were chatting and lying "he suddenly complained of stomach ache, went to the latrine, passed no stools, returned and had hic-cup; he passed stools in his bed and then he became unconscious". Whether or not the accused had or had not any hand in the matter her paramour could not have been throttled without her knowledge; so the information given by her was false to her knowledge and given with intent to screen the offender from legal punishment.

Held, the information need not be given to the police or the magistrate and it is immaterial whether the information is volunteered or given in reply to enquiries. The accused was guilty under S. 201 of the Indian Penal Code.

Appeal against the order of the Court of Session of the Chingleput Division in C. C. No. 26 of 1939.

V. T. Rangaswami Aiyangar for Appellant.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court delivered the following

JUDGMENT:—The appellant is a dancing girl and she was charged with the murder of her paramour Murugesa Mudali.

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* Crl. App. No. 654 of 1939. 25th April, 1940.

Pattammal, *In re.*

She was acquitted of that offence and has been convicted under S. 201 (1), Indian Penal Code, for giving false information with intent to screen the offender from legal punishment and sentenced to rigorous imprisonment to three years.

Murugesa Mudali went to the house of the appellant about 3 P.M. on 15th July last and P. W. 5, the sweeper woman, found him and the appellant lying and chatting on a cot when she left the house about 4-30 P.M. There was none else in the house and the appellant came out some time later and shouted "Akka, Akka, see the aniyayam". The mother and sisters of the appellant who were near their house close by rushed into the house and P. Ws. 13 and 14 who were near P. W. 13's house next door ran up. The appellant requested them not to crowd and closed the door against them and P. Ws. 13 and 14 returned. But P. Ws. 15 and 16 who were near the opposite house went and knocked the door and the sister of the appellant opened it. P. Ws. 15 and 16 then went in and they found Murugesa Mudali partially reclining on the chest of the appellant in the room which was almost closed. He was unconscious and breathing heavily and P. Ws. 15 and 16 enquired what the matter was. The appellant stated that Murugesa Mudali complained of stomach ache, had a motion and was reduced to that condition and P. Ws. 15 and 16 suggested that he should be brought to the verandah. This was done and one of the sisters of the appellant asked P. W. 15 to fetch her paramour Sundaresa Pillai. He was brought and P. W. 8 was sent for. He was absent from his house and his son P. W. 6 was informed. P. W. 6 informed his brother P. W. 4 who was in the house of Murugesa Mudali and P. Ws. 4, 6 and 7 rushed to the spot. Murugesa Mudali was lying unconscious and P. W. 2 the Mission Doctor was sent for. P. W. 4 asked the appellant what the matter was and she stated:

"We were chatting and lying. Mudaliar suddenly complained of stomach ache. He went to the latrine. He passed no stools. He returned. He had a hic-cup. He passed stools in his bed and then he became un-conscious."

But Murugesa Mudali was in fact reduced to that condition by throttling and he died on 18th July of pneumonia due to throttling. The information given by the appellant was therefore false and on her own statement to P. W. 4 there was none else in the house and she and Murugesa Mudali were lying and chatting. There is also the evidence of P. W. 5 the sweeper

Pattammal, *In re.*

woman, to the same effect and whether or not the appellant had any hand in the matter Murugesa Mudali could not have been throttled without her knowledge. The information was thus false to her knowledge and it is obvious that it was given with intent to screen the offender from legal punishment. The information need not be given to the police or the Magistrate under S. 201, Indian Penal Code (vide *The Queen* v. *Subramania Pillai*[1]) and it is immaterial whether that information is volunteered or given in reply to enquiries (vide *Queen-Empress* v. *Ramji Sajabarao*[2] and *The Acting Public Prosecutor* v. *Chinnappa Reddi*[3]). The conviction under S. 201, Indian Penal Code, is therefore correct and in the circumstances of the case the sentence is not excessive.

The conviction and sentence are therefore confirmed and the appeal is dismissed.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Ganapathi Bhatta ... *Petitioner** (*Petitioner*)

v.

A. M. L. D'Sowza and others .. *Respondents* (*Respondents-Plaintiff and Defendants 1 and 2*).

Ganapathi Bhatta *v.* D'Sowza.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Judgment-debtor alone entitled to scaling down—Purchaser of equity of redemption from Official Receiver in the insolvency of the judgment-debtor—Whether meaning of judgment-debtor is wide—Civil Procedure Code (V of 1908), S. 2 (10).

To be entitled to the benefits of the S. 19 of the Act (IV of 1938) no other person but a judgment-debtor as defined in S. 2 (10) of the Civil Procedure Code is thought of. Hence a purchaser of the equity of redemption from a Receiver in the insolvency of the judgment-debtor cannot be a judgment-debtor and obtain relief by scaling down of the decree debt as against him.

Thiruvengadam Pillai by agent V. Latchmiah v. *B. Venkatasubbiah,* (1912) 13 I.C. 659, relied on.

Perianna Goundan v. *Sellappa Goundan,* (1938) 2 M.L.J. 1068: I.L R. (1939) Mad. 218, distinguished.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif

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1. (1866) 3 M.H.C.R. 251.
2. (1885) I.L.R. 10 Bom. 124.
3. (1892) 1 Weir 118.

* C. R. P. No. 1048 of 1938. 24th April, 1940.

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of Karkal dated 26th July, 1938 and made in R. I. A. No. 470 of 1938 in O. S. No. 579 of 1936.

K. Srinivasa Rao for Petitioner.

G. A. Pais for Respondents.

The Court delivered the following

JUDGMENT.—The first respondent obtained a mortgage decree, and the petitioner purchased the equity of redemption from the receiver in the insolvency of the judgment-debtor. The petitioner applied in R. I A. No. 470 of 1938 on the file of the District Munsif of Karkal under S. 19 of the Madras Agriculturists' Relief Act to have the decree debt scaled down as against him. The lower Court held that he was not a judgment-debtor and that therefore S. 19 did not apply to his debt.

S. 19 says:

"Where before the commencement of this Act a Court has passed a decree for the repayment of a debt, it shall, on the application of any judgment-debtor who is an agriculturist . . . . apply the provisions of this Act to such decree and . . . . amend the decree accordingly. . . . ."

It is thus seen that the petitioner cannot have the advantage of this section unless he is a judgment-debtor. The Agriculturists' Relief Act does not define the word 'judgment-debtor' and so we must take it that the ordinary meaning is assigned to that expression. "Judgment-debtor" is defined in the Civil Procedure Code (Act V of 1908) in S. 2 (10) as meaning "any person against whom a decree has been passed or an order capable of execution has been made". Clearly, the petitioner is not a judgment-debtor in that sense. The learned Advocate for the petitioner has referred to an old ruling of this Court in *Panduranga Mudaliar* v. *Vythilinga Reddi*[1], in which it was held that the provisions of S. 258, Civil Procedure Code, Act XIV of 1882 applied not only to judgment-debtors but to those claiming through them or in their right. But even there it was not said that persons claiming through judgment-debtors were also judgment-debtors. It only says that S. 258 applied to those claiming through them and in their right as well as to judgment-debtors. We are however not concerned with the Code as it stood then, but with the present Code. It cannot be said that there is anything in the present Code which suggests that 'judgment-debtor' may sometimes mean more than it is

1. (1907) 17 M.L.J. 417: I.L.R. 30 Mad. 537.

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defined to mean. No example has been cited to me in which a wider meaning has been given to the word 'judgment-debtor' than is found in the definition itself. It was expressly held in *Thiruvengadam Pillai by agent V. Latchmiah* v. *B. Venkatasubbiah*[1] that in O. 21, r. 58 'judgment-debtor' does not include the assignee of a judgment-debtor. Reliance has been placed on a decision of this Court in *Perianna Goundan* v. *Sellappa Goundan*[2], which is a decision under this very Act. The learned Judges there were not concerned with the definition of judgment-debtor, but with the definitions of "debt" and "debtor". There, the purchaser of the equity of redemption was made a party to the suit and a decree was passed against him; and so he was undoubtedly a judgment-debtor; but it was argued in that case that as he was not liable personally, his property only being liable, he was not a debtor. That argument was repelled; and it was held that there was nothing in the Madras Agriculturists' Debt Relief Act which distinguished between a personal obligation to pay a debt and an obligation under which only a man's property is liable.

The application was therefore rightly decided; for the petitioner was not entitled to the benefit of S. 19. The petition is accordingly dismissed with costs.

K. C. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

K. Ranganayaki Ammal .. *Appellant** (*Plaintiff-Petitioner*)

v.

K. Sampathkumaran and others .. *Respondents* (*Defendants-Applicants*).

Ranganayaki Ammal v. Sampathkumaran.

Registration Act (XVI of 1908), S. 17 (2) (b)—Memorandum of compromise by parties to suit to be filed in Court for obtaining a decree in terms—When exempted from registration.

A memorandum of agreement requires registration if the parties intend it to be a declaration of rights and it is so worded but a memorandum (in this case a compromise agreement) drawn up for the purpose of obtaining another document to declare the rights (in this case the decree) does not require registration.

1. (1912) 13 I.C. 659.
2. (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218.

* O. S. A. No. 20 of 1938. 10th August, 1939.

Ranga-nayaki Ammal v. Sampath-kumaran.

Appeal against the order of the Hon'ble Mr. Justice Wadsworth dated 28th October, 1937 and made in Application No. 30 of 1937 in C. S. No. 248 of 1934 in the exercise of the Ordinary Original Civil Jurisdiction of the High Court.

V. V. Srinivasa Aiyangar, M. Chelva Aiyangar and *V. R. Venugopalan* for Appellant.

A. Seshachariar for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant was the plaintiff in a suit filed on the Original Side of this Court against her husband, her two sons, and her grandson for possession of a house known as No. 9, Dewan Ramiengar Road, Vepery, Madras. She claimed that the house was her absolute property. The defence was that the house was built in part by monies belonging to the defendants and that they had an interest in it. During the pendency of the suit the husband died and subsequently the parties agreed to a compromise decree being passed. The agreement which was entered into comprised disputes relating to other matters. The terms agreed upon were embodied in a document and the sons filed an application asking for formal leave to compromise the suit and for a decree in the terms of the compromise so far as it related to the suit property. It was necessary for the Court to give formal leave as the grandson was a minor. Notice of this application was served upon the appellant, who resisted it. Before the filing of this suit the appellant was living in the house with the defendants. The filing of the suit led to great bitterness and the appellant went to reside elsewhere. She asked the Court to refuse to record the compromise on the ground that it was a condition precedent to the agreement that she should be taken back into the family. Holding that there was no such condition and that the suit had been compromised on the terms set out in the document filed in Court, Wadsworth. J., passed a decree in accordance with the agreement. The appellant asks that the compromise decree be set aside for the reason she advanced before the learned Judge.

It is conceded by the appellant's learned advocate that on the evidence as it stands on the record the learned Judge's finding cannot be questioned. He says, however, that the admission of the agreement was wrong because it required registration

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and not having been registered the document cannot be put in evidence. S. 17 (1) (*b*) of the Indian Registration Act requires registration of a non-testamentary instrument which purports or operates to create, declare, assign, limit or extinguish whether in present or in future any right, title or interest, whether vested or contingent, in immovable property of the value of Rs. 100 and upwards. The contention is that the agreement on which the respondents moved for a decree is in law a document which falls within S. 17 (1) (*b*) and therefore cannot be received in evidence as the provisions of S. 49 stand in the way.

The document must be read as a whole and in the light of the surrounding circumstances and when this is done it is manifest that it does not fall within the purview of S. 17 (1) (*b*). As I have indicated, there were other disputes besides the dispute which led to the filing of the suit. These disputes related *inter alia* to two other houses and the parties met to settle all their differences. The terms of settlement having been agreed upon they were put in writing in order that there should be no dispute with regard to them. The document is headed with the cause title of the suit and the document says that it was the intention of the parties that the terms of the compromise should be embodied in a decree of the Court. Clause (*k*) reads as follows:—

> "This compromise shall be filed in this High Court, each party shall bear his or their own costs a report shall be made to the effect that the matter of this suit has been settled (out of Court) and a compromise decree shall be obtained in terms of this compromise."

There can be no doubt that the document in question was not intended to declare the rights of the parties in the immovable properties, but those rights were to be declared in a decree of the Court. Clause (*k*) leaves no other conclusion open. A memorandum of agreement, which this document is, requires registration if the parties intend it to be a declaration of rights and it is so worded, but a memorandum drawn up for the purpose of obtaining another document to declare rights—in this case the decree—does not require registration. S. 17 (2) (*b*) of the Registration Act expressly exempts from registration a document not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but

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merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest. And a decree or order of a Court does not require to be registered except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding. In this case the compromise decree was registered and the Registration Act was therefore complied with. The learned Judge rightly admitted this document in evidence and it shows conclusively that there is no substance in the appellant's case.

The appeal will be dismissed with costs.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Dara Tripura Sundaralingam .. *Petitioner* (Defendant)*

v.

Vinjamuri Venkataramanayya .. *Respondent (Plaintiff).*

Sundaralingam v. Venkataramanayya.

Madras Debt Conciliation Act (XI of 1936), S. 25—Duty of Court to grant unconditional stay.

In staying proceedings under S. 25 of the Debt Conciliation Act, imposition of a condition is *ultra vires*. The Court has no discretion in the matter but to stay all proceedings in connection with the debt which is being considered by the Debt Conciliation Board.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Vizagapatam dated 14th November, 1939 and made in E. A. No. 913 of 1939 in E. P. Nos. 83 and 84 of 1939 in O. S. No. 101 of 1934.

P. Somasundaram for Petitioner.

V. Venkataramanayya for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner brought an application before the Subordinate Judge of Vizagapatam, purporting to be under S. 25 of the Madras Debt Conciliation Act and S. 151, Civil Procedure Code, asking for a stay of the execution of a money decree pending proceedings before the Debt Conciliation Board under S. 4 of the Act. When the application was filed, a copy

* C. R. P. No. 2461 of 1939. 3rd May, 1940.

of the petition was filed before the Debt Conciliation Board. A counter was filed making the usual allegations of frivolity and so on against the petitioner; and the Court passed an order staying the disposal of the execution application on condition of the petitioner's paying up the costs of the suit or of depositing them into Court on or before a certain date. The petitioner contends that this condition imposed by the order of the Subordinate Judge was *ultra vires.*

Under S. 25 of the Madras Debt Conciliation Act, the Court is bound to stop all proceedings in connection with the debt which is being considered by the Debt Conciliation Board. The wording of the section is most peremptory:

"When an application has been made to a Board under S. 4, any suit or other proceeding . . . . in respect of any debt for the settlement of which application has been made shall not be proceeded with until the Court has dismissed the application."

So that the Court, upon its attention being drawn to the fact that proceedings are pending before the Debt Conciliation Board, is bound to stay whatever proceedings are before it in connection with that debt. It does not matter whether or no the Court is of opinion that the proceedings before the Debt Conciliation Board are frivolous or intended to delay justice; and no petition for stay is necessary. It is not necessary even to call upon the other side for a counter. The Court may require the petitioner to produce proof that he has filed the petition before the Debt Conciliation Board and that it has not been dismissed; and if the petitioner can satisfy him on those points, the Court has no discretion but to stay.

The petitioner added S. 151, Civil Procedure Code, as one of the sections under which he asked the Court to exercise its powers; and there can be no doubt that the Court has power, when it orders stay by virtue of its inherent power to do so, to impose such terms as it thinks fit. It was however unnecessary in this case to invoke the inherent powers of the Court under S. 151. What in effect the petitioner did was to draw the attention of the Court to the fact that an application before the Debt Conciliation Board was pending.

In staying proceedings under S. 25 the Court cannot impose any condition; for the power to impose a condition implies a corresponding power to dismiss the application if the condition is not fulfilled. If a conditional order is made under S. 25

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staying the suit or other proceeding, the Court cannot dismiss the application upon the nonfulfilment of the condition. From this it follows that the imposition of a condition is *ultra vires*.

This petition is therefore allowed and the condition attached to the order of stay cancelled. The petitioner is entitled to his costs in this Court from the respondent.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Rachamadugu Narayanaswami Chetti .. *Petitioner** (*Petitioner—1st Defendant*)

v.

R. Venkata Reddi (died) and others .. *Respondents* (*Plaintiff and nil*).

Narayanaswami Chetti v. Venkata Reddi.

Madras Debt Conciliation Act (XI of 1936), Ss. 4 and 25—Applicability to execution proceedings—Decree on basis of mortgage—If falls within purview of the Act—Execution—Stay of.

When an application has been made to a Board under S. 4, any suit or other proceeding including a proceeding in execution of a decree pending before a Civil Court in respect of any debt, secured or otherwise, for the settlement of which application has been made, cannot be proceeded with until the Board has dismissed the application.

Hirannayya v. Thippeswami, (1938) 2 M.L J. 1032, relied on.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order dated 17th August, 1939 and made in E. A. No. 223 of 1939 in E. P. No. 41 of 1939 in O. S. No. 59 of 1937 on the file of the Sub-Court of Chittoor.

T. K. Srinivasa Thathachariar and *C. Balakrishna Menon* for Petitioner.

T. Kumaraswamiah for Respondents.

The Court delivered the following

JUDGMENT.—This is a revision from an order passed by the learned Subordinate Judge of Chittoor dismissing an application made by a judgment-debtor under the Debt Conciliation Act with the object of securing a stay of execution of a mortgage decree passed against him. The two grounds on

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* C. R. P. No. 2174 of 1939. 3rd May, 1940.

Narayana-swami Chetti v. Venkata Reddi.

which the execution Court refused to accede to the petitioner's request were

(1) that S. 25 of the Act did not apply to execution proceedings,

(2) that a decree passed on the basis of a mortgage-deed does not fall within the purview of the Debt Conciliation Act.

As to the first ground of the learned Subordinate Judge's decision, I find the words in S. 25 to be quite general and apparently intended to cover every proceeding, whether in the nature of an execution or otherwise. An application for execution, although arising out of a suit after a decree is passed therein is none the less a proceeding and there seems to be no justification for restricting the words only to miscellaneous proceedings other than those in execution. The words of the section leave no scope for the argument that the proceedings must necessarily be independent of the suit in which the decree was passed. As to the second ground, the learned Subordinate Judge's attention does not seem to have been drawn to the definition of the word 'debt' which has been given in S. 2 (*f*) of the Debt Conciliation Act. A debt has been defined to cover a secured debt as well and whether it is payable under a decree of a Civil Court or otherwise. A secured debt has been defined in sub-cl. (1) of the same section to include a mortgage-debt or any debt for which there is security, lien or charge on immovable property. The result of these definitions would be that "when an application has been made to a Board under S. 4, any suit or other proceeding, including a proceeding in execution of a decree, pending before a Civil Court in respect of any debt, secured or otherwise, for the settlement of which application has been made" cannot be proceeded with until the Board has dismissed the application. A reference to S. 18 (3) and S. 19 (4) (*b*) appears to be beside the point. S. 18 (3) only provides that certain decrees would not be executable after the registration of an agreement under S. 14 (2) against the assets set apart in the agreement until all amounts recorded as payable under such agreements have been paid. S. 19 (4) (*b*) makes an application for execution of a decree suspended under S. 18 (3) to be unexecutable by a Civil Court. Neither of these sections have any relevancy to the consideration of the question to be decided

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in this case; or suggest an inference that a secured creditor stands in any position different from that of a simple creditor so far as S. 25 is concerned.

A Division Bench of this Court took the same view in *Hirannayya v. Thippeswami*[1]. This is binding on me. It is true that it does not consider the points raised in this revision specifically; but unless that was the opinion of the learned Judges, they could not have arrived at the decision to which they did.

For the above reasons, the revision must be accepted and is allowed with costs.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

C. K. Kunjandi .. *Petitioner* (Plaintiff)*

v.

Kuduvayoor Nagarathil Melharath Kadir Moideen Rowthen's son Chinnavava Rowthen and others.. *Respondents (Defendants).*

Kunjandi v. Chinnavava Rowthen.

Limitation Act (IX of 1908), Ss. 19 and 20—Joint debtors—Payment towards debt by one debtor after the death of the other within limitation—If saves limitation against the heirs of the deceased debtor.

A promissory note was executed by two persons, one of whom subsequently died. The other made a payment within the period of limitation and in a suit filed within three years of that payment the heirs of the deceased debtor were sought to be made liable.

Held, the payment did not save limitation against the heirs of the deceased joint contractor.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of South Malabar at Palghat in S. C. S. No. 243 of 1936.

K. Kuttikrishna Menon for Petitioner.

S. Venkatachala Sastri for Respondents.

The Court delivered the following

JUDGMENT.—The second defendant is the mother of defendants 3 to 5. The husband of the second defendant, the

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1. (1938) 2 M.L.J. 1032.

* C. R. P. No. 352 of 1937. 23rd April, 1940.

Kunjandi v. Chinnavava Rowthen.

father of defendants 3 to 5, and the first defendant executed a promissory note in favour of the plaintiff-petitioner. Within the period of limitation, after the death of the second defendant's husband, first defendant made a payment. This suit was brought within three years of that payment but more than three years from the execution of the note. The first defendant was clearly liable; but the more difficult question was whether defendants 2 to 5 were liable also or whether the suit was barred as against them. That point was decided in favour of the defendants 2 to 5 by the Subordinate Judge of Palghat.

There can be no doubt that it is well established in this High Court that any acknowledgment made under S. 19 by one person does not save limitation against any other persons liable under the note, whereas a payment made under S. 20 saves limitation as against all those liable under the note. I am unable to see any great difference in the wording of Ss. 19 and 20 which would account for this difference in the law applying to acknowledgments and payments. The earlier Indian decisions on the subject seem to have been based largely on the English law; and the decisions to which I have been referred assume the difference between Ss. 19 and 20 and follow earlier cases.

S. 21 (2) of the Limitation Act says:

"Nothing in the said sections (Ss. 19 and 20) renders one of several joint contractors, ... chargeable by reason only of a written . . . . . . payment made by . . . . . any other or others of them."

Reading Ss. 20 and 21 together, it would follow that a payment saves limitation against all the debtors unless the debtors are co-contractors. It has been laid down in a number of cases, *Narasimha Rama Aiyar* v. *Ibrahim*[1], *Lokandha Naiko* v. *Lokhono Naiko*[2] and *Pangudaya Pillai* v. *Uthandiya Pillai*[3], that a payment by an heir saves limitation against other heirs.

The position in this case is rather peculiar. There is no payment by one heir; but there was a payment by a joint contractor. At the time when this payment was made, the other joint contractor was dead and, strictly speaking, there was no other joint contractor to whom S. 21 (2) could directly apply; but defendants 2 to 5 are sought to be made liable because they are the heirs of the other joint contractor. Their liability depends

1. (1928) 56 M.L.J. 630. 2. (1929) 127 I.C. 641.
3. (1938) 2 M.L.J. 33: I.L.R. (1938) Mad. 968.

Kunjandi v. Chinnavava Rowthen.

upon the liability of the person whose heirs they are. That other person was a joint contractor and defendants 2 to 5 represent his estate. I am therefore of opinion that this payment made by the first defendant does not save limitation against defendants 2 to 5.

The petition is accordingly dismissed with the costs of the contesting respondent.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

Edara Venkayya Pantulu *alias* E. V. Pant and another .. *Appellants* (Defendants Nos. 1 and 2)*

v.

Kalipattapu Chitti Surya Prakasamma and another .. *Respondents (Plaintiff and 3rd Defendant).*

Venkayya Pantulu v. Surya Prakasamma.

Libel—Damages—Criminal prosecution and conviction of defendant before civil suit—If ground for reducing amount of damages—Costs—If to be proportionate to damages awarded.

The law allows both a criminal and civil remedy for defamation and the fact that there had been a criminal prosecution and conviction obtained before the civil suit for damages was launched is no reason for reducing the amount of damages which the plaintiff would otherwise get.

Ma Sein Tin v. *U Kyaw Maung*, A.I.R. 1936 Rang. 332 at 334, dissented from.

It is not possible for the Court to assess the damages for a libel at an exact figure and parties cannot be expected to assess the damages in an exact manner. Though the amount of damages decreed is very much less than the amount claimed the Courts can give full costs to the plaintiff.

Rahim Bakhsh v. *Bachcha Lal*, (1928) I.L.R. 51 All. 509, relied on.

Appeal against the decree of the Court of the Subordinate Judge (Additional) of Ellore in O. S. No. 9 of 1937.

T. V. Ramanatha Aiyar for Appellants.

Kasturi Seshagiri Rao and *D. Suryaprakasa Rao* for Respondents.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—[After dealing with the facts his Lordship continued.]

The defamation having been established beyond doubt it only remains to consider whether the amount of damages

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* Appeal No. 52 of 1938. 29th April, 1940.

Venkayya Pantulu v. Surya Prakasamma — Pandrang Row, J.

awarded by the Court below is reasonable. It may be mentioned in this connection that before the suit was filed there was a criminal prosecution at the instance of the father of the plaintiff which resulted in the conviction of all the defendants which was upheld in the High Court on revision. It is argued that the very fact that there had been a criminal prosecution and a conviction obtained before the civil suit was launched is itself a reason for reducing the amount of damages, and reliance has been placed on the decision in *Ma Sein Tin* v. *U Kyaw Maung*[1]. At page 334 there are certain observations which show that the learned Judge disapproved conduct of this kind, that is, the filing of a civil suit for damages after a criminal prosecution, though the law grants both remedies to the wronged person. We are not prepared to accept this view, namely, that where the law permits two remedies a party who avails himself of one remedy after another should not get, so to say, as much compensation as he would otherwise get. What the law allows must be awarded by the Courts which administer the law. The remedies are moreover different. The law gives a party both remedies and it is not right in our opinion to take away so to speak by a judicial decision what the law gives in cases of this kind. The amount awarded by the Court below is Rs. 1,500 whereas the amount claimed is Rs. 5,250. The learned Judge who tried the case has given reasons for assessing the damages at Rs. 1,500 and no attempt has been made to show that these reasons are not well founded beyond relying on the decision in *Ma Sein Tin* v. *U Kyaw Maung*[1]. In a case of this kind it is not possible for the Court to assess the damages at an exact figure giving absolutely convincing reasons for so doing. This observation is made necessary by the fact that an attempt was made to argue that the lower Court should have allowed only proportionate costs in view of the fact that only Rs. 1,500 was decreed in respect of a claim of Rs. 5,250. Parties cannot be expected to assess the damages in an exact manner. Especially in a case of this kind where loss of reputation is suffered in respect of the virginity or purity of an unmarried girl like the plaintiff it is impossible to say that a claim for Rs. 5,250 is unreasonable. It is enough to refer to the case reported in *Rahim Bakhsh* v. *Bachcha Lal*[2], where in appeal full costs were given though the amount decreed was

1. A.I.R. 1936 Rang. 332. 2. (1928) I.L.R. 51 All. 509.

Venkayya Pantulu v. Surya Praka-samma.

Pandrang Row, J.

only Rs. 200 in respect of a claim for Rs. 5,100. Another reason is that we ourselves should have been prepared to enhance the amount of damages but for the fact that the memoranda of cross-objections in which an extra amount of Rs. 1,000 was claimed by the plaintiff-respondent was not pressed before us by her advocate. We therefore see no reason to interfere with the order regarding costs made by the lower Court.

The appeal is accordingly dismissed with costs of the plaintiff-respondent. The memorandum of objections not being pressed is also dismissed but without costs.

K. S. *Appeal and memorandum of objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Kowtha Suryanarayana Rao .. *Appellant* (10th Defendant)*

v.

Patibandla Subrahmanyam and others .. *Respondents (Plaintiffs and Defendants 1 to 9 and 11).*

Surya-narayana Rao v. Subrah-manyam.

Societies Registration Act (XXI of 1860)—Reading room—Original name—Gift by a donor of a hall—Hall to be named after him—Members suing management—Civil Court's jurisdiction, when does lie.

It is a well-established principle that, provided that the acts of the management are within the powers of the Society itself, any dispute between individual members of a Society registered under the Societies Registration Act and those responsible for its management must be decided by the machinery provided by the rules and not in a Court of Law. If the Society as a whole does not approve of the acts of its management, it has every power by summoning a general meeting and passing a resolution to correct and control the acts of the management. It is only when an act is *ultra vires* the Society that a member is entitled to come to a Civil Court and have the act of management which is *ultra vires* declared to be void.

Where the plaintiff members of a Free Reading Room, registered under the Societies Registration Act and named after a patriotic son of India, sued the managing committee and the tenth defendant, who was the donor of a hall to the Reading Room premises which he wished to be named after him and the managing committee permitted his name to be perpetuated in that form,

Held, that the suit should be dismissed, as the matter in dispute had to be decided by the Association itself, and not by a Court of Law.

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* Second Appeal No. 640 of 1936. 27th October, 1939.

Surya-narayana Rao v. Subrah-manyam.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada in A. S. No. 36 of 1935 preferred against the decree of the Court of the District Munsif of Bezwada in O. S. No. 664 of 1933.

S. Parthasarathi and *V. K. Thiruvenkatachari* for Appellant.

G. Lakshmanna and *G. Chandrasekhara Sastri* for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiffs are five members of an Association called the Ram Mohan Roy Free Library and Reading Room Association, which was registered in 1914 under the Societies Registration Act, XXI of 1860. Defendants 1 to 9 are the members of the managing committee of that Association and the tenth defendant is a person who, according to the findings of the lower appellate Court, has given an unconditional gift of an upstairs room erected above the original premises of the Association. The managing committee has permitted the tenth defendant to have embedded in three wall-plates with the name "Kowtha Suryanarayana Rao Public Hall" engraved. The plaintiffs have brought this suit to restrain the defendants from affixing plates of cast letters of this description or any other letters either cast or written or of any kind except those bearing the words Ram Mohan Roy.

It is argued not only that the managing committee acted *ultra vires* in permitting the tenth defendant to place plates with this inscription on the walls of the upstair room; but that the grant of such permission was *ultra vires* of the association itself. This last contention seems so ludicrous as not to need any argument to refute it. There is certainly nothing in the rules which prevents the association from naming any hall or room in any manner it pleases; and the giving of a particular name cannot be in contravention of any rules of the association relating to the aims and objects of the Society. If, as the tenth defendant alleged in his written statement, his gift had been subject to conditions, it might well be argued that those conditions were not in consonance with the objects of the association; but with that case of the tenth defendant we are not concerned, in view of the findings of the lower appellate Court that the gift was unconditional. It is a well-established princi-

Surya-narayana Rao v. Subrah-manyam.

ple that, provided that the acts of the management are within the powers of the Society itself, any dispute between individual members of the Society and those responsible for its management must be decided by the machinery provided by the rules and not in a Court of Law. If disgruntled members were allowed to air their domestic grievances in Court, orderly management of the affairs of societies and corporations would be impossible. If the Society as a whole does not approve of the acts of its management, it has every power by summoning a general meeting and passing a resolution to correct and control the acts of the management. In the suit Society the acts of the managing committee are subject to the control of the general committee, of which every member of the Society is a member. It is only when an act is *ultra vires* the Society that a member is entitled to come to a Civil Court and have the act of the management which is *ultra vires* declared to be void.

The Courts below seem to have come to their conclusions on the assumption that this Ram Mohan Roy Free Library and Reading Room Association was a members' club; but it is clear that the Association is maintained not by mere subscriptions from its members but by donations; and it is therefore difficult to see how it can be a club. However, for the purposes of this appeal it is immaterial whether the society is a club or not; for even a member of a club cannot sue the management because it does some act of which he disapproved, provided of course that he is not personally damnified by expulsion or punishment or by loss to property of which he may be a joint owner.

The decisions of the Courts below are therefore wrong; and the matter in dispute being one that should be decided by the Association itself, the suit has to be dismissed. In order that the gift of this room and the inscriptions on it should not cause further disharmony between the members of the association, the tenth defendant is willing to delete the word "Public" from the inscriptions. He undertakes through his advocate to do this within three months of this date. As the tenth defendant has given this undertaking, this appeal is allowed and the suit dismissed. The plaintiffs will pay the costs of the tenth defendant in this Court only.

Leave refused.

K. C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Nukala Surya Rao .. *Petitioner** (*Petitioner*)

v.

Yedida Bullemma *alias* Venkayya and another .. *Respondents* (*Respondents*).

Surya Rao *v.* Bullemma.

Madras Debt Conciliation Act (XI of 1936), S. 25—Application under Civil Procedure Code, O. 21, r. 90 by judgment-debtor to set aside sale—If a "proceeding in respect of the debt" which can be stayed under S. 25 of Madras Act XI of 1936.

When a sale has been held in execution of a decree for the payment of a debt, the decree is not satisfied until the sale is confirmed and the decree-holder is permitted to draw out of Court the money in deposit. When there is an application pending under O. 21, r. 90 the Court has no power to confirm the sale till that application has been decided. Accordingly the application to set aside a sale in execution must come within the very wide terms of the phrase "proceedings in respect of a debt" used in S. 25 of Madras Act XI of 1936.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order and decree of the Court of the District Munsif of Amalapuram in C. M. P. No. 776 of 1939 (in O. S. No. 120 of 1934) dated 6th day of September, 1939.

P. Somasundaram and *G. Balaparameswari Rao* for Petitioner.

Respondents not represented.

The Court delivered the following

JUDGMENT.—This petition canvasses the correctness of a decision to the effect that when there has been a decree on a mortgage-debt and the hypotheca has been sold and an application is filed under O. 21, r. 90 by the judgment-debtor to set aside the sale on the ground of material irregularity, etc., that proceeding is not a proceeding in respect of a debt within the purview of S. 25 of the Madras Debt Conciliation Act (XI of 1936.) S. 25 runs as follows:—

"When an application has been made to a Board under S. 4 any suit or other proceedings then pending before a Civil Court in respect of any debt for the settlement of which application has been made shall not be proceeded with until the Board has dismissed the application."

The decree in this case was passed in a suit of 1934. The petition under O. 21, r. 90 was E. A. No. 756 of 1937 and it was actually pending when the petitioner applied under E. A.

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* C. R. P. No. 1821 of 1939. 12th April, 1940.

Surya Rao *v.* Bullemma.

No. 776 of 1939 for a stay of the earlier application on the ground that he had on 31st August, 1939, filed an application before the Debt Conciliation Board for the settlement of all his outstanding debts including the debt embodied in the decree. The learned District Munsif holds that a proceeding under O. 21, r. 90 is not a proceeding in respect of a debt and dismisses the petition. He gives no reasons in support of his conclusion.

When a sale has been held in execution of a decree for the payment of a debt, the decree is not satisfied until the sale is confirmed and the decree-holder is permitted to draw out of Court the money in deposit. When there is an application pending under O. 21, r. 90, the Court has no power to confirm the sale till that application has been decided (*vide* r. 92). So long as the purchase price remains in Court deposit and the sale is unconfirmed, the decree is not satisfied and the essential nature of the enquiry under r. 90 is an adjudication of the question whether the sale held is valid and whether the money in deposit can be withdrawn by the decree-holder in satisfaction of his decree. That is to say, the effect of proceedings under O. 21, r. 90 is to decide whether a particular property has been validly sold in discharge of the decree debt and whether the purchase price deposited as a result of that sale shall go in liquidation of this debt. It seems to me that such proceedings must come within the very wide terms of the phrase "proceedings in respect of a debt" used in S. 25 of the Madras Act XI of 1936.

I therefore allow the revision petition and direct the trial Court to restore the application to file and dispose of it according to law. The petitioner will be entitled to his costs in revision.

K. S. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Kanthasami Reddiar .. *Petitioner** (*Defendant*)

v.

Pethusami Reddiar .. *Respondent* (*Plaintiff*).

Kanthasami Reddiar *v.* Pethusami Reddiar.

Limitation Act (IX of 1908), Art. 64—Applicability—Suit on alleged settlement of account—Heading of account and entries in handwriting of

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* C. R. P. No. 1406 of 1937. 12th April, 1940.

Kanthasami Reddiar v. Pethusami Reddiar.

defendant—Whether a statement of account "signed" by the defendant sufficient for purposes of Art. 64.

A suit was based on an alleged settlement of accounts. The actual page of the account with the name of the defendant at the heading was in the handwriting of the defendant a servant of the plaintiff. The account was totalled up and balance struck in pencil in the handwriting of the defendant.

Held, this was not a statement of account signed by the defendant sufficient for the purposes of Art. 64 of the Limitation Act.

Sadasook Agarwalla v. *Baikanta Nath Basunia*, (1904) I.L.R. 31 Cal. 1043 and *Andarji Kalyanji* v. *Dulabh Jeevan*, (1877) I.L.R. 5 Bom. 88, distinguished.

As the account showed that the balance shifted at times against the plaintiff, *held*, that Art. 85 would apply and save the suit from the bar of limitation.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Koilpatti dated 9th October, 1937 and passed in S. C. S. No. 145 of 1937.

A. Swaminatha Aiyar and *S. Thyagaraja Aiyar* for Petitioner.

K. S. Champakesa Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner was the defendant in a Small Cause suit for a sum of Rs. 232-2-2 due on account of dealings had by defendant with plaintiff from 6th March, 1933, to 1st March, 1934. The plaint was certainly based on a settlement of account on 1st March, 1934. The defendant raised pleas of discharge and also alleged that the suit was barred by limitation. The trial Court found against the pleas of discharge, there being no oral evidence adduced for the defendant. That decision of fact cannot be canvassed here.

The learned District Munsif also held that the suit was in time having regard to Art. 64 of the Limitation Act. Now, the actual page of the account bearing this alleged settlement entry is proved to be all in the handwriting of the defendant who was employed by the plaintiff. The heading shows that it is the account of Kandasami Reddiar the defendant in the plaintiff's cotton shop. That also was in the handwriting of the defendant. The first entry in that page is dated 6th March, 1933, and the account closes with a small credit for cotton supplied by the defendant to the plaintiff on 1st March, 1934. Then the credit and debit entries are totalled in

Kanthasami Reddiar v. Pethusami Reddiar.

pencil and there is another pencil entry striking the balance at Rs. 230-2-2. These pencil entries are also in the handwriting of the defendant. The learned District Munsif has held that, having regard to the fact that the defendant has written his own name at the top of the account and that the final balance is in the handwriting of the defendant, the decisions in *Sadasook Agarwalla* v. *Baikanta Nath Basunia*[1] and *Andarji Kalyanji* v. *Dulabh Jeevan*[2], warrant the conclusion that there is a statement of account signed by the defendant sufficient for the purpose of Art. 64 of the Limitation Act. Now, it is difficult to support this conclusion. The cases referred to deal with accounts bearing the name of the debtor at the head and at the foot an authentication in the manner customary amongst the class of people to which the writer belongs indicating that he is the writer of the balance and accepts it as correct, he being also the writer of the name at the head. The Courts, having regard to the commercial practice of authenticating accounts in this way, have held that the authentication at the foot of the account and the name at the head may be taken together to spell out a signature of the settled account. There are no such facts in the present case. All we have is an account starting approximately one year before the settlement with the writing of the heading by the defendant. This must have been written at the time when the account was blank. Then follow a series of entries all in the handwriting of the defendant and a mere pencilled totalling and striking of the balance. There is nothing in the way of an authentication of this balance or an express indication that the writer accepts it as binding upon himself and authenticates it as accepted by the person whose name appears at the head of the account and the writing of the name at the head of the accounts cannot possibly be regarded as an authentication of the balance finally struck approximately one year later. It seems to me clear that Art. 64 of the Limitation Act does not apply.

There is no reference in the judgment to any other article of the Limitation Act. But the learned District Munsif gives findings of fact which clearly brings the suit within Art. 85 of the Limitation Act. He finds that there are a number of credit entries showing sales of cotton by the defendant to the plaintiff which constitute counter-claims for the defendant and that in

1. (1904) I.L.R. 31 Cal. 1043.
2. (1877) I.L.R. 5 Bom, 88.

Kanthasami Reddiar v. Pethusami Reddiar.

the same account the balance shifts at times against the plaintiff. There was no necessity for the learned District Munsif to record these findings unless he had in mind the considerations governing the disposal of a case falling under Art. 85. It is not at all likely that any further evidence of value would be forthcoming if the suit were sent back for an express finding whether Art. 85 does apply. On the accounts before me, the findings recorded by the learned District Munsif appear to be correct and the suit appears to be clearly within time having regard to Art. 85 of the Limitation Act. This being a revision petition, it does not seem to me in the circumstances of the case necessary to interfere with the decision of the trial Court though the finding that the case is within time having regard to Art. 64 of the Limitation Act seems to me to be erroneous. To my mind, the suit is within time, though the wrong article has been quoted.

In the result therefore this petition is dismissed with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

S. V. S. Nelliappa Pillai .. *Appellant* (1st Respondent)*

v.

Sethuramalingam Pillai and others .. *Respondents (Appellants and 2nd Respondent).*

Nelliappa Pillai v. Sethuramalingam Pillai.

Deed—Construction—Agreement to finance litigation—Clause "one half (of suit property) to be taken by you as compensation for your trouble"—If confers a present interest on the financier—Financier if entitled to come on record in the place of the original party under O. 22, r. 10, C.P. Code.

In an agreement financing a litigation there was a clause that "one half (of the remaining properties) should be divided in equal halves and one half should be taken by you as compensation for your trouble . . . . you are entitled to join as party and conduct proceedings in the above suits" During the pendency of the appeal the appellant died and the financier applied to be brought on record in his place under the provisions of O. 22, r. 10, Civil Procedure Code.

Held, the document did not confer upon the financier an absolute transfer of a half share and did not operate to give him a present interest and he cannot be brought on record.

Decision of Abdur Rahman, J., affirmed.

Basant Singh v. *Mahabir Prasad*, (1913) 25 M.L.J. 301: L.R. 40 I.A. 86: I.L.R. 35 All. 273 (P.C.), followed.

*L. P. A. No. 11 of 1939. 5th December, 1939.

Nelliappa Pillai v. Sethuramalingam Pillai.

Appeal under cl. 15 of the Letters Patent against the order of the Hon'ble Mr. Justice Abdur Rahman dated 8th November, 1938 and made in C. M. A. No. 124 of 1937 preferred against the order of the District Court of Tinnevelly dated 8th February, 1937 and made in I. A. No. 155 of 1935 in A. S. No. 208 of 1934.

N. Somasundaram for Appellant.

K. Venkateswaran for Respondents.

The Court delivered the following

Leach, C. J.

JUDGMENTS. *The Chief Justice.*—The appellant financed an appeal filed by one Avudayappa Pillai in a suit which Avudayappa Pillai had instituted to recover a half share in certain immovable properties situated in Tinnevelly which he claimed formed part of the joint family estate. It was held that the properties in suit were the separate properties of Baliah Pillai, the deceased brother of Avudayappa Pillai. The suit was dismissed by the trial Judge, the Subordinate Judge of Tinnevelly, and an appeal was filed to the District Court. During its pendency Avudayappa Pillai died and the appellant in this Letters Patent Appeal applied to be brought on the record in his place under the provisions of O. 22, r. 10 of the Code of Civil Procedure. He claimed that he had acquired a half of Avudayappa Pillai's interest in the suit properties by virtue of a deed dated the 12th of February, 1934. The District Judge allowed the application, but on an appeal to this Court his decision was overruled by Abdur Rahman, J., from whose judgment this Letters Patent Appeal has been filed. The learned Judge held that the document on which the appellant relied did not operate to give him a present interest in Avudayappa Pillai's share in the suit properties. He considered that the case fell within the decision of the Privy Council in *Basant Singh* v. *Mahabir Prasad*[1]. The decision of the appeal turns on the effect to be given to cl. 5 of the deed. The clause reads as follows:—

"You should render help to me pecuniarily and prefer an appeal, etc., in the Tinnevelly District Court against O. S. No. 22 of 1936 of Tinnevelly Sub-Court on my behalf, and conduct necessary proceedings in the High Court thereon if necessary. In connection therewith you might engage vakils you like, give vakalat and pay them fees, etc., appoint agents and conduct all proceedings. In respect of other properties in this District which are not included in the above suit and wherein I should get a share, that is, in respect of shops and lands purchased by Eswaran Pillai in the name of his

1. (1913) 25 M.L.J. 301: L.R. 40 I.A. 86: I.L.R 35 All. 273 (P.C).

Nelliappa Pillai
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Leach, C. J.

wife Sitalakshmi Ammal out of a portion of the money brought from Colombo and belonging to us, you should get my share by conducting proceedings or by a suit according to your discretion. Similarly, you should, on my behalf conduct all necessary proceedings for getting my share in the pangus, in the soda mill, cash shop, license shop, outstandings, cash amounts pertaining to the immovable properties and shops at Colombo, and get a share peacefully or by conducting proceedings as you like. You should spend money as you like in respect of all that, and keep accounts yourself. I should, without raising any objection, accept the accounts which may be given by you in respect thereof. The said amounts would bear interest at one per cent. per mensem. You should adjust and take the said principal amounts with interest at one per cent. per mensem out of the properties which I may get for my share. The remaining properties should be divided in equal halves and one half should be taken by you as compensation for your trouble. The remaining one half should be delivered to my possession. You are entitled to join as party and conduct proceedings in the above suits."

On the same day on which this agreement was executed Avudayappa Pillai executed a power of attorney in favour of the appellant in order to enable the appellant to conduct the appeal on his behalf and collect the properties awarded to him in the event of the appeal being successful.

I am unable to read into cl. 5, a transfer of a half share in Avudayappa Pillai's interest. There are no words there implying transfer, and when the document is read as a whole, what it amounts to is that in the event of the appeal being successful and the appellant being able to collect the properties belonging to Avudayappa Pillai, he was to divide them and give one moiety to Avudayappa Pillai and retain the other moiety for himself. The words "on my behalf", which are used twice in the clause, indicate that the appellant was merely acting on behalf of Avudayappa Pillai and not in his own behalf. The words "one half should be taken by you as compensation for your trouble", are definitely opposed to any idea of a present interest. Therefore I am of the opinion that the reading of Abdur Rahman, J., of this clause is correct. The statement "you are entitled to join as party and conduct proceedings in the above suits" amounts to nothing if the document does not confer upon the appellant an absolute transfer of a half share, and I hold that it does not.

In *Basant Singh* v. *Mahabir Prasad*[1], the agreement said that the financier "will be a co-sharer of one half share" and "that in case of success he will be entitled to proprietary possession of the share entered in paragraph 1 of this document." The Judicial Committee said that these provisions did

1. (1913) 25 M.L.J. 301 : L.R. 40 I A. 86 : I.L.R. 35 All. 273 (P.C.).

Nelliappa Pillai v. Sethuramalingam Pillai.

Leach, C.J.

not confer upon the financier a then present right to possession of a share in the property which was the subject-matter of the suit. By the agreement it was contracted that till the suit was successful the financier should be merely a partner or co-owner in a certain undivided fraction of the property. There was no personal grant or assignment to him of any separate share or fraction of the property divided or undivided. At best the contract only amounted to this that in a certain future event he should become entitled to the proprietary possession of a certain undivided fraction of it, and then have the right to have that fraction partitioned. That seems to me to be the position here and I agree with Abdur Rahman, J., that *Basant Singh* v. *Mahabir Prasad*1 has direct application.

I would dismiss the appeal with costs.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—The language of the agreement is by no means as clear as one might wish. I was at first impressed with the argument of the learned advocate for the appellant that a definite right to have the property divided was conferred by this document and there remained nothing further to be done by Avudayappa Pillai for the appellant getting that right. But at the same time I find that there are no words of transfer capable of conferring an immediate right on the appellant. Though the sentence "you are entitled to join as party and conduct proceedings in the above suits" might be regarded as indicating the creation of a present right in the appellant, effect cannot be given to it when the entire document is read as we must read it in the circumstances in which the parties were placed. I therefore agree that the appeal must be dismissed.

K. S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Yelamanchilli Basavayya .. *Petitioner* (Petitioner)*

v.

Jaldu Manikyala Rao .. *Respondent (1st Respondent).*

Basavayya v. Manikyala Rao.

Madras Agriculturists' Relief Act (IV of 1938), S. 23—Sale held in execution of decree before 1st October, 1937—If can be reopened and scaled down.

There is no provision in the Act empowering the Court to reopen a sale held under a decree before the 1st October, 1937.

1. (1913) 25 M.L.J. 301: L.R. 40 I.A. 86: I.L.R. 35 All. 273 (P.C.).

* C. R. P. No. 534 of 1939. 1st May, 1940.

Basavayya v. Manikyala Rao.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Masulipatam dated 11th March, 1939 and made in C.M.P. No. 1450 of 1938 in O. S. No. 380 of 1932.

K. Krishnamurthy for Petitioner.

N. Vasudeva Rao for Respondent.

The Court delivered the following

JUDGMENT.—This petition raises a question under Act IV of 1938. The petitioner was the judgment-debtor under a decree which was executed on 20th September, 1937, by the sale of five acres of his property. For some reason apparently connected with proceedings under the Debt Conciliation Act, the sale was not confirmed until February, 1939. Meanwhile, Madras Act IV of 1938 having come into force, the debtor applied on 20th June, 1938, to scale down the decree. He does not, however, appear to have filed any application under S. 20 to stay proceedings in execution of the decree. The result was that, before the application under Madras Act IV of 1938 was heard, in the ordinary course a confirmation order was passed with reference to the sale held in September, 1937. In March, 1939, the learned District Munsif dismissed this application as incompetent, the sale having been held before the date 1st October, 1937, stipulated in S. 23 of the Act and the decree having been satisfied.

It seems to me that the decision of the learned District Munsif is correct. S. 23 empowers the Court to reopen sales held under a decree on or after 1st October, 1937, notwithstanding the fact that the sales have been confirmed. There is no provision in the Act empowering the Court to reopen a sale held before the 1st October, 1937. Assuming but not deciding that the petition at the date on which it was filed was competent, on the theory that the proceeds of the sale had not yet been applied to the satisfaction of the decree, by the time when the order of the District Munsif was passed, there was no decree outstanding and nothing left which could be scaled down and certainly the District Munsif had no power merely because this application was filed before the confirmation of the sale to treat the sale as null and void by reason of that application. This view is in accordance with that expressed by the Bench which decided O. S. A. No. 21 of 1939.*

In the result the petition is dismissed with costs.

K. S. ——— *Petition dismissed.*

* *Rukmavathi Ammal* v. *Soona Bai Ammal*. Decided by their Lordships The Chief Justice and Krishnaswami Aiyangar, J., on 21st September, 1939.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Amatipati Bhadrachalam and others .. *Petitioners** (*Petitioners*)

v.

Ramineedi Nagarupavatamma and another .. *Respondents* (*Respondents*).

Bhadrachalam *v.* Nagarupavatamma.

Madras Agriculturists' Relief Act (IV of 1938), S. 4 (h)—Debt owed by agriculturist to two women jointly or as co-owners—Exemption under S. 4, cl. (h)—Applicability.

When the Court has to adjudicate under the Act on a debt due by an agriculturist to two women jointly or as co-owners the interest of each woman in the debt and the assets of each woman apart from the debt must be taken into consideration in order to determine whether each woman is entitled to claim the exemption under S. 4 (*h*) of the Act.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Subordinate Judge of Cocanada dated 17th August, 1938 and made in I. A. No. 893 of 1938 in S. C. No. 761 of 1934.

G. Balaparameswari Rao for Petitioners.

D. Narasaraju for Respondents.

The Court delivered the following

JUDGMENT.—This revision petition raises the question of the effect of S. 4 (*h*) of the Madras Agriculturists' Relief Act upon the liabilities of the parties when the debt sought to be scaled down is a debt owned in common by two women. I have found considerable difficulty in dealing with the questions of law raised by this petition owing to the absence of any clear findings of fact in the lower Court's judgment. So far as the evidence goes the position seems to me to be as follows:—

The petitioners are the judgment-debtors under a decree for Rs. 625, the decree-holders being two sisters. These two sisters had been given a sum of money by their father and this sum of money was originally invested in a mortgage executed by the present petitioners which was discharged in 1936 by payments amounting in all to a sum variously estimated at Rs. 4,000 and Rs. 4,500. According to the evidence of the respondents' father, the whole of the payments in discharge of this mortgage went towards three documents Exs. I, II and IV. Ex. I is a mortgage in favour of the two sisters, the respon-

* C. R. P. No. 978 of 1938. 15th April, 1940.

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dents, for the sum of Rs. 408 dated 23rd October, 1936. Ex. II is a similar mortgage for a sum of Rs. 1,475 in favour of the same two sisters dated 24th February, 1936; and Ex. IV is a sale-deed for Rs. 1,000 executed by the present petitioners, mortgagors, in favour of the respondents' father. It provides that the sale price having been adjusted against the mortgage-debt due to the vendee's daughters, the vendee is to pay the sale price of his daughters. The father of the respondents has given evidence to the effect that this sum of Rs. 1,000 was used to discharge debts incurred for the marriage of one of the daughters which took place in 1935 and also to purchase jewels for the daughters. So according to his evidence this sum of Rs. 1,000 has to be left out of account for the purpose of S. 4 (*h*) of the Act. The learned Subordinate Judge does not say whether he accepts or rejects this evidence. But his whole judgment seems to proceed on the basis that the two daughters are together possessed of assets worth more than Rs. 4,000. He does not find what those assets are. Exs. I and II cannot account for much more than Rs. 2,000 allowing for interest. If on the other hand the balance is made up of jewels and the money spent on the marriages of the two daughters, whether the two daughters are treated as one unit or as two units for the purpose of S. 4 (*h*) of the Act, they are not shown to be possessed of unexempted property other than the suit debt and the two mortgage-debts. If, on the other hand, the evidence of the father is not believed, it would seem to follow that they must be possessed either of an interest in the land sold under Ex. IV, the purchase price for which really came out of their money, or of other assets which have not been disclosed. It seems to me impossible to dispose of this petition without first recording a finding on the question whether either or both of these ladies did own any other property excluding those classes of property covered by the explanation. The learned Subordinate Judge has gone at length into the question whether the mortgages Exs. I and II are immovable properties or not. This question seems scarcely to arise. For, if these two mortgages are debts due from agriculturists, seeing that they together do not exceed Rs. 3,000 they would clearly not bar the respondents from getting the benefit of cl. (*h*), provided that cl. (*h*) has any application to a case of joint creditors or co-owners. If, on the other hand, Exs. I and II are not debts due from agriculturists, they do not come within the definition of debts

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under the Agriculturists' Relief Act and must therefore be regarded as other property, whether they be regarded as movable property or immovable property, and the existence of any other property not covered by the explanation will take the ladies out of the exemption in sub-S. (*h*) of S. 4, having regard to the decision to which I was a party in *Ramasami Reddi* v. *Alagayammal*[1].

The question whether cl. (*h*) of S. 4 applies to a debt owed by an agriculturist to two women is not without difficulty and the working out of the effects of the dual ownership of the debt under this clause is also clothed with difficulty. Ordinarily speaking unless there is anything repugnant in the context the singular includes the plural [*vide* S. 3 (35) of the Madras General Clauses Act]. Both sides here, in fact, contend that the words in cl. (*h*) 'any debt or debts due to a woman' would apply to a debt or debts to two women and I can see no reason for rejecting this view, unless it be that the clause does not make any clear provision for the consequences of a plurality of female creditors. Assuming that cl. (*h*) does apply to a debt due to two women and having regard to the fact that it imposes a limit of wealth below which a woman may claim to be exempted from the purview of the Act, it would to my mind follow that the same financial limit, cannot have been intended to apply to a number of joint creditors as to a single creditor and that the limit must have been imposed with reference to the debt owed to each one of those joint creditors and the property owned by that creditor and not to the debt due to all of them jointly and their joint property. This is substantially the view taken by the lower Court. A reasonable interpretation of this clause seems to me to be that when a debt is due to two women jointly or as co-owners and relief is claimed by the debtor under the Act, in order to determine whether either of the creditors is entitled to resist that relief, the Court must look to the amount of the debt due to that particular creditor, the amount of other debts due from agriculturists to that particular creditor and the possession of other property by that creditor not covered by the explanation, that is to say, when the Court has to adjudicate under the Act on a debt due to two women jointly or as co-owners, the interest of each woman in the debt and the assets of each woman apart from the debt

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1. (1940) 1 M.L.J. 534.

must be taken into consideration in order to determine whether each woman is entitled to claim the exemption under S. 4 (*h*).

Bhadrachalam *v.* Nagarupavatamma.

As the facts have not been found so as to enable me to apply the provisions of the Act to these facts, the petition will be remanded to the lower Court for disposal in the light of this judgment. Costs throughout to abide by the result.

K. S. *Petition remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Tajbi, minor by father and next friend Mohamed Alli .. *Appellant** (*Respondent-Plaintiff*)

v.

Nattar Sheriff .. *Respondent* (*Appellant-1st Defendant*).

Tajbi *v.* Nattar Sheriff.

Mahomedan Law—Sunnis—Hanafi law applicable—Husband and wife—Divorce before consummation—Wife entitled to only half the dower.

Among the Sunnis (who are governed by Hanafi law) if the husband divorces his wife before consummation she receives half her specified dower even if it is prompt dower.

Appeal against the decree of the Court of the Subordinate Judge of Ellore in Appeal Suit No. 105 of 1936 preferred against the decree of the Court of the District Munsif of Ellore in O. S. No. 192 of 1933.

A. K. Pavithran for Appellant.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant, who is a Sunni and therefore governed by the Hanafi law, brought this suit in the Court of the District Munsif of Ellore to recover a sum of Rs. 725 which she claimed as mahar. She was married to the respondent on the 31st March, 1930, when she was only nine years of age. On the 24th November, 1932, before the marriage had been consummated, the respondent divorced her. It is common ground that the respondent agreed at the time of the

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* S. A. No. 49 of 1937. 9th April, 1940.

Tajbi v. Nattar Sheriff. —— Leach, C.J.

marriage to pay the appellant the sum of Rs. 725 as mahar, but it was contended in the trial Court that the appellant was only entitled to half the amount as the marriage was never consummated. The District Munsif gave a decree for the full amount, but this decree was set aside by the Subordinate Judge of Ellore on appeal. The Subordinate Judge held that the defence was well founded and gave the appellant a decree for Rs. 362-8-0 only. The appellant has appealed to this Court.

It is quite clear that the decision of the Subordinate Judge was correct. Hedaya, Book II, Chapter 3, page 124, expressly states that if the husband divorces his wife before consummation she receives half her specified dower. The authority of this statement cannot be questioned. In fact it is unreservedly accepted by the learned authors of text books on Mahomedan law. The learned Advocate for the appellant has contended that inasmuch as the mahar in this case was prompt and not deferred, she was entitled to the full amount as soon as the marriage contract was completed irrespective of the consummation of the marriage. This statement runs contrary to direct authority and cannot be accepted. The appeal will be dismissed with costs.

K.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE HORWILL.

Nunna Satyanarayanamurthy and another .. *Appellants** (*Defendants 10 and 11*)

v.

Awa Krishnamoorthy and others.. *Respondents* (*Plaintiff and Defendants 1 to 9*).

Satyanarayanamurthy v. Krishnamoorthy.

Mortgage—Contract that mortgagors should sell some lands to mortgagee—How far discharge of mortgage—Suit on mortgage—Maintainability

An executory contract can amount to a discharge of a mortgage debt, but there is no presumption in law that it does so. The mere recital in the plaint that the plaintiff had entered into a contract with the mortgagors (the defendants) that the defendants should sell their property to the mortgagee is not tantamount to an admission that the mortgage is no longer in existence. The suit on the mortgage is maintainable and a decree can be passed on the mortgage.

* Appeal No. 328 of 1937 and C. M. P. No. 201 of 1940. 6th February, 1940.

Satya-narayana-murthy v. Krishna-moorthy.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatam in O. S. No. 56 of 1936, etc.

P. Satyanarayana Rao and *M. V. Nagaramayya* for Appellants.

B. Sitarama Rao and *N. Vasudeva Rao* for Respondents.

The judgment of the Court was delivered by

Horwill, J.

Horwill, J.—This was a suit on a mortgage. Defendants 1 to 9 are mortgagors or their descendants and defendants 10 and 11 are purchasers of the equity of redemption in execution of a small cause decree held by themselves. The suit was allowed and defendants 10 and 11 have appealed.

The principal contention in the lower Court—as well as in this Court—is that the suit mortgage was discharged by the execution of a contract of sale on the 8th October, 1933. The tenth defendant obtained his decree on 23rd June, 1933; but before he could attach the property in execution of his decree, the contract relied on by defendants 10 and 11 had been executed. It is not now denied that the plaintiff enjoyed the crop raised in fasli 1344. The attachment was on 17th February, 1934, and the tenth defendant took delivery of the land on 3rd November, 1935, while the crop presumably raised by the plaintiff's tenants was still on the ground. That crop was the subject of criminal litigation and, finally, the plaintiff succeeded in obtaining that also. The tenth defendant then filed proceedings under S. 145 of the Criminal Procedure Code and was maintained in his possession pending the result of civil litigation. That led the plaintiff to file the present suit, in which he says that he had intended to realise his mortgage debt by getting the defendants to sell the land to him and then executing a contract to that effect; but that as that contract had been made impossible of performance he had been compelled to bring this suit on his mortgage.

Defendants 10 and 11 cannot succeed on the issues raised. The case of defendants 10 and 11, as argued in this Court and in the Court below, is that the suit mortgage was discharged by the execution of the contract of 8th October, 1933. That case, however, was never definitely put forward in the written statement. The defendants obviously desired to defeat the plaintiff without committing themselves to the definite case that the contract was true. Defendants 10 and 11 began paragraph 3 of their written statement by saying:

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"Whatever be the truth or falsity in respect of the sale contract referred to in paragraph 6 of the plaint . . . . . . as the plaintiff believes it to be true according to his contentions, he may take further steps according to law on the strength of that contract; but to file a suit on the deed of mortgage is opposed to law."

The rest of the paragraph then sets out particulars of the various admissions made by the plaintiff from time to time in the criminal proceedings above referred to. It is thus seen that the plea of the defendants in this paragraph is not so much a plea of discharge as a plea that the suit, as framed, is not maintainable.

Turning to the plaint itself, it is clear that the contention of defendants 10 and 11 that the suit, even as framed, is not maintainable is not correct. It is true the plaintiff in paragraph 6 of the plaint says that the plaintiff, with the object of purchasing lands as a discharge of the mortgage debt, obtained a contract of sale from defendants 1, 2, 3 and 7 and the other mortgagors and that the plaintiff took possession of the lands mentioned in the contract. In paragraph 7 he says:

"The said petition under S. 145, Criminal Procedure Code, was decided in favour of the tenth defendant. Thus the said contract became infructuous and impossible of performance. By its terms and according to law the said contract became useless."

It is undoubtedly true, as has been pointed out in *Krishnaswami Rao* v. *Srinivasa Desikan*[1] and *Sura Reddi* v. *Rama Narasu*[2], an executory contract can amount to a discharge of a mortgage debt; but there is no presumption in law that it does so. Ordinarily, one would not expect a person to give up his rights under a mortgage until he had got something concrete in its place. However, the circumstances may be such as to show that the mortgagee intended even from the day of the execution of the contract to give up his rights under the mortgage. The mere recital in the plaint that the plaintiff had entered into a contract with the mortgagors and their descendants that the defendants should sell their property to the mortgagees is not tantamount to an admission that the mortgage is no longer in existence. We cannot therefore agree that on the plaint, as it stands, the suit is not maintainable.

On this question, therefore, the appellants have to fail; for the suit is maintainable as framed and these defendants have

1. (1936) 71 M.L.J. 850.

2. (1937) 2 M.L.J. 922.

Satyanarayanamurthy v. Krishnamoorthy. — Horwill, J.

not set up a definite plea of discharge. The plaintiff is therefore entitled to a mortgage decree.

A minor question has been raised as to whether credit should be given to the appellants for certain crops that were enjoyed by the plaintiff. This plea was not raised in the written statement and we are not prepared to entertain it here.

Our attention has been drawn to a small mistake in the drafting of the decree by which the plaintiff is given liberty to proceed against defendants 10 and 11 not only for the costs of the suit, but for the balance of the mortgage amount which may remain after the property has been sold. This was clearly wrong and is not in accordance with the judgment. In so far as this is concerned, therefore, the appeal has to be allowed.

A petition (C. M. P. No. 201 of 1940) has been filed by the fourth respondent to have the decree debt scaled down. This petition will be sent for disposal to the lower Court and the decree here passed will be subject to the result of that application.

Except as above mentioned the appeal is dismissed with the costs of the plaintiff.

K. S. *Appeal dismissed in the main.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

S. Ratnasabapathi Pillai .. *Appellant* (Party-Petitioner)*

v.

Gopala Aiyar and another .. *Respondents (Plaintiff-Defendant).*

Ratnasabapathi Pillai v. Gopala Aiyar,

Civil Procedure Code (V of 1908), O. 22, rr. 10 and 11 and Ss. 146 and 151—Lessor's suit against sub-tenant for recovery of suit property on expiry of main lease—Decree in trial Court—Discovery during appeal that by a partition decree during pendency of suit the property was allotted to lessor's sons—Objection raised in appeal to lessor's right to sue—Son whether entitled to be impleaded in appeal as rightful owner.

A lessor filed a suit against his sub-tenant for the recovery of the leased property on the ground that the main lease had terminated. The suit was decreed on 26th September, 1933, and the sub-tenant preferred an appeal. The sub-tenant then discovered that a final partition decree dated 25th August, 1927, which was affirmed on second appeal on 15th September, 1933, had allotted the suit property to the lessor's sons. The sub-tenant then

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* S. A. No. 508 of 1936 and C. M. A. No. 252 of 1936. 22nd August, 1939.

Ratnasabapathi Pillai v. Gopala Aiyar.

contended that the lessor had no right to sue and thereupon one of his sons filed an application to implead himself as supplemental respondent in the appeal as rightful owner.

Held, the son was not entitled to come on record under S. 146, Civil Procedure Code, as there was no assignment or devolution from his father. (2) The son acquired the property as his separate and absolute property by the partition decree during the pendency of the suit and before the appeal was filed and he did not acquire any title during the pendency of the appeal as contemplated in O. 22, r. 10 read with r. 11, Civil Procedure Code, and so that provision would not entitle the son to be impleaded in the appeal. (3) The son having failed to apply to be impleaded during the pendency of the suit under the specific provisions of O. 22, r. 10 cannot be allowed to invoke the inherent powers of the Court under S. 151, Civil Procedure Code.

Appeal against the decree of the Court of the Subordinate Judge, Mayavaram, in A. S. No. 7 of 1935 preferred against the decree of the Court of the District Munsif of Shiyali in O.S. No. 268 of 1932 and appeal against the order of the Court of the Subordinate Judge, Mayavaram, dated 23rd October, 1935, in I. A. No. 13 of 1935 in A. S. No. 7 of 1935 on his file.

K. S. Sankara Aiyar for Appellant.

C. A. Seshagiri Sastri for Respondents.

The Court delivered the following

JUDGMENT.—The facts giving rise to the Civil Miscellaneous Appeal and the connected Second Appeal No. 508 of 1936 are briefly these. One Sambasivan Pillai, the third respondent herein, brought the suit O. S. No. 268 of 1932 for recovery of the plaint mentioned property from the first respondent herein on the ground that it had been leased by him to one Vyasachariar who let the first respondent into possession as a sub-tenant and that the latter was bound to surrender possession as the lease to Vyasachariar had been terminated.

The trial Court decreed the suit on 26th September, 1933, and the first respondent preferred an appeal, A. S. No. 7 of 1935, on the file of the Subordinate Judge's Court of Mayavaram. By that time, the first respondent had discovered that there had been a partition suit between the third respondent and his two sons and that a final decree had been passed therein on the 25th August, 1927, under which the suit property had been allotted to the sons of the third respondent. That partition suit culminated in a second appeal (S. A. No. 630 of 1933) to this Court which was dismissed on 15th September, 1933. On these facts, the first respondent contended in his appeal to the Subordinate Judge of Mayavaram that the third respondent

had no right to sue for recovery of the property as he had lost the right to such property by reason of the final decree passed in August, 1927, under which the suit property as already stated had been allotted to the third respondent's sons. In view of this contention, the appellant herein, who is one of the sons of the third respondent who got the property under the partition decree, filed I. A. No. 13 of 1935 in A. S. No. 7 of 1935 in the lower appellate Court under O. 22, r. 10, Civil Procedure Code, to implead himself as a supplemental respondent in the appeal so as to enable him to resist the first respondent's appeal as the rightful owner of the property and thus safeguard his interests therein. The Court below dismissed this application and allowed the appeal and this Civil Miscellaneous Appeal and the connected second appeal have been preferred against the said order and decree respectively.

The learned Counsel for the appellant has urged three contentions before me in the C. M. A. First he argued that the appellant was entitled to come on record under S. 146, Civil Procedure Code, and that the lower Court was wrong in dismissing the petition without considering the applicability of that section. I do not however see how that provision is applicable to the appellant in the circumstances of the case. That section would apply only if the appellant could be properly regarded as claiming under the third respondent who originally brought the action and was the sole respondent in the appeal in the Court below. But it is clear that the appellant cannot be so regarded as he got the suit property by virtue of the partition decree referred to already and not by reason of any assignment or devolution from his father, the third respondent. I must therefore reject this contention.

The appellant's Counsel next urged that O. 22, r. 10 applied to the case and the appellant is entitled to be impleaded in the appeal under that provision. But, as pointed out by the Court below, reading that provision in the light of r. 11 of the same order, it is clear that unless the assignment, creation or devolution referred to in the provision occurred during the pendency of the *appeal* that provision would not entitle the appellant to be impleaded in the appeal, and from the material dates already given, it will be seen that the appellant acquired the suit property as his separate and absolute property by virtue of the partition decree passed during the pendency of

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the suit and before the appeal was filed, even taking the date of the dismissal of the second appeal as the date when the partition became final between the parties. It cannot therefore be said that the appellant acquired any title during the pendency of the *appeal* as contemplated in O. 22, r. 10 read with r. 11—see *Phul Chand* v. *Khwaja Tahir Husain*[1] and *Kanti Chander Mukerji* v. *Pirbhu Dayal*[2].

Lastly it is urged that if neither S. 146 nor O. 22, r. 10 was applicable to the facts of this case, the Court had inherent powers under S. 151 of the Civil Procedure Code to implead the respondent as otherwise the appellant would be deprived of all opportunity of resisting the appeal and might run the risk of even losing the property to which the first respondent was found to have no manner of right or title. I should be disposed to consider this argument with more favour if I could see my way to hold that the appellant's case was altogether outside the purview of O. 22, r. 10. But I am of opinion that the accrual of exclusive title to the appellant in respect of the suit property under the partition decree could properly be regarded as the 'creation' of an interest within the meaning of O. 22, r. 10, so that if the appellant had only applied under that provision to be impleaded during the pendency of the *suit*, his application would have been in order and the present difficulty would have been avoided. He, however, failed to do so and made this application only during the pendency of the appeal when it was no longer maintainable under that provision for the reasons already indicated. The appellant had thus an appropriate remedy under a specific provision of the Code of which, however, he failed to avail himself and he cannot therefore be allowed to invoke the inherent powers of the Court. It has often been held that there is no room for the exercise of such powers in a case coming within any specific provision of the Code. (See *Joshi Shib Prakash* v. *Jhinguria*[3], *Ghusnavi* v. *The Allahabad Bank, Ltd.*[4] and *Vallabhbhai Naranji* v. *Chhotalal Purshottamdas & Co.*[5]). This contention also must therefore be rejected.

In the result, the appeal fails and is dismissed with costs. It is conceded that if the Civil Miscellaneous Appeal is dismissed,

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1. A.I.R. 1934 All. 442.
2. A.I.R. 1935 Lah. 119.
3. (1923) I.L.R. 46 All. 144.
4. (1917) I.L.R. 44 Cal. 929 (F.B.)
5. (1926) I.L.R. 51 Bom. 26.

the Second Appeal cannot be sustained. It is accordingly dismissed but I make no order as to costs therein.

Ratna-sabapathi Pillai v. Gopala Aiyar.

K. S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Chadalavada Anandaramayya .. *Appellant** (*Petitioner*)

v.

Chadalavada Subbayya .. *Respondent* (*Respondent*).

Anandaramayya v. Subbayya.

Child Marriage Restraint Act (XIX of 1929)—Decree for payment towards marriage expenses—Marriage in violation of the Act—Marriage performed in a Native State to escape the British Indian Act—Decree not against public policy in the circumstances.

Where a decree was passed against the appellant whereunder he was required to pay a sum of money towards his share of the marriage expenses of his sister which was celebrated in a Native State to avoid the prohibition of the Child Marriage Restraint Act, on the question whether the decree was enforceable as being against public policy,

Held, that it is well established that the power of the Court to decline to enforce contracts and other instruments on grounds of public policy is a power which should be confined within the limits laid down by the authority. The Court should not refuse to enforce a payment under a decree because the object for which a payment is made is contrary to the law of British India, when that object was actually performed in a state where it was perfectly legal.

Appeal against the order of the District Court of Guntur dated 29th September, 1936, in A. S. No. 48 of 1936 preferred against the order of the Court of the District Munsif of Tenali dated 16th November, 1935 and made in E. A. No. 958 of 1935 in O. S. No. 754 of 1922.

K. Kotayya for Appellant.

P. Satyanarayana Rao for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of the execution of a decree in a partition suit whereunder the appellant was required to pay a sum not exceeding Rs. 1,000 towards his share of the marriage expenses of each of his sisters. The youngest sister was married on 7th March, 1935, and it was admitted by the father (the respondent) that he had the marriage celebrated within the Hyderabad State because it would have been illegal under the Child Marriage Restraint Act (XIX of 1929) had it

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* A. A. A. O. No. 93 of 1937. 11th September, 1939.

Ananda-ramayya v. Subbayya.

been performed in British India. There is no suggestion that any of the parties belonged to or was domiciled in Hyderabad. The appellant objects to pay the amount due under the decree towards this marriage firstly because the marriage was one opposed to public policy and secondly because he was not given notice of the marriage.

As to the second point the trial Court rejects the respondent's assertion that he sent an invitation to the appellant for the wedding. It is, of course, not unlikely that the appellant knew all about the marriage as the parties were living in the same village. But whether this be so or not though the judgment of the Full Bench which eventually decided the litigation contemplates previous notice to the appellant, the decree is silent on the point. The utmost therefore that could be said is in my opinion that to the extent to which the details of the claim were contested, the fact that there was no notice might be taken into consideration in admitting or rejecting items of expenditure.

I turn next to the more substantial question whether a marriage performed outside British India in order to evade the provisions of what is popularly known as the Sarda Act is one opposed to public policy, towards which no contribution can be recovered in execution of a decree. My attention has been drawn to a decision of Panckridge, J., reported in *Pan Mal Lodha* v. *Gad Mal Lodha*[1]. The learned Judge declined to sanction payment of money by a Court's receiver for the purpose of solemnization of a marriage outside British India which would have been illegal if celebrated in British India where the parties were domiciled. I see no reason to differ from the conclusions arrived at by the learned Judge in that case. But it seems to me very evident that a refusal of the Court to make a discretionary payment towards a marriage the object of which was clearly to avoid the law of British India is quite a different matter from the refusal of the Court to direct a payment unconditionally required under the Court's decree, on the ground that the object for which the payment was to be made was one which would have been illegal if performed in British India. It is well established that the power of the Court to decline to enforce contracts and other instruments on grounds of public

1. (1936) I.L.R. 63 Cal. 1153.

policy is a power which should be confined within the limits laid down by authority. Clearly the Court would not enforce a contract and presumably would not enforce a decree if the enforcement implied the approbation by the Court of an act which was contrary to law. But I see no reason why the Court should refuse to enforce a payment under a decree because the object for which a payment is made is contrary to the law of British India when that object was actually performed in a state where it was perfectly legal. If it had been the policy of the Legislature to prevent British Indian subjects from going into another state to celebrate marriages which would be prohibited under Act XIX of 1929 in British India, then surely the Legislature would have made provision in the statute itself to restrain such migrations for matrimonial purposes. The Act as passed originally was very restricted in its scope and was surrounded by many safeguards to prevent it from being operated in an oppressive manner. One is not justified in importing into the Act an intention which the Act itself does not declare to regulate the conduct of British Indian subjects when outside the territories to which the Act applies. I must therefore hold that the learned District Judge was right in declining to accept the contention that the amount payable under the decree towards this marriage should be refused on grounds of public policy. The appeal is therefore dismissed with costs.

Leave to appeal is refused.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Muthuswami Thevar *alias* Mappilaiswami Thevar .. *Petitioner* (1st Counter-Petitioner)*

v.

Rajakumar B. Rajaram Pandian .. *Respondent (Petitioner).*

Muthuswami Thevar v. Rajaram Pandian.

Criminal Procedure Code (V of 1898), S. 145—Proceeding, under—Undivided fraction of village—Order declaring party's possession—Validity.

It is not permissible for a Magistrate acting under S. 145, Criminal Procedure Code, to pass an order declaring that one party was entitled to possession of an undivided fraction of a village.

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* Crl. R. C. No. 56 of 1940. 3rd April, 1940.
(Crl. R. P. No. 53 of 1940).

Muthuswami Thevar v. Rajaram Pandian.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Joint Magistrate of Ramnad dated 27th November, 1939 and passed in M. C. No. 22 of 1939.

K. S. Jayarama Aiyar for Petitioner.

U. Somasundaram for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The respondent claimed to be in possession of the entire village and the Joint Magistrate has declared him to be entitled to possession of an undivided 5-8ths of the village. This is not permissible under S. 145 of the Criminal Procedure Code and the order declaring the respondent to be entitled to possession of 5-8ths of the village is set aside.

B. V. V. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Kodali Ramakoteswara Rao .. *Petitioner** (*1st Defendant*)

v.

Kodali Suryanarayana and another .. *Respondents* (*Plaintiff and 2nd Defendant*).

Ramakoteswara Rao v. Suryanarayana.

Arbitration—Examination of party—If should be in the presence of all other parties.

It is clearly necessary for an arbitrator to enquire of the parties what their case is and on what basis they found their claims. But there is no principle of equity or justice which requires the examination of a party in the presence of all the other parties It is otherwise of course with regard to the examination of other persons whose testimony might be impugned for some reason or other.

Venkatasubbayya v. *Venkataramanayya*, A.I.R. 1930 Mad. 646 and *Sanyasi Rao* v. *Venkata Rao*, (1922) 44 M.L.J. 263: I.L.R. 47 Mad. 30, distinguished.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Ellore dated 11th November, 1938 and made in O.S. No. 462 of 1937.

V. Viyanna for Petitioner.

P. Satyanarayana Rao for Respondents.

The Court delivered the following

JUDGMENT.—During the trial of O.S. No. 462 of 1937 on the file of the District Munsif's Court of Ellore, the matter in dispute was referred to arbitration. The arbitrator was given

* C. R. P. No. 1149 of 1939. 15th April, 1940.

Rama-
koteswara
Rao
v.
Surya-
narayana.

full power to examine or not to examine witnesses and after he had given his decision largely in favour of the respondents, the matter came before the District Munsif for hearing objections. A number of points were raised which were all decided against the petitioner. The two objections that are reasserted in this revision petition are (1) that the award was void because the first respondent was a minor (an award not binding a minor) and (2) that the arbitrator acted improperly in examining the plaintiff's next friend in the absence of the first defendant.

There is nothing in the first point; because an arbitration to which a minor is a party, is not in itself void; but is voidable at the instance of the minor. The minor in the present case (or rather his next friend), far from attempting to set aside the award, supports it. It is not open to the first defendant, who is a major, to have an award which was made at his instance set aside, merely on the ground that the first respondent was a minor.

The main complaint in this petition is that the respondents —the next friend of the plaintiff and the second defendant— were examined in the absence of the first defendant. These persons are parties to the suit; and I can see no principle of equity or justice which requires the examination of a party in the presence of all the other parties. It is clearly necessary for an arbitrator to enquire of the parties what their case is and on what basis they found their claims. I can see no reason why, in making these enquiries, it is necessary for the other parties to be present. It is otherwise of course with regard to the examination of other persons, whose testimony might be impugned for some reason or other.

The learned advocate for the petitioner relies on the decision of Madhavan Nair, J., in *Venkatasubbayya* v. *Venkataramanayya*[1], in which the binding nature of an award was discussed. He seems to have been of opinion, following *Sanyasi Rao* v. *Venkata Rao*[2], without giving any reasons of his own, that the examination of a party in the absence of another party amounted to improper conduct which would vitiate an award. He did not however find that there was any such improper conduct as alleged and he did not find it necessary to remand the suit for a finding on that point; because he had already found that the award on some other ground was void and not binding

1. A.I.R. 1930 Mad. 646.
2. (1922) 44 M.L.J. 263: I.L.R. 47 Mad. 30.

Rama-koteswara Rao v. Surya-narayana.

on the parties. *Sanyasi Rao* v. *Venkata Rao*[1], which was followed by Madhavan Nair, J., without discussion, was a case in which a minor sought to set aside an award, in which case it might be argued that special care should be taken to protect the minor's interests. Both these cases may however be distinguished from the present case; for it was impossible to examine the second defendant and the next friend of the plaintiff in the presence of the first defendant because the first defendant was in jail. The arbitrator visited the first defendant in jail and there is no reason to think that he did not ask the first defendant about his case and the grounds on which he supported it. The plaintiff's next friend and the second defendant could not have been present at the examination of the first defendant and the first defendant therefore knew that if the plaintiff's next friend and the second defendant were examined, he could not be present there. It might perhaps be argued in a case where these special circumstances did not exist that the parties would take it for granted that the arbitrator would not examine the opposite party in their absence and that if the arbitrator did so, it would amount to misconduct; but there can be no such ground for setting aside the award in the present case, where the incarceration of the first defendant was an obstacle known to all the parties concerned to the examination of one party in the presence of the other parties.

I therefore find no ground for disagreeing with the lower Court. The petition is accordingly dismissed with the costs of the first respondent.

K.S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Cherutty *alias* Vasu (minor) and another .. *Appellants** (*Plaintiffs 3 and 4*)

v.

Nangamparambil Ravu *alias* Kuttaman and others .. *Respondents* (*Defendants*).

Cherutty v. Nangam-parambil Ravu.

Hindu law—Joint family—Coparcener's right to sue for maintenance, whether conditioned—Daughter's right to maintenance—Whether suit lies against joint family irrespective of father's personal obligation.

1. (1922) 44 M.L.J. 263: I.L.R. 47 Mad. 30.

* L. P. A. No. 96 of 1938. 29th November, 1939.

Cherutty v. Nangamparambil Ravu.

The right of a coparcener to be maintained out of a joint family property is merely one of the modes in which the coparcenary right finds expression. That being so, it is not possible to agree with the view that that right is not to be exercised if there is a right to partition. There is no warrant for holding that an excluded member must either sue for partition or be content to remain without being maintained at the expense of the joint family property.

Case-law reviewed.

An unmarried daughter is entitled to maintain a suit for her maintenance against all the members of the family. The contention that the liability of the joint family during the life of the father was only based on the father's personal obligation to maintain and bear the marriage expenses of his daughter and that the obligation fell upon the joint family through him only, is not correct.

Subbayya v. *Anantaramayya*, (1928) 57 M.L.J. 826: I.L.R. 53 Mad. 84 (F.B.), followed.

Per *Krishnaswami Aiyangar, J.*—The personal liability of the father furnishes an additional ground of claim over and above the liability of the family property. The former alone can be said to be enforceable against the father and his separate property. The latter gives rise to a right enforceable against the joint family as a whole.

Appeal under cl. 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Wadsworth, dated 24th October, 1938 and passed in S. A. No. 968 of 1934 (reported in *Cherutty* v. *Nangamparambil Ravu*[1]) preferred against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in A. S. No. 176 of 1931 (A. S. No. 398 of 1931, District Court), preferred against the decree of the Court of the District Munsif of Vayitri at Calicut in O. S. No. 77 of 1930 (O. S. No. 600 of 1929, District Munsif's Court).

K. P. Ramakrishna Aiyar for Appellants.

K. Subramaniam for Respondents.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—This Letters Patent Appeal arises out of a suit filed in the Court of the District Munsif of Vayitri by the appellants and their parents for a decree for maintenance. The first appellant is the son and the second appellant is the daughter of one Nangamparambil Imbichutty and his wife Kalyani. Both the appellants are minors. The parents and their two children constitute one of two branches of an undivided Hindu family of which the first respondent is the manager. The respondents represent the other branch and were all made defendants. The District

1. (1939) 1 M L.J 683.

Cherutty v. Nangampparambil Raru.

Leach, C.J.

Munsif held that the parents of the appellants were not entitled under the Hindu law to maintain a suit for maintenance, but that the appellants were, and granted them a decree. The respondents appealed to the Subordinate Judge of South Malabar, who gave judgment in their favour. The appellants then appealed to this Court. The appeal was heard by Wadsworth, J., who concurred in the decision of the Subordinate Judge. The appellants' parents accepted the decision of the District Munsif and therefore are not parties to this appeal.

The parties are Tiyyas of South Malabar and it is common ground that the questions arising in the appeal have to be decided according to the ordinary rules of Hindu law. Wadsworth, J., was of the opinion that a major coparcener can never sue for maintenance. When maintenance is denied him his only remedy, he said, is to sue for partition. With regard to a minor coparcener the learned Judge was of the opinion that a suit for maintenance might be filed, provided that he asked in the alternative for a decree for partition. It was for the Court to decide whether the appropriate relief was a decree for maintenance or a decree for partition. The learned Judge considered that the daughter of a coparcener, like her father, can never maintain a suit for maintenance against the manager of the family. He said that her only remedy is to bring a suit against her father and claim maintenance out of his properties, joint and separate. Having obtained a decree she would be in a position to sell her father's share in the joint family estate in execution proceedings.

I find myself unable to concur in any of the conclusions of the learned Judge. It is true that there are statements in the latest edition of Mayne's "Hindu Law and Usage", 10th Edition, page 825, and in Mulla's "Principles of Hindu Law", 8th Edition, page 582, which support the learned Judge in his opinion that a major coparcener cannot sue for partition, but they are based on certain observations of the Bombay High Court which appear to me to run contrary to decisions of the Privy Council. In passing I may mention that Varadachariar and Mockett, JJ., in *Subbayya Thevar* v. *Sivagnana Maruthappa Pandian*[1], observed it was doubtful whether an adult son could maintain a suit for maintenance against his father when he could sue

1, (1936) 71 M.L.J. 568: I.L.R. (1937) Mad. 42.

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for partition, but they gave no reasons for the expression of doubt and presumably it was based on the Bombay cases.

Every member of an undivided Hindu family is entitled to be maintained out of the family estate. In *Rama Rao* v. *Rajah of Pithapur*[1] (known as the second Pithapur case), Lord Dunedin in delivering the judgment of the Board, dealt with the question of the right of a coparcener to be maintained out of the common property. After pointing out that it was admitted on both sides of the Bar, 'that in an ordinary joint family ruled by the Mitakshara law the junior members, down to three generations from the head of the family, have a coparcenary interest accruing by birth in the ancestral property, that this coparcenary interest carries with it the inchoate right to raise an action of partition, and that until partition is *de facto* accomplished these same persons have a right to maintenance, Lord Dunedin went on to say:

> "It seems clear that this right is an inherent quality of the right of coparcenary—that is, of common property. The individual enjoyment of the common property being ousted by the management of the head of the family, they have a right till they exercise their right to divide, to be maintained out of the property which is common to them, who are excluded from the management, and to the head of the family, who is invested with the management."

The right to maintenance out of joint family property was dealt with again by the Privy Council in *Vellayappa Chetti* v. *Natarajan*[2]. The question there was whether an illegitimate son of a Sudra was entitled as a member of the family to maintenance out of the joint family property in the hands of the collaterals with whom his father was joint. Sir Dinshaw Mullah in delivering the judgment of the Board, pointed out:

> "That the illegitimate son of a Sudra by a continuous concubine is a member of the family; that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son; and that where the father has left no separate property and no legitimate son, but was joint with his collaterals, the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but he is entitled as a member of the family to maintenance out of that property."

It is here emphasised that the share of inheritance is not given in substitution of a right to maintenance. As there is a right to maintenance there must be an appropriate remedy when that right is denied. To say that the member of a joint family

1. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).
2. (1931) 61 M.L.J. 522: L.R. 58 I.A. 402: I.L.R. 55 Mad. 1 (P.C.).

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to whom maintenance has been denied shall cause the family to be divided and the family estate partitioned, or go without anything, is not providing an appropriate remedy for the injustice done to him. He may not want to have the family divided and it may be against his interest to have the family estate partitioned.

In view of the fact that Wadsworth, J., relied on the statements in Mayne and Mullah based on the Bombay decisions it is necessary that I should refer to them. The cases are *Himmatsingh Becharsingh* v. *Ganpat Singh*[1], *Ramchandra Sakharam Vagh* v. *Sakharam Gopal Vagh*[2] and *Bhupal* v. *Tavanappa*[3]. In *Himmatsingh Becharsingh* v. *Ganpat Singh*[1], Westropp, C.J. and Kemball, J., held that a suit for maintenance out of the ancestral estate by a Hindu son lies against his father when the estate is impartible. The Court did not decide the question of the right of a son to maintenance when he was in a position to sue for partition. The footnote to the report, however, shows that in an earlier case Westropp, C.J. and Melvill, J., had decided that a suit by one coparcener against the other coparceners for maintenance when the estate was impartible was unsustainable, "unless indeed he were illegitmate, deformed, or idiotic, or suffering from other disability to inherit, in which case he would not be a parcener entitled to an equal share with the other members of the family, but only a person entitled to a maintenance". It is quite clear from this observation that the opinion of the Bombay High Court was that the right to maintenance was in lieu of a right to share in the estate, but I am not aware that this opinion has been accepted by any other High Court and it appears to me that it is opposed to the principle which the judgments of the Privy Council in the *Second Pithapur case*[4] and in *Vellayappa Chetti* v. *Natarajan*[5] have established. In *Ramchandra Sakharam Vagh* v. *Sakharam Gopal Vagh*[2], Pinhey, J., regretted that the judgment in *Himmatsingh Becharsingh* v. *Ganpat Singh*[1] allowed a member of a family owning an impartible estate to sue for maintenance, but the decision in that

1. (1875) 12 Bom. H.C.R. 94. 2. (1877) I.L.R. 2 Bom. 346.
3. (1921) I.L.R. 46 Bom. 435.
4. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).
5. (1931) 61 M.L.J. 522: L.R. 58 I.A. 402: I.L.R. 55 Mad. 1 (P.C.).

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case was eventually accepted. The case of *Bhupal* v. *Tavanappa*[1] had reference to a family owning a partible estate. The plaintiff was a minor member of the family, but his father was alive and therefore under the Hindu law as administered in the Bombay Presidency he could not file a suit for partition without the consent of his father. It was held that in such circumstances he was entitled to sue for maintenance because he was in the same position as if the estate were impartible. As the Bombay decisions proceed on the basis that the right to maintenance is given in lieu of a right to share a position which has never been accepted in this Presidency they cannot be accepted as correctly stating the law in Madras.

If a major coparcener is entitled to sue for maintenance, and I hold that he is, the right cannot be denied to a minor coparcener and there appears to me to be no support at all for the view that if he does happen to sue for maintenance he must couple with the prayer for that relief a prayer for partition.

The statement that a daughter cannot sue the manager of the family, but must proceed against her own father is also unsupported by authority. On the contrary there is the Full Bench decision of this Court in *Subbayya* v. *Anantaramayya*[2], which shows that she is entitled to maintain a suit for her maintenance. It was there held that the right of a daughter to her marriage expenses and maintenance was based on her right to or interest in the joint family property, and not based on the natural obligation of a father to maintain his children. The contention that the liability of the joint family during the father's lifetime was only based on the father's obligation to maintain and bear the marriage expenses of his daughters, and the obligation fell upon the joint family through him, was rejected. Ramesam, J., said:

"So far as the joint family property is concerned, the obligation is that of all the members of the family, that is, the father and the brothers, and it is not that it was originally the obligation of the father only and through him it has extended to the whole joint family."

I agree with the following observations of Chandavarkar, J., in *Naranbhai Vaghjibhai* v. *Ranchod Premchand*[3]:

"Apart from authority, there is no reason, founded on sound principle, why a Hindu coparcener, who is excluded from the enjoyment of his joint

1. (1921) I.L.R. 46 Bom. 435.
2. (1928) 57 M.L.J. 826: I.L.R. 53 Mad. 84 (F.B.).
3. (1901) I.L.R. 26 Bom. 141 at 145.

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rights, should be compelled at the instance of the other coparceners or strangers claiming under them and against his will to break up the joint family and forced to a suit for partition."

That would be the position if the judgment now under appeal were to stand. I have said sufficient to indicate that I consider the judgment to be against principle and authority and the appeal must be allowed. The result is that the case will be remanded to the Court of the Subordinate Judge. His decision was based merely on the issue relating to the maintainability of the suit. There are other issues and these will have to be decided. On the record reaching him the Subordinate Judge will hear and dispose of according to law the appellants' appeal from the judgment of the District Munsif, but as their parents did not appeal from the judgment of the District Munsif the suit will stand dismissed so far as they are concerned. The appellants are entitled to their costs in this appeal and in the second appeal. They will also be entitled to the refund of the court-fees paid in the Second Appeal and in the Letters Patent Appeal.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I am of the same opinion but shall add a few words on certain aspects of the question argued before us. The judgment of Wadsworth, J., when analysed seems to be based upon two propositions: (*i*) that the right of a member to maintenance out of the joint family assets is only to be recognised where he has no right to enforce partition, and (*ii*) that the right of an unmarried minor daughter in a joint family to be maintained till marriage is enforceable only against the father and not against the joint family as a whole. The soundness of these propositions is open to question, as there seems to be nothing either in the texts or in the principles of Hindu law to lend support to either of them.

The learned Judge has referred in support of his decision to the statement of law contained in Mayne and in Mullah (*see* Mayne's Hindu Law, 10th Edition, page 825; Mullah's 8th Edition, page 582). While recognizing that these statements reflect the view taken in Bombay he accepted them as equally applicable to Madras, as the proposition is found stated in general terms and no Madras authority to the contrary was cited before him. He did not notice the decision of the Privy Council in the second Pithapur case, *Rama Rao* v. *Rajah of Pithapur*[1], which unambiguously recognized the right

1. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).

of a coparcener to be maintained out of the joint family property, but held however that it is the ordinary rule that a coparcener cannot claim maintenance if he is entitled to claim partition.

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Of the three Bombay cases cited in support of the proposition, the first two *Himmatsingh Becharsingh* v. *Ganpat Singh*[1] and *Ramchandra Sakharam Vagh* v. *Sakharam Gopal Vagh*[2] related to a claim for maintenance by an adult son against the father. The family possessed property which was however not liable to partition, being by nature impartible. The claim was upheld. The right of a son to be maintained out of impartible joint family estate is beyond question, and does not appear to have ever been doubted. Decisions of the highest tribunal and of this Court in *Maharajah of Venkatagiri* v. *Raja Rajeswara Rao*[3], have since authoritatively settled the point. It is plain, therefore, that no exception can be taken to the correctness of the actual decision of the Bombay High Court so far as it went.

The ratio of the decision in the first of these cases *Himmatsingh Becharsingh* v. *Ganpat Singh*[1] is to be found in the observation of Westropp, C.J., that

"no authority was cited . . . . to show that where a son could not enforce a partition with his father, he was prevented from suing the latter for maintenance."

To recognize a right, namely, the right of coparcenary, but at the same time to deny a remedy for its infringement is an impossible position and this is what seems to have weighed with the Court. The learned Chief Justice expressly refrained from expressing any opinion as to the right of a son to sue for maintenance, where he might if he chose sue for partition. This he did in spite of the fact that an earlier decision to which he had himself been a party had laid it down that a member of an undivided family could not sue for maintenance, unless by reason of a personal disqualification he was not entitled to sue for partition. The opinion here expressed does seem to support the view which has found favour with Wadsworth, J., but, as I shall presently show, is no longer tenable. *Ramchandra*

1. (1875) 12 Bom.H.C.R. 94.
2. (1877) I.L.R. 2 Bom. 346.
3. (1939) 1 M.L.J. 831 : I.L.R. (1939) Mad. 622.

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Krishnaswami Aiyangar, J.

Sakharam Vagh v. *Sakharam Gopal Vagh*[1] was a case in which the father was found to be in possession of impartible property, but not of any property in which the son could claim a share. Melvill, J., observed that as a general rule perhaps, a Hindu is not bound to support a grown up son, but held that the liability existed when the family estate is impartible. Pinhey, J., agreed, but doubted whether it is good Hindu law to say that an adult son in an undivided Hindu family, who is suffering from no disability recognised by that law, can claim a separate maintenance from his father. In the later decision of the Bombay High Court, *Bhupal* v. *Tavanappa*[2], the son sued for separate maintenance, as a coparcener in a family consisting of the father, uncle, cousin and step-brother, and owning joint family property which was partible. He could not however on the view of the law as accepted in that Presidency, enforce a partition against a father when the father was joint in estate with his own ancestor or his collaterals and against his consent. Right to partition not existing, the son was held, on the principle of the earlier decisions, entitled to sue for maintenance. In all these cases, the right of the son to sue for maintenance was expressly stated to arise on account of the absence of the right to partition. The larger remedy being available, the lesser relief was denied on the footing that the primary and the only true remedy for the excluded parcener was to enforce his right to partition by suit. When this remedy is cut out by reason of a personal disqualification or otherwise, the coparcenary right ordinarily inherent in every member of the family suffers a diminution and it then finds expression in the inferior remedy of maintenance. The right to maintenance is thus to be regarded as a substitute for the lost right to a share and is in the nature of a secondary remedy to be granted in lieu of the primary one, where it is not available. This I think is the rationale which underlies the decisions of the Bombay High Court. With all respect, I regret to say that such a view of a coparcener's right cannot be sustained either in principle or on authority.

It is well to remember in this connection that a right to maintenance may arise in one of three ways. First, the existence of certain specified personal relationships, independently of the possession of joint property in the person liable, may give rise to the claim. The right in this class of cases is

1. (1877) I.L.R. 2 Bom. 346. 2. (1921) I.L.R. 46 Bom. 435.

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enforceable personally against the person on whom the law casts the burden, and is based on the well-known text of Manu, that

"the aged parents, a virtuous wife, and an infant child must be maintained even by the doing of a hundred prohibited acts."

The right does not extend to remoter relations. The second and the more important ground of claim is that based not on pure relationship, but on membership in a joint family possessed of joint family property. The Privy Council has in the second Pithapur case, *Rama Rao* v. *Rajah of Pithapur*[1], examined the jural basis of the right in this class of cases, and declared that it is an inherent quality of the coparcenary property that it should afford the means of sustenance to all the members of the coparcenary while the family remained joint. This is clear from the following observations of their Lordships:

"This coparcenary interest carries with it the inchoate right to raise an action for partition, and until partition is *de facto* accomplished these same persons (junior members) have a right to maintenance."

The meaning of this statement is sufficiently explicit. The junior members are entitled to maintenance until partition out of the common property where that property is ordinary partible property. The right will cease the moment a partition takes place, for thereafter there is no common property. It will continue to subsist so long as partition does not take place, and in the case of impartible property it is incapable of being terminated. The effect of the texts on the subject is correctly stated in Mayne's Hindu Law, page 821, in the following passage:

"The head of the undivided family is bound to maintain its members, their wives and their children; to perform their ceremonies and defray the expenses of their marriages."

Membership in the family, and the existence of joint property are the only conditions to which the right is subject. The third head of claim is based on the text of Yagnavalkya, which imposes a personal disqualification by reason of some defect, such as blindness, impotency, etc. (Yagnavalkya, II, 140-142.) The defect operates to exclude the sufferer from a share in the inheritance, but, in lieu of it, he is recognised as being entitled to maintenance. This, in my opinion, is the only class of cases in which the right to maintenance can be said to be recognised as a substitute for the right to partition with some justification, though even here, the right springs from the existence of joint property subject to the burden of supporting

1. (1918) 35 M.L.J. 392: L.R. 45 I.A. 148: I.L.R. 41 Mad. 778 (P.C.).

Cherutty v. Nangamparambil Ravu.

Krishnaswami Aiyangar, J.

all the members of the family whether entitled to partition or not. But even if there is no impediment to the exercise of the right to partition, there can be no logical reason for compelling a member to sue for partition, when the head of the family neglects to maintain him. The right of an excluded member to sue for joint possession, without being obliged to sue for partition is recognised by Art. 127 of the Indian Limitation Act. From this it is to my mind clear, that partition is not to be regarded as the sole remedy. Joint possession which he can seek, is in most cases indistinguishable from maintenance out of the family assets, and it is therefore difficult to maintain a distinction in principle between the two. The logic of the observations of Chandavarkar, J., in *Naranbhai Vaghjibhai* v. *Ranchod Premchand*[1] referred to in the judgment of my Lord, appears to my mind to be indisputable.

That the true origin of the right in the second and third classes of cases is the existence of joint property, partible or impartible, scarcely admits of doubt at the present day. It seems to me to be absolutely impossible to get away from the principle laid down by the Privy Council which is that the right of a junior member in a joint family where the family possesses property is a right which springs from the joint property itself. When the question came to be examined by the Board in a case, *Vellayappa Chetti* v. *Natarajan*[2], in which the claim to maintenance was advanced by an illegitimate son of a deceased member of a joint family possessing joint family property, their Lordships used language which removes all further doubt on the point. Referring to the view taken in a decision of this Court in *Ranoji* v. *Kandoji*,[3] that the share of inheritance given to the illegitimate son was merely in lieu of maintenance in the case of Sudras, their Lordships made the following observations:

"On the consideration of the texts and the cases on the subject their Lordships are of opinion that the illegitimate son of a Sudra by a continuous concubine has the status of a son, and that he is a member of the family; that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son; that where the father has left no separate property and no legitimate son, but was joint with his collaterals, as in the present case, the illegitimate son is not entitled to demand a partition of the joint family property in their hands, but he is entitled *as a member* of the family to maintenance *out of that property*." (The italics are mine.)

1. (1901) I.L.R. 26 Bom. 141 at 145.
2. (1931) 61 M.L.J. 522: L.R. 58 I.A. 402: I.L.R. 55 Mad. 1 (P.C.).
3. (1885) I.L.R. 8 Mad. 557.

Cherutty v. Nangamparambil Ravu. — Krishnaswami Aiyangar, J.

In the Full Bench decision of this Court in *Subbayya* v. *Anantaramayya*[1], the basis of the right of a daughter to maintenance out of the family property was examined, and it was again clearly laid down that the obligation was not personal to the father who was along with others a member of the family but that the obligation lay upon the family as a whole, that is to say, *against the family property.* The texts and the decisions were gone into and the learned Judges expressed the opinion that the right of the daughter was the surviving remnant of a larger right she once enjoyed in the joint family property.

These authorities seem to take the question beyond the region of controversy. The right of a coparcener to be maintained out of joint property is merely one of the modes in which the coparcenary right finds expression. That being so, it is not possible to agree with the view that that right is not to be exercised if there is a right to partition. There is no warrant for holding that an excluded member must either sue for partition or be content to remain without being maintained at the expense of the joint family property.

Wadsworth, J., has held that the daughter must institute a suit against the father in the first instance and pursue her remedies against his share in the joint family property. This view can be understood only on the theory that the daughter's right to maintenance is based solely on the personal obligation of the father. As I have already indicated, this theory is opposed to the decision in the Full Bench case already referred to. The personal liability of the father furnishes an additional ground of claim over and above the liability of the family property. The former alone can be said to be enforceable against the father and his separate property. The latter gives rise to a right enforceable against the joint family as a whole.

K. C. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE ABDUR RAHMAN.

Koraka Kannayya Naidu .. *Appellant** (*Plaintiff*)

v.

Rayapureddi Appala Naidu .. *Respondent* (*Defendant*).

Kannayya Naidu v. Appala Naidu.

Limitation Act (IX of 1908), S. 20—Joint Hindu family—Pronote by son—Payment of interest and endorsement on pronote by father—If acknowledgment by "person duly authorised in that behalf."

1. (1928) 57 M.L.J. 826: I.L.R. 53 Mad. 84 (F.B.).

* Appeal No. 343 of 1937. 28th February, 1940.

Kannayya Naidu v. Appala Naidu.

A member of a Hindu joint family cannot, simply because he is a member of that family without specific authority, pay a debt on behalf of the other member so as to enlarge the period of limitation.

Appeal against the decree of the Court of the Agency Subordinate Judge of Jaypore in O. S. No. 13 of 1937.

C. Rama Rao for Appellant.

Y. Suryanarayana for Respondent.

The judgment of the Court was delivered by

Abdur Rahman, J.

Abdur Rahman, J.—This appeal arises out of a suit brought on the basis of a promissory note executed by one R. Appala Naidu in favour of the plaintiff on the 8th August, 1930 (Ex. A) for Rs. 680-2-9. Several defences were raised to this suit. But the main defence, with which we are now concerned, is that of limitation. The lower Court held the suit to be barred by time and dismissed it. The plaintiff appeals.

Since the suit was instituted more than three years after the execution of the promissory note it would ordinarily be barred by limitation. But it is contended on behalf of the plaintiff that a payment of Rs. 145 which was made on the 23rd July, 1933, on behalf of the executant of the promissory note by his father brings the suit within time. As there is an endorsement of payment of Rs. 145 on the back of the promissory note signed by the defendant's father on the 23rd July, 1933, it has to be conceded that this payment was made by him in respect of the promissory note in suit. But the real question to decide is if the father was, as required by S. 20 of the Limitation Act, duly authorised on behalf of his son to pay this amount. So far as the endorsement is concerned, there is nothing in it which would show that the father was authorised to pay the money on behalf of his son. There is a reference in it to his (*i.e.*, the father's) being a member of an undivided family with his son; but this is a different matter and we shall advert to it later. The father was not examined by the plaintiff although we are conscious of the reasons why the appellant did not summon him to give evidence. That does not, however, solve the plaintiff's difficulty. The onus of establishing that the payment by the father was made under the authority of the son has to be discharged by the plaintiff and unless we find it to have been discharged, he must fail. There is a reference in the statement of P. W. 2 that the plaintiff's brother was sent by the plaintiff to make a demand and the

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defendant when approached said in reply that he would send the money through his father. The plaintiff failed to produce his brother and the defendant's statement remained unproved. We have thus been left to depend on the oral testimony of the plaintiff and that of P. W. 2. Having regard to the fact that there is nothing in the endorsement which corroborates the statements of these witnesses, we are not inclined to place any credit, like the lower Court on their testimony.

The next question is, if there is anything in the endorsement itself which would show that the father was authorised to pay the money on behalf of his son. Mr. Rama Rao naturally laid a great deal of emphasis on the word 'undivided' appearing in the endorsement. His contention was that since the father and the son were members of a joint family, the father must be presumed to have been authorised on behalf of the son to make the payment. We are afraid it would be impossible for us to do so, unless there was something else to show that authority was, in fact, given to the father by the son to pay the debt on his behalf. A member of the joint Hindu family cannot, simply because he is a member of that family, without specific authority, pay a debt on behalf of another member of the family or make an endorsement on behalf of the other member so as to enlarge the period of limitation. In the absence of any other facts from which an authority may be inferred our decision must be that the plaintiff has failed to establish that the suit was within time. The dismissal of the suit by the lower Court was thus correct and its decision must be upheld. The appeal accordingly fails and is dismissed with costs.

K. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Oorakkarai Seetharama Chettiar .. *Appellant* (Plaintiff)*

v.

Sheik Abdul Rahiman Sahib and others .. *Respondents (Defendants 1, 3 and 4).*

Seetharama Chettiar v. Sheik Abdul Rahiman Sahib.

Limitation Act (IX of 1908), Art. 182 (2)—'Appeal'—Meaning of—Equitable considerations, whether to be given effect to in construing the Act.

Where an appeal arose out of an application in 1935 to execute a decree of 1929 and the question was whether it was barred by limitation, but the

* A. A. A. O. No. 141 of 1938. 12th April, 1940.

Seetharama Chettiar v. Sheik Abdul Rahiman Sahib.

appellant claimed that, by reason of certain proceedings taken by the respondent, he was entitled to count time as beginning to run at a much later date, that is, from 1933 as the respondents' application in 1931 to record satisfaction of the decree had been dismissed as well as an appeal against that in 1933,

Held, that the present case did not fall within the principle laid down in *Sriramachandra* v. *Venkateswara*, (1938) 2 M.L.J. 1048: I.L.R. (1939) Mad. 252, because to accept the appellant's contention, the word 'appeal' in Art. 182 would have to mean any appeal the result of which may affect not the decree itself, but only the decree-holder's right to execute it at a particular time and in particular circumstances, which is just one of those equitable considerations against which the warning of the Privy Council in *Nagendranath De* v. *Sureshchandra De*, (1932) 63 M.L J. 329: L.R. 59 I.A. 283: I.L. R. 60 Cal. 1 (P.C.), is directed. Hence the application was rightly barred as out of time.

Appeal against the order of the District Court of Salem in A. S. No. 148 of 1937 preferred against the order of the Court of the District Munsif of Salem dated 22nd July, 1937 and made in R. E. P. No. 282 of 1936 in O. S. No. 766 of 1927.

K. Rajah Aiyar for Appellant.

P. S. Narayanaswami Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—This appeal arises out of an application filed on 21st August, 1935, to execute a decree passed on 9th November, 1929, and the question is whether it is barred by limitation. *Prima facie* it is so barred, but the appellant claims that by reason of certain proceedings taken by the respondent he is entitled to count time as beginning to run at a much later date. In November, 1931, respondent applied to the executing Court to record satisfaction of the decree. The Court dismissed his application. He appealed. His appeal was dismissed on 20th March, 1933. Appellant contends that under Art. 182 (2) of the Limitation Act time began to run only from that date.

The point for determination is whether the appeal by the respondent is an appeal within the meaning of that article. I have been referred by appellant's learned Advocate to a judgment of a Bench of which I was myself a member, reported in *Sriramachandra* v. *Venkateswara*[1] and have been asked to extend the principles of that judgment to the facts of this case. To some degree that is a very plausible argument. In the judgment prominence is given to the rule formulated by the Privy Council in *Nagendranath De* v. *Sureshchandra De*[2], that:

1. (1938) 2 M L.J. 1048: I.L R (1939) Mad. 252.
2. (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 (P.C.).

Seetharama Chettiar v. Sheik Abdul Rahiman Sahib.

"So long as there is any question *subjudice* between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution, which, if the final result is against them, may lead to no advantage."

That rule certainly applies to the facts in this case; for, if respondent's appeal had been allowed appellant would have had no right to execute his decree. And, from a practical point of view, there is no difference between a decree-holder whose decree may be set aside, and a decree-holder who may be told by the Court that his decree has already been satisfied. But I cannot think that the rule so formulated by the Privy Council is intended to be the sole guide for the interpretation of the article. On p. 255 of *Sriramachandra* v. *Venkateswara*[1], the meaning of the word 'appeal' is discussed; and it is held that an appeal in this context means any appeal which 'affects' the decree sought to be executed. It cannot be successfully argued that respondent's appeal in the present case 'affects' the decree in any way. However it may have been decided the decree remains valid and without modification. There is here in the words of their Lordships of the Privy Council in *Nagendranath De* v. *Sureshchandra De*[2], no application "to set aside or revise the decision of a Subordinate Court" which is embodied in the decree; and on page 7 of the same judgment their Lordships emphasise the principle that in construing the provisions of the Limitation Act "equitable considerations are out of place, and the strict grammatical meaning of the words is the only safe guide." To accept the contention of the appellant's learned advocate that 'appeal' in Art. 182 means any appeal the result of which may affect not the decree itself, but only the decree-holder's right to execute it, at a particular time and in particular circumstances is to apply just one of those equitable considerations against which the warning of the Privy Council is directed.

I am accordingly of opinion that the present case does not fall within the principles of *Sriramachandra* v. *Venkateswara*[1] and that if I am bound by that decision I am bound by it to dismiss and not to allow this appeal. The appeal is dismissed with costs.

Leave granted. *Appeal dismissed.*

K. C.

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1. (1938) 2 M.L.J. 1048: I.L.R. (1939) Mad. 252.
2. (1932) 63 M.L.J. 329: L.R. 59 I.A. 283: I.L.R. 60 Cal. 1 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

M. Venkatachariar .. *Petitioner** (*Respondent*)

v.

Moulvi Mahammad Faizuddeen Sahib Bahadur, by agent, Moulvi Manjoor Ahamed Sahib Kuddoossi .. *Respondent* (*Petitioner*).

Venkatachariar *v.* Moulvi Mahammad Faizuddeen Sahib Bahadur.

Civil Procedure Code (*V of 1908*), *O. 9, rr. 9 and 13, and O. 43, r. 1*—Ex parte *decree—Application to set aside—Conditional order passed—Condition not fulfilled—Dismissal of petition—Fresh application to restore earlier petition—Maintainability—Order of trial Court—Appealability.*

The petitioner's suit was decreed *ex parte* and the respondent put in an application under O. 9, r. 13 of the Code of Civil Procedure to set aside the *ex parte* decree. A conditional order was passed setting aside the *ex parte* decree if the respondent deposited a certain sum of money within a prescribed time. The condition, however, was not fulfilled and the petition was dismissed. No appeal was preferred against that order but a petition was filed purporting to be one under S. 151 and O. 9, r 9 of the Code to restore the earlier petition which had been dismissed for non-fulfilment of the condition. The District Munsif after considering the application on its merits dismissed it on the ground that the respondent did not show sufficient cause for reopening the earlier application. An appeal having been preferred to the District Judge he came to the conclusion that the respondent had substantially complied with the condition and allowed the petition.

Held, in revision, that since the petition under O. 9, r. 9 had not been dismissed for default no petition would lie to reopen the previous order. If a petition lies at all, it would presumably be a review petition and the Court would in that case have to confine itself to the situation as it was at the time it considered the first application.

Held, further, that the appeal to set aside the order of the District Munsif dismissing the second petition was not competent as O. 43, r. 1 of the Code makes no provision for an appeal under such circumstances And the mere fact that the petitioner did not object to the maintainability of the appeal did not make the order in the appeal valid, although that was a circumstance which could be taken into account in deciding whether the High Court should interfere with the order in revision.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the decree of the District Court of Chittoor in C.M.A. No. 79 of 1936 preferred against the order dated 5th August, 1936 and made in I.A. No. 325 of 1936 in O.S. No. 266 of 1935 on the file of the Court of the District Munsif of Sholingur.

D. Krishnaswami Aiyar for Petitioner.

T. Kumaraswamiah for Respondent.

The Court delivered the following

* C. R. P. No. 291 of 1937. 17th October, 1939.

Venkatacharar v. Moulvi Mahammad Faizuddeen Sahib Bahadur.

JUDGMENT.—The petitioner's suit was decreed *ex parte* and the respondent put in an application under O. 9, r. 13 of the Code of Civil Procedure, to set aside the *ex parte* decree. A conditional order was passed setting aside the *ex parte* decree if the respondent deposited a certain sum of money within a prescribed time. The condition was not fulfilled and so the petition was dismissed. No appeal was preferred against that order; but a petition was filed purporting to be under O. 9, r. 9 and S. 151, Civil Procedure Code, to restore the earlier petition which had been dismissed for non-fulfilment of the condition. The District Munsif considered the application on its merits and came to the conclusion that the respondent did not show sufficient cause for re-opening the earlier application. He accordingly dismissed it. An appeal against this later order was preferred to the District Court, Chittoor. No question as to the maintainability of the appeal seems to have been raised and the learned District Judge came to the conclusion that the respondent had substantially complied with the condition and that the petition should have been granted.

It has been held in *Salar Beg* v. *Kotayya*[1], and *Venkatanarasimha Rao* v. *Suryanarayana*[2], that when an application under O. 9, r. 9 is dismissed for default, another application to set aside that order would also be an application under O. 9, r. 9 and would therefore lie. In the present case, however, the petition under O. 9, r. 9 was not dismissed for default and I cannot see how any petition would lie to re-open the previous order. If a petition lies at all, it would presumably be a review petition and the Court would in that case have to confine itself to the situation as it was at the time it considered the first application. The appeal to set aside the order of the District Munsif dismissing the second petition was not competent as O. 43, r. 1, makes no provision for an appeal under such circumstances.

It is next argued that the petitioner must be deemed to have waived the above objection by not raising it in the lower Court. The respondent filed a revision petition against the order of the District Munsif and that petition was withdrawn and dismissed when the District Judge allowed the appeal and restored the suit to file. The petitioner was not however responsible for the withdrawal of that petition and there can be

1. A.I.R. 1926 Mad. 654. 2. (1925) 50 M.L.J. 75.

Venkatachariar v. Moulvi Mahammad Faizuddeen Sahib Bahadur.

no waiver with regard to jurisdiction. The mere fact that the petitioner did not object to the maintainability of the appeal does not make the order in the appeal valid, but the petitioner's failure to raise the objection below is a circumstance that can be taken into account in considering whether this Court should interfere in revision. Any inconvenience caused by the default of a party during the hearing of a suit is generally a matter for which the other side can be compensated by the awarding of costs; and as in the present case no substantial injustice was done to the petitioner, I do not feel called upon to interfere with the order restoring the suit.

In the result, the Civil Revision Petition is dismissed, but there will be no order as to costs.

B. V. V. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

P. A. Raju Chettiar .. *Appellant** (*Nil*)

v.

Mihor Shanmugam Pillai *alias* Sarangapani Pillai and others .. *Respondents* (*Plaintiffs 2 to 4, 1st Defendant and nil*).

Raju Chettiar v. Shanmugam Pillai.

Will—Construction of—Word 'or' — Whether substitution of 'and' possible—Appeal filed by the mortgagee during pendency of trial—S. 146, Civil Procedure Code (V of 1908), applicable—O. 22—Indian Succession Act (XXXIX of 1925), S. 96.

One *S*, the maternal great-grandfather of the respondents, died leaving a will by which he directed that the balance of income from his estate after allowing for certain charitable bequest, should be paid yearly by the trustees named in the will to his daughter *P* during her lifetime. The material portion of the will ran as follows:

"After her death all my properties should go in equal shares to such of my aforesaid daughter *P's* sons or the sons' children as are alive. . . . . ."

P died and was survived by her son the fourth respondent whose sons were 1, 2 and 3 respondents. On the contention that on the death of *P* the entire estate became divisible in equal shares among the sons of the fourth respondent and the fourth respondent himself, as would be supported by the construction of 'and' put upon 'or' appearing in the will,

Held, that the construction of 'and' could not be put upon the word 'or'; what the will said was that after *P's* death the estate should go to her sons or if there were no sons, to the son's children. Such a construction alone is possible would be clear by reading S. 96 of the Indian Succession Act.

* Appeal No. 216 of 1938. 1st May, 1940.

Passage in Jarman on "Wills" (7th edn.), p. 452, relied on.

Penley v. *Penley*, (1850) 12 Beav. 547: 50 E.R. 1170 and *Sparks* v. *Restal*, (1857) 24 Beav. 218: 53 E.R. 341, followed.

Held, further, that the appeal filed by a mortgagee from the fourth respondent during the pendency of the trial was not wrong. There is nothing in O. 22, Civil Procedure Code, which prevents the application of S. 146, Civil Procedure Code, in this case. Hence the appellant had the right to file the appeal.

Sitaramaswami v. *Lakshmi Narasimha*, (1917) I.L.R. 41 Mad. 510, relied on.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore in O. S. No. 118 of 1937.

K. Rajah Aiyar for *T. V. Ramiah* for Appellant.

R. Desikan, K. Parasuraman and *V. Meenakshisundaram* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal raises the question of the construction of a will. One Shanmugam Pillai, the maternal great-grandfather of the first, second and third respondents and the grandfather of the fourth respondent, died in November, 1917, and by his will directed that the balance of the income of his estate, after allowing for a charitable bequest, should be paid yearly by the trustees appointed by the will to his daughter Ponnammal during her lifetime. Then follow these provisions:

"After her death all my properties should go in equal shares to such of my aforesaid daughter Ponnammal's sons or sons' children as are alive. The said trustees should put them in possession of the properties as aforesaid at the appointed time according to their respective shares. At the time of such delivery of possession, if those who take the property are minors they (trustees) should manage only their share of properties and deliver possession thereof as soon as the minor becomes a major."

Ponnammal died in or about the month of July, 1935. She was survived by her son the fourth respondent, who was married to one Sarathambal, the mother of the first, second and third respondents. Sarathambal and her children filed a suit in the Court of the Subordinate Judge, Coimbatore, to recover three-fourths of the estate of Shanmugam Pillai. Their contention was that on the death of Ponnammal the entire estate became divisible in equal shares between the fourth respondent and his children. They urged that the word 'or' in the passage "after her death all my properties should go in equal shares to such of my aforesaid daughter Ponnammal's sons or sons' children" should be read as "and". The Subordinate Judge

Raju Chettiar v. Shanmugam Pillai.

Leach, C.J.

accepted this construction of the will and decreed the suit. Hence this appeal.

The appellant is a mortgagee of a part of the estate, the mortgage having been created by the fourth respondent during the pendency of the proceedings in the trial Court. The first respondent having challenged the right of the appellant to file this appeal it is necessary to deal with this point first. S. 146 of the Code of Civil Procedure says that save as otherwise provided by the Code or by any law for the time being in force where a proceeding may be taken or an application made by or against a person, then the proceeding may be taken or the application may be made by or against a person claiming under him. O. 22, r. 10 makes provision for the continuance of a suit when there has been a death or marriage or insolvency during its pendency and when there has been an assignment or devolution of interest before the hearing has been completed. There is nothing in O. 22 which prevents the application of S. 146 in this case and a decision to this effect was given by this Court in *Sitaramaswami* v. *Lakshmi Narasimha*[1]. For the respondents it has been suggested that the decision of the Privy Council in *Maharaja Sir Manindra Chandra Nandi* v. *Ram Kumar Bhagat*[2] has in effect overruled *Sitaramaswami* v. *Lakshmi Narasimha*[1]. A perusal of the judgment of the Privy Council shows that this is not the case and it was so held by this Court in *Sreeramamurthi* v. *Jayaraja Lakshmi Ammal*[3]. We consider that the appellant had the right to file this appeal and the objection must be overruled.

The appellant's contention that the decision of the trial Judge is erroneous is well founded. The word "or" in this will cannot be read as "and". What the will says is that after Ponnammal's death the estate shall go to her sons or if there are no sons living to the sons' children. That the will must be construed in this way is indicated by S. 96 of the Indian Succession Act. That section says:

"Where property is bequeathed to a person with a bequest in the alternative, to another person or to a class of persons, then, if a contrary intention does not appear by the will, the legatee first named shall be entitled to the legacy if he is alive at the time when it takes effect; but if he is then dead, the person or class of persons named in the second branch of the alternative shall take the legacy."

1. (1917) I.L.R. 41 Mad. 510.
2. (1922) 43 M.L.J. 589: L.R. 49 I.A. 220: I.L.R. 1 Pat. 581 (P.C.).
3. (1932) 64 M.L.J. 489: I.L.R, 56 Mad. 469.

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Leach, C.J.

Illustration (*iv*) to the section runs as follows:

"Property is bequeathed to *A* or his heirs. *A* survives the testator. *A* takes the property absolutely."

The legal position is stated in Jarman on Wills (7th Edition, page 452) in these words:

"The question whether 'or' imports substitution arises most frequently in cases where the latter part of the gift is in favour of a class of persons related to the original devisee or legatee, such as 'issue', 'children', 'heirs', as for example, where the gift is to *A* or his issue or to *A* or in case of his death to his issue. The tendency of the modern cases is to construe such a gift as intended to substitute the issue for the original devisee or legatee in the event of the latter dying in the testator's lifetime."

In *Penley* v. *Penley*[1], there was a bequest to "my son William or his children." It was held that the son who survived was absolutely entitled and that the children could only take by substitution in the case of the death of their parent. In *Sparks* v. *Restal*[2], there was a bequest to *A* for life and after her death to *B* and *C* or their children. *B* and *C* survived. It was held that their children took nothing. It is unnecessary to pursue the investigation into the authorities further. Sufficient has been said to make it clear that the Subordinate Judge erred in construing the will in the way he did.

The appeal will be allowed and the suit dismissed with costs against the first, second and third respondents in this Court and in the Court below.

K. C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Alagu Sundarammal .. *Appellant** (*Plaintiff*)

v.

Ko. So. Thiruvengadathu Aiyangar .. *Respondent* (*Defendant*).

Sundarammal v. Thiruvengadathu Aiyangar.

Provincial Insolvency Act (*V of 1920*), *Ss. 42* (*1*) (*a*) *and 44* (*1*) (*c*)—*Insolvent's fraud in not disclosing existence of a debt—Creditor petitioning after discharge of the insolvent—Prohibition on the insolvent from claiming discharge.*

Where an insolvent designedly omitted to disclose to the Court the existence of an item of debt and thereby played a fraud upon the petitioning creditor in order that the insolvency proceedings might be decreed to his advantage,

1. (1850) 12 Beav. 547: 50 E.R. 1170.
2. (1857) 24 Beav. 218: 53 E.R. 341.

* C. R. P. No. 508 of 1937. 3rd May, 1940.

Sundara-ammal *v.* Thiru-vengadathu Aiyangar.

Held, that S. 44 (1) (*c*) of the Provincial Insolvency Act would apply to a case like this. Hence the discharge granted by the lower court was wrong as the insolvent's procedure was within the prohibition contained in S. 42 (1) (*a*) of the Act.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Devakotta in S. C. S. No. 366 of 1936.

A. V. Narayanaswami Aiyar for Appellant.

S. Panchapakesa Sastri and *K. R. Krishnaswami Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—The petitioner was a close relative and a creditor of the respondent. The suit debt was incurred in 1928 in Devakottah, where both the petitioner and the respondent were living. The respondent has a son-in-law in the South Arcot District and while on a visit to him, filed an insolvency application under the summary procedure and omitted to mention the petitioner as his creditor. During the course of the insolvency proceedings, he made an endorsement on the pronote of the petitioner which saved limitation; but he failed to draw the attention of the Insolvency Court to the existence of this debt. The lower Court has found that he played a fraud upon the petitioner and deliberately concealed the existence of this debt in order that the insolvency proceedings might be decided to his advantage. The procedure being on the summary side, many formalities were dispensed with and very little publication was given to the insolvency. Nothing was, of course, known about the insolvent's life at Devakottah and neighbourhood and whether he had any property there. It is the petitioner's case that the respondent has property and that if she had been a party to the insolvency proceedings, she would have been able to prove so. Although no dividend was presumably declared, yet the Insolvency Court (that of the Subordinate Judge of Cuddalore) granted an absolute discharge without any hesitation, in spite of the prohibition contained in S. 42 (1) (*a*) of the Provincial Insolvency Act.

The position on the findings given by the learned Subordinate Judge—with which I agree—is therefore that the insolvent by his fraud prevented the petitioner from appearing in the Insolvency Court and obtaining a share of the assets, if there were any, and now, when a suit is filed, he pleads the bar

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of these very insolvency proceedings in which he would not allow the petitioner to participate. S. 44 (1) (*c*) of the Provincial Insolvency Act would, I think, apply to a case like this. This was a debt in respect of which the respondent obtained forbearance by a fraud; for it was on account of his fraud that the petitioner was unable to appear in the insolvency proceedings and proceed against his assets.

The petition is therefore allowed and the suit decreed in favour of the plaintiff. The petitioner is entitled to her costs in this Court as well as in the lower Court.

K. C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Sofia Bi Bi Saheba .. *Appellant* (Plaintiff)*

v.

Vasudeva Chetty and another .. *Respondents (Defendants).*

Sofia Bi Bi Saheba v. Vasudeva Chetty.

Easements Act (V of 1882), S. 33—Easement of light and air—Blocking up of window by defendant raising his wall—Plaintiff receiving sufficient light and air from other sources—Effect on plaintiff's right of action.

It was found that the plaintiff's windows were in existence for over the statutory period and that obstruction was caused to one of them by defendants raising a wall. But it was found that plaintiff was receiving sufficient light and air from other sources. In a suit by the plaintiff for a mandatory injunction,

Held, the closing of the window constitutes an invasion of the plaintiff's easement and though the defendants' action did not cause actual damage to the plaintiff the plaintiff has a right of action against the defendant as the act affects the evidence of easement and the plaintiff is entitled to Rs. 150 as damages.

Appeal against the decree of the Court of the City Civil Judge, Madras, in O. S. No. 555 of 1935.

N. R. Sesha Aiyar for Appellant.

T. C. A. Bashyam and *T. C. A. Tirumalachari* for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal by the plaintiff against the judgment of the Principal City Civil Judge at Madras in O. S. No. 555 of 1935. The suit is for a mandatory injunction directing the defendants to remove the construction on their property so far as is necessary to restore to the plaintiff the free use of

* C. C. C. A. No. 68 of 1937. 2nd May, 1940.

Sofia Bi Bi Saheba v. Vasudeva Chetty.

her windows and the quantity of light and air that has been coming through them undiminished and for a permanent injunction restraining them from erecting any construction so as to interfere with plaintiff's use of her windows.

The plaintiff is the owner of a storied house No. 420 situated on the western row of the Triplicane High Road facing the east. The defendants are owners of house No. 419 situated next south of the plaintiff's house. The plaintiff alleges that the southern wall on the first floor of her house facing the defendants' house, contains three windows which have been in existence for over 50 years, that she had been enjoying free light and air through those windows for over 50 years, that the defendants began, about a month or two prior to suit, to construct a first floor on their house which consisted uptill then of only a ground-floor, that the defendants in so doing put up a wall by the side of the plaintiff's southern wall and as a result completely blocked the easternmost of the three windows, that the defendants' obstruction causes serious danger to the inmates of the plaintiff's house and that the value of her property is thereby diminished. The defendants deny the existence of the windows for over the statutory period and contend that the plaintiff suffers no substantial privation of light and air and that their act does not amount to an actionable nuisance.

The trial Judge found that the three windows were in existence for over the statutory period. It may here be noted that the learned Judge made a personal inspection of the premises on several occasions. He held on the evidence adduced, that there is no such diminution of light and air as to amount to a nuisance. As regards the westernmost window there is admittedly no obstruction. With respect to the middle window the Judge found that by reason of the roof of the defendants hanging over a portion of it there is no such diminution as to cause serious discomfort or to render the plaintiff's house uninhabitable. As for the easternmost window it is not disputed that it is completely blocked up. But the learned Judge found that the plaintiff receives sufficient light and air from other sources and holds that even if the easternmost window is closed up, the plaintiff cannot succeed as there is no substantial damage.

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I agree with the findings of the lower Court. But the real question to be decided is whether under these circumstances the plaintiff has any cause of action against the defendants. S. 33 of the Indian Easements Act (V of 1882) which deals with disturbance of easements, runs as follows:

"33. The owner of any interest in the dominant heritage, or the occupier of such heritage may institute a suit for compensation for the disturbance of the easement or of any right accessory thereto: provided that the disturbance has actually caused ***substantial damage*** to the plaintiff."

Explanation I.—The doing of any act likely to injure the plaintiff by affecting the evidence of the easement, or by. . . . . is substantial damage within the meaning of this section.

Explanation II.—Where the easement disturbed is a right to the free passage of light . . . . . . no damage is substantial within the meaning of this section, unless it falls within the first explanation or . . . .

Explanation II above says that in respect of an easement of light, damage is substantial if it falls within Explanation I which provides that the doing of any act likely to injure by ***affecting the evidence of easement*** is substantial damage. The principle underlying Explanation I is that any act of the defendant which affects the evidence of easement is enough to sustain an action though the plaintiff does not suffer actual damage. In other words there is a wrongful act for which an action lies. In *Esa Abbas Sait* v. *Jacob Haroon Sait*[1], a bench of this Court laid down at p. 332:

"There can be no doubt that in the present case, the act done by the defendants is likely to injure the plaintiff by affecting the evidence of the easements."

Goddard in the Law of Easements (8th Edition) at page 410 says:

"Generally the law will allow presumption of damage to be made in the case of alleged disturbance of easements as distinguished from natural rights, although no actual damage has resulted to the dominant owner, because any disturbance of an easement must be an injury to the right of the owner, as it tends to call his right in question and afford evidence thereafter in derogation of his title."

The learned author notes the case of *Bomer* v. *Hill*[2], where the plaintiff's right of way along a stream was obstructed by the defendant who put up a tunnel and it was held that:

1. (1909) 20 M.L.J. 291: I.L.R. 33 Mad. 327.
2. 1 Scott. 526.

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"Though the plaintiff received no damage, his right to the way is injured and if acquiesced in for over 20 years it would become evidence of renunciation and abandonment of the right."

Jones in Law of Easements at page 701 observes as follows:

"Damages are presumed to have resulted from the violation of the right. The disturbance of the easement is in derogation of the title of the dominant owner; and although he has suffered no actual injury he may maintain action to vindicate his title and have a judgment for nominal damages."

In the present case though the defendant's action did not cause actual damage to the plaintiff yet the closing of the eastern window constitutes an invasion of the plaintiff's easement; and on the principles stated above, the plaintiff has a right of action against the defendant.

The next question is as to the relief which the plaintiff is entitled. S. 35 of the Act provides that an injunction may be granted subject to the provisions of the Specific Relief Act. Having regard to the facts of this case I am inclined to award Rs. 150 as damages to the plaintiff. This sum will carry interest at 6 per cent. per annum from the *date of the plaint* until payment. In other respects the appeal is dismissed. Each party will bear his or her own costs throughout.

K. S. —— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Bolisetti Sundaram and another *Petitioners** (*Plaintiffs*)

v.

Kanuparthi Venkatappadasu and another .. *Respondents* (*Defendants*).

Sundaram v. Venkatappadasu.

Negotiable Instruments—Joint promissory note—Absence of execution by one of the makers—Effect—Actual executant, when liable—Claim by actual executant for relief against liability under the note—Burden of proof.

An instrument written as a joint promissory note by *A* and *B* (in renewal of an earlier one by both and a promissory note by *B* alone) was executed by *A* but though the scribe had written at the foot of the note the description of *B* as the person who affixed his mark, no mark or thumb impression was taken from *B* who went away while the note was being written. In a suit on the promissory note *A* did not defend the suit.

Held, as there was no execution either by *B* or by a person authorised to execute on his behalf, *B* was not liable on the pronote. In the absence of any evidence one way or the other whether or not *A* executed only on the faith that *B* would also execute, *A* is liable under the note. The burden of proof is not on the plaintiff who seeks to impose liability upon the actual

* C. R. P. No. 270 of 1937. 17th April, 1940.

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executant but it is a ground of defence which must be established by the person who has signed the instrument.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Repalle in S. C. S. No. 146 of 1936.

N. Vasudeva Rao for Petitioners.

A. Lakshmayya for Respondents.

The Court delivered the following

JUDGMENT.—The petitioners were plaintiffs in a small cause suit based on a promissory note, Ex. A, dated 25th March, 1933, for a sum of Rs. 167-12-9. The promissory note reads as if it were a joint promissory note by the first and the second defendants. But it is found that it was not executed by the second defendant though it was executed by the first defendant. What happened was that the two defendants went to the plaintiffs and asked them to write a promissory note in renewal of two earlier promissory notes, the major note being Ex. C, a joint bond executed by both the first and second defendants, the lesser one being Ex. B a promissory note by the first defendant alone. While the suit note was being written the second defendant went away. The scribe wrote at the foot of the note the description of the second defendant as the person who affixed his mark, but no mark or thumb print was in fact taken from the second defendant. The first defendant executed the promissory note and he did not defend the suit nor has he appeared to oppose this revision petition. The lower Court found that as the note was intended to be a joint note and was not executed by one of the joint promisors, there was no completed contract and the suit had to be dismissed as against both the defendants. In revision, it is contended that both the defendants are liable.

The case with reference to the second defendant is simple. It is based on the decision of a bench of this Court in *Balayya* v. *Subbayya*[1], which held that when a party to a promissory note authorised the scribe to affix his mark and under that authority the scribe wrote words indicating that the promisor was the person who affixed the mark, but did not actually put any mark, there was a sufficient execution by the agent of the promisor to bind him. It seems to me that there are no such facts in the present case. There is no evidence that the second defendant authorised any one to affix his mark; all that we have

1. (1917) I.L.R. 40 Mad. 1171.

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is evidence that he promised to execute the note and went away without doing so. There was no execution either by him or by a person authorised to execute on his behalf. Clearly, therefore, the decision of the lower Court so far as the second defendant is concerned is correct.

The position with reference to the first defendant is not so clear and there is a good deal of rather conflicting case-law on the subject. Most of the cases decided by the Indian Courts have references to S. 87 of the Negotiable Instruments Act and are cases in which when one person has signed a bond, the signature of the other person is forged on that bond either with or without the connivance of the actual executant. We are not here concerned with any alteration of the instrument or any forgery of the signature of the second defendant. The simple position is this: When there is a promissory note purporting to be a joint promissory note of *A* and *B* and *A* alone executes and delivers that note and *B* fails to execute it, is the note binding on *A*, when there is no evidence one way or the other whether or not *A* executed only on the faith that *B* would also execute. It is, I think, well established that when *A* executes a bond on the faith that *B* will also execute it and that *B* fails to do so, *B* has an equity in his favour relieving him from a liability which he never intended to undertake. But it seems also to be settled that if *A* signed the bond without any regard to the question whether *B* signed it or not and if he delivered it as his bond, he is liable thereon, even though *B* did not sign. The English cases do to some extent distinguish between a deed and a simple contract. Seeing that under S. 46 of the Negotiable Instruments Act the making of a promissory note is completed by delivery, it is difficult to see how a person who signs and delivers a negotiable instrument is in any better position than a person who signs, seals and delivers a deed. The instrument is in law the instrument of the maker, unless he can establish any equity whereby it should not be enforced against him. It seems to be settled that the question whether a particular instrument was signed by one of the parties on the faith, that the other would also sign is a question of fact. (Vide *Latch* v. *Wedlake and Lewis Thomas*[1].) Is this question of fact one which must be proved by the plaintiff who seeks to impose liability upon the actual executant or is it a ground of

1. (1840) 11 Ad. & E. 959: 113 E.R. 678.

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defence which must be established by the person who has signed the instrument. The latter view seems to be a correct view. It is true that Jessel, M.R., has stated in the case of *Luke* v. *South Kensington Hotel Co.*[1], that:

"It is well settled that if two persons execute a deed on the faith that a third will do so, and that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute."

This dictum has, however, been criticised by the House of Lords as going too far. In the case of *Nass* v. *Westminster Bank, Ltd.*[2], where their Lordships discuss the cases on this subject and point out that they are mainly cases where it was sought to impose on a man a greater liability than he had ever intended to bear, where his intention was not in doubt, and where, if he were not able to get equitable relief, he would suffer substantial loss. Their Lordships further on quote with approval the case of Ex parte *Harding*: re *Smith, Fleming & Co.*[3], where it is expressly decided that the person who asserts such an equity in his favour to relieve him from the obligations of the contract which he has signed must affirm and prove the grounds upon which that equity is based. Their Lordships state that:

"Two propositions as regards the equity in question may safely be asserted, namely, (*i*) that the intention of the person who is setting it up is not a matter of mere conjecture, and (*ii*) that the equity comes into play only when, in its absence, the legal effect of the unconditional execution of the deed will lead to substantial injustice."

I may observe that the case just referred to of Ex parte *Harding*[3] was not a case of a deed but of a simple letter of guarantee. And it was clearly laid down that the burden of proof lay upon the person who, having signed that guarantee, sought equitable relief against the obligation which it imposed. It is true that in that case the letter of guarantee did not in its actual recitals indicate an intention that other parties should also sign it. But the previous letter leading up to that letter of guarantee made this point clear.

Turning to the facts of the present case, there was no doubt an intention to execute a joint promissory note. But the first defendant was personally liable under both of the promissory notes which the suit note superseded. There was no question therefore of his being a mere surety or guarantee and the plaintiffs could have recovered the whole amount of the

1. (1879) 11 Ch. D. 121 at 125.
2. (1940) 1 All. E.R. 485 : (1940) A.C. 366 (H.L.).
3. 41 L.T. 517.

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two earlier promissory notes from him personally. It is true that the failure of the second defendant to execute the suit promissory note might make it difficult for the first defendant to establish a right of contribution as against him. But so far as the plaintiffs were concerned, the liability with which they propose to charge the first defendant under this note is not different from the liability which he proposed to undertake; and there is no evidence that he would have been unwilling to sign this promissory note, had it not been for the belief that the second defendant was also going to sign it. The first defendant has not denied his liability and has not put forward any plea that his liability was incurred conditionally upon the second defendant undertaking a similar liability. On these facts and on the authorities cited, it seems to me that the first defendant having signed and delivered this promissory note and having established no grounds to relieve him from the liability incurred thereunder must be held liable for the suit claim.

In the result, therefore, I allow the petition to the extent that the plaintiffs will have a decree for the suit claim with interest at the contract rate until to-day and subsequent interest at 6 per cent. till realisation and costs against the first defendant only. As against the second defendant, the revision petition is dismissed with costs.

K. S. *Petition allowed against first defendant.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SOMAYYA.

Govada Balabharathi Co-operative Credit Society, Govada, represented by its President, T. Suryanarayana .. *Petitioner** (*2nd Respondent*)

v.

Alapati Venkatakrishnayya and another .. *Respondents* (*Petitioner and 1st Respondent*).

Govada Bala-bharathi Co-operative Credit Society v. Venkata-krishnayya.

Madras Co-operative Societies Act (VI of 1932)—Award of Registrar—Insolvency of debtor—Purchaser in good faith—Whether affected—Provincial Insolvency Act (III of 1907), S. 51 (1).

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* C. R. P. No. 245 of 1936. 15th March, 1939.

Govada Bala-bharathi Co-operative Credit Society v. Venkata-krishnayya.

A sale in execution of an award of the Registrar or the Arbitrator under the Madras Co-operative Societies Act gives a good title to the purchaser who in good faith purchased it as against the Receiver in insolvency.

If the award under the Madras Co-operative Societies Act is not a decree, then the whole of S. 51 (1) of Provincial Insolvency Act becomes inapplicable. But S. 51 (1) of the Act should be held to apply to all execution sales and should not be confined to assets realised in execution of 'decrees' as restricted by the decision of the Full Bench in *Rajagopala Chettiar* v. *The Hindu Religious Endowments Board*, (1933) 66 M L.J. 43 : I.L.R. 57 Mad. 271 (F. B.).

Petition under S. 75 (1) of the Provincial Insolvency Act praying the High Court to revise the order of the District Court of Guntur in C. M. A. No. 53 of 1935 preferred against the order of the Court of the Subordinate Judge of Bapatla in C. M. P. No. 1670 of 1934 in I. P. No. 105 of 1934.

V. Subramanyam and *V. Satyanarayana* for Petitioner.

K. Kotayya for Respondents.

The Court delivered the following

JUDGMENT.—Balabharathi Co-operative Credit Society of Govada had to get some money from one Ramatulasamma. The society proceeded under S. 51 of the Madras Co-operative Societies Act of 1932 to recover the dues and an award was passed directing payment of the sum due. The award was being executed against the property of the debtor. At that stage, another creditor of the debtor who is the first respondent in this Civil Revision Petition filed I. P. No. 105 of 1934 to adjudicate Ramatulasamma as an insolvent and applied for the appointment of a receiver under S. 20 of the Provincial Insolvency Act. The Subordinate Judge before whom the application was made rejected the application holding that the Co-operative Credit Society had a first charge upon the entire estate of the debtor. The matter was taken up on appeal, and the District Judge held that the Co-operative Society had no prior charge over the general estate of the debtor and that the prior charge refers only to the interest of the member in the share capital of the Society. By the time the appeal was decided by the District Judge, the properties of Ramatulasamma had been sold by the Sale Officer under r. 22 of the Rules made under the Act, and hence, there was no scope for the appointment of a receiver of the properties. The District Judge, therefore, dismissed the appeal with a direction that the appellant before him might take necessary steps as regards the sale proceeds in the hands of the society.

Govada Bala-bharathi Co-operative Credit Society v. Venkata-krishnayya.

The application out of which the present revision arises, was filed in the Subordinate Judge's Court under S. 51 (1) of the Provincial Insolvency Act and S. 151 of the Civil Procedure Code, requesting the Court to call for the entire sale proceeds of about Rs. 2,100 or at least the balance due after deducting the amount due to the society. The Subordinate Judge dismissed the application holding that neither S. 51 (1) of the Provincial Insolvency Act nor S. 151 of the Civil Procedure Code applied to this case. On appeal, the District Judge came to the conclusion that S. 51 (1) of the Provincial Insolvency Act applies and that the Co-operative Society was bound to remit the sale proceeds to the Insolvency Court. The Appellate Court held that the Co-operative Society is not entitled to the benefit of the execution against the receiver in the insolvency because the assets were realised after the date of the admission of the Insolvency Petition.

This revision petition is filed in this Court by the Co-operative Credit Society. It is argued that S. 51 (1) of the Provincial Insolvency Act applies only where execution of a decree has issued against the properties of the judgment-debtor. It is said that in this case the property was sold not in execution of a decree but that it was sold in execution of an award under the Co-operative Societies Act (Madras Act VI of 1932).

The expression 'decree' is not defined in the Provincial Insolvency Act and under S. 2, cl. 2, of the Act:

"Words and expressions used in this Act and defined in the Code of Civil Procedure, 1908 and not hereinbefore defined shall have the same meanings as those respectively attributed to them by the said Code."

Under S. 2 (2) of Civil Procedure Code decree means:

"The formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit."

What is urged is that the Registrar or Arbitrator is not deciding a suit. The Registrar or the Arbitrator in passing the award under the Act is certainly acting as a Court.

So, the real question is whether a proceeding under the Act is a "suit". The procedure laid down under the Co-operative Societies Act is a substitute for an ordinary suit in a Civil Court and the requirements of a suit are, I think, satisfied in a proceeding under the Co-operative Societies Act.

Under r. 15, cl. (1) of the Rules made under the Madras Co-operative Societies Act the reference under S. 51 of the Act

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is required to be in writing. This corresponds to the plaint in an ordinary suit; the other clauses of r. 15 show that the subsequent procedure is substantially the same as that followed in an ordinary suit. But Mr. V. Subramaniam, the learned Counsel for the petitioner, relies upon the decision of the Full Bench in *Rajagopala Chettiar* v. *The Hindu Religious Endowments Board*[1]. The decision was rendered under the Hindu Religious Endowments Act and it was held that a proceeding under S. 84 (2) of the Act was not a suit. There are various provisions in that Act where the proceedings are referred to as suits, but the proceeding under S. 84 (2) is referred to as a petition and the decision of the Full Bench may be distinguishable on this ground. But the decision lays down that an adjudication in a proceeding will be a decree only where the proceeding starts with a plaint. I do not, therefore, wish to base my judgment on the question whether a proceeding under the Madras Co-operative Societies Act is or is not a decree within the meaning of S. 2 (2) of the Civil Procedure Code and therefore covered by S. 51 (1) of the Provincial Insolvency Act, though my own view is that an award under the Madras Co-operative Societies Act is a decree as used in S. 51 (1) of Provincial Insolvency Act.

Under S. 28 (7) of the Provincial Insolvency Act the order of adjudication relates back to and takes effect from the date of the presentation of the petition. Under S. 28 (2) on the making of an order of adjudication the whole property of the insolvent vests in the Court or in the Receiver and shall be divisible among the creditors. Reading S. 28 (2) and S. 28 (7) together, the result is that on an adjudication the properties of the insolvent vest in the Receiver with effect from the date of the presentation of the petition. There are similar provisions in the Presidency Towns Insolvency Act and in the English Bankruptcy Act. If matters stood there all dealings with the property after the date of the insolvency petition would be null and void but certain provisions are enacted to protect persons who deal *bona fide* with the insolvent before the date of actual adjudication. A payment by the insolvent to any of his creditors, a payment or delivery to the insolvent, any transfer by the insolvent for valuable consideration and any contract or

1. (1933) 66 M.L.J. 43: I.L.R. 57 Mad. 271 (F.B.).

Govada Bala-bharathi Co-operative Credit Society, v. Venkata-krishnayya.

dealing by or with the insolvent for valuable consideration, are protected provided that the transaction took place before the date of the order of adjudication and the person with whom such transaction takes place had not at that time notice of the presentation of any insolvency petition by or against the debtor. (*See* S. 55 of the Provincial Insolvency Act.) Then we have S. 51 of the Act which provides for sales in execution of the property of the insolvent. Under S. 51 (3):

"A person who in good faith purchases the property of the debtor under a sale in execution *shall in all cases* acquire a good title to it against the receiver."

This does not restrict the sales to those held in execution of a decree but applies to sales in execution in general. Therefore, the sale in execution of an award of the Registrar or the Arbitrator under the Madras Co-operative Societies Act gives a good title to the purchaser who in good faith purchased it as against the Receiver, in insolvency. S. 51 (1) deals with the assets realised in execution. The clause itself begins with the expression "where execution of a decree has issued against the property of the debtor" and provides that in such a case no person shall be entitled to the benefit of the execution against the Receiver except in respect of assets realised in course of *the* execution by sale or otherwise before the date of the admission of the petition. It appears to me that both Ss. 55 (1) and 55 (3) refer to the same classes of cases; under cl. (3) the sale itself is good and under cl. (1) the sale proceeds go to the receiver if realised after the date of the admission of the petition and to the creditor if realised before that date. There is no reason to suppose that a decree-holder under an award under the Act is intended to be placed on any higher footing than an ordinary decree-holder.

If the contention advanced by Mr. Subramanian is correct, then the protection given under S. 51 (1) will not apply. If the award under the Madras Co-operative Societies Act is not a decree, then the whole of S. 51 (1) becomes inapplicable. In such a case there is no other provision in the Act which will give the society any immunity even to the extent to which such immunity is provided in the case of executions of decrees by S. 51 (1). The acceptance of the argument far from benefiting the petitioner, is against him.

I think, therefore, that S. 51 (1) should be held to apply to all execution sales and should not be confined to assets realised

in execution of "decrees" as restricted by the decision of the Full Bench in *Rajagopala Chettiar* v. *The Hindu Religious Endowments Board*[1].

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In either view therefore whether the word "decree" as used in S. 51 of the Provincial Insolvency Act is to be understood in a general sense or in the restricted sense, I think the same result follows so far as this revision is concerned.

This Civil Revision Petition is therefore dismissed with costs.

K. C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Minni Zuleka Bi and another .. *Petitioners** (*Petitioners*)

v.

Kulsum Bi and another .. *Respondents* (*Respondents*).

Minni Zuleka Bi v. Kulsum Bi.

Civil Procedure Code (V of 1908), S. 152—Abatement of appeal as against one respondent—Decree on merits as to others—Application for amendment by legal representatives of deceased respondent—Forum.

When an appeal has abated so far as one of the respondents is concerned but has been decided on the merits so far as the other respondents are concerned, a subsequent application for an amendment of the decree under S. 152, Civil Procedure Code, at the instance of the legal representative of the deceased respondent should be made in the appellate Court and not in the trial Court.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsiff of Vellore dated 10th January, 1939 and made in I. A. No. 510 of 1938 in O. S. No. 117 of 1934.

T. L. Venkatarama Aiyar for Petitioners.

R. Thirumalai Thathachari for Respondents.

The Court delivered the following

JUDGMENT.—This revision petition raises the question whether when an appeal has abated so far one of the respondents is concerned but has been decided on the merits so far as the other respondents are concerned, a subsequent application for an amendment of the decree under S. 152, Civil Procedure Code, at the instance of the legal representatives of the deceased respondent should be made in the trial Court or in the appellate

1. (1933) 66 M.L.J. 43: I.L.R. 57 Mad. 271 (F.B.).

* C. R. P. No. 1034 of 1939. 23rd April, 1940.

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Court. The question is apparently not covered by authority and is not without difficulty. Unfortunately, very few of the relevant documents are before the Court and there is a certain obscurity regarding the facts.

So far as I have been able to gather them, the admitted facts are as follows: The suit was originally filed by one plaintiff alone for partition of his share in properties owned in common by members of a Muhammadan family. This plaintiff was entitled to a 7/24th share. By a clerical error the plaint was so drafted as to make it appear that instead of claiming 7/24 of the whole of the properties, he was claiming only 7/24 of 7/24 of the family properties. This error was not noticed till after the preliminary decree had been passed and an appeal had been filed by certain of the defendants. There was a large array of respondents, but the principal respondent was the original plaintiff. He died during the pendency of the appeal and no legal representative having been brought on record within the time allowed, the appellate Court ordered that the appeal so far as he was concerned, abated. Apparently, the appellant made out no case against the other respondents, and the appeal as against them was dismissed with costs. There was no order as to costs in respect of the deceased respondent. After this decision the present petitioners, legal representatives of the deceased first plaintiff were impleaded in the final decree proceedings as the second and third plaintiffs and it was at this stage that the error in the plaint which had been incorporated in the preliminary decree was discovered and an application was filed before the District Munsiff to rectify this error both in the plaint and in the preliminary decree. It was rejected by the District Munsiff on the ground that he had no jurisdiction to modify the decree of the appellate Court. This is the order against which the present revision petition has been filed, but the judgment contains no reference to the fact that the appeal, so far as it related to the first plaintiff under whom the petitioners claim, had abated before the dismissal of the appeal as against the other respondents. A review application was filed calling the attention of the District Munsif to this abatement. The District Munsif declined to modify the previous order and there is no petition to revise the review order.

The contention of the petitioners is that when an appeal abates, the position of the deceased respondent is just the same

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as it would have been had no appeal been filed and his legal representatives are entitled to treat, as the only decree affecting them, the decree of the trial Court. Therefore, it is contended, if a clerical error is discovered in this decree, they must look to the trial Court to amend that decree and they have no *locus standi* to approach the appellate Court for the same relief. This being a matter of first impression and one which is not free from difficulty, it is, in my opinion, necessary to dispose of it with reference to the special facts of the case and it is not desirable to attempt to adjudicate on the hypothetical case in which an amendment is sought of a decree in a case when the appeal has abated as against the sole respondent. In many respects, the abatement of an appeal has the same effect as the dismissal of an appeal. Under O. 22, r. 9, Civil Procedure Code, the abatement of a suit or appeal prevents the filing of a fresh suit or appeal raising the same contentions and it is established that when an appeal has abated, limitation runs from the date of the order of abatement and not from the date of the preliminary decree. It is obviously necessary that one Court or other should have the power to rectify clerical errors affecting the process of execution in which the legal representatives of the deceased respondent are interested. There is a decision of a Bench of the Allahabad High Court reported in *Deoki* v. *Jwala Prasad*[1] to the effect that when the appellate Court merely allows an appeal to be withdrawn, this order has not the effect of a decree superseding the trial Court's decree and any amendment is to be carried out by the trial Court. It is of course arguable that when an appellant allows the appeal against the deceased respondent to abate, the effect is very much the same as if the appeal had been withdrawn as against that deceased respondent. But even assuming this to be so if the appeal is withdrawn as against one respondent but prosecuted as against other respondents until it results in a decree on the merits in the appellate Court, in such circumstances should the respondent in respect of whom the appeal has been withdrawn be required to go to the trial Court for his amendment or to the appellate Court. My attention has been drawn to two decisions of the Madras High Court which have some slight bearing on the question before me. One is the decision of a single Judge reported in *Muthu Bhattar* v. *Mrithunjaya Bhattar*[2].

1. (1928) I.L.R. 50 All. 608. 2. (1917) 7 L.W. 8.

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The actual decision was to the effect that when there is a second appeal pending, it is the lower appellate Court which has jurisdiction to amend the decree. The correctness of that proposition is not disputed, but it is contended that a consequential order of the learned Judge on a Civil Miscellaneous Petition, filed contemporaneously with the Civil Revision Petition against the District Judge's refusal to amend by implication recognises the power of the High Court to carry out an amendment in the case of an appeal which has been withdrawn. It does appear that the second appeal in that case was eventually withdrawn; but it does not appear that the second appeal had been withdrawn at the time when this Civil Miscellaneous Petition was filed. If as seems likely, the second appeal was still pending, the order on the Civil Miscellaneous Petition, consequential upon the order in the Civil Revision Petition, that the amendment was to be carried out by the District Judge, would have no more effect than to implement the decision that the pendency of an appeal did not affect the power of the lower Court to amend. The other case is one reported in *Pankajammal* v. *Seshadri Aiyangar*[1]. That was a revision against an order of amendment carried out by the lower appellate Court when there had been a second appeal which had been dismissed. One of the learned Judges held that the lower appellate Court had the power of amendment because the second appeal had been dismissed merely on the ground that no appeal lay and therefore there was no decree of the second appellate Court confirming the decree of the lower appellate Court. The other learned Judge does not appear to have adopted this view, for he agrees with the decision on another ground and refrains from commenting on the theory that the dismissal of a second appeal on the ground that no appeal lies is not tantamount to a decree. There is also a decision of a Bench of the Allahabad High Court reported in *Pitam Lal* v. *Balwant Singh*[2], in which it was held that when an appeal was dismissed for default, there is, properly speaking, no superseding decree of the appellate Court and an amendment application lies to the lower Court. This decision, like that in *Deoki* v. *Jwala Prasad*[3], already referred to, does not deal with the difficult question which arises when the appellate Court actually gives a decision on the merits so far as

1. (1912) 16 I.C. 933.
2. A.I.R. 1925 All. 556.
3. (1928) I.L.R. 50 All. 608.

some of the parties are concerned though the appeal fails for want of prosecution or some similar cause as regards another party.

Whatever the position may be when an appeal abates in its entirety and there is no possibility, in consequence, of conflicting decrees, it seems to me that there are obvious grounds for limiting the power of amendment to the appellate Court when an appeal has abated only in part and a decree on merits has been given as against the other respondents. In such circumstances, there is clearly a decree capable of execution passed by the appellate Court. The legal representatives of the deceased respondent would presumably be required when filing an application to execute the trial Court's decree, to produce a copy of the appellate Court's decree in order to prove that the appellate Court had not modified the decree so far as the deceased decree-holder was concerned. When the decree in question, like that which is now under consideration, is a preliminary decree for partition and possession of a fractional share, the result of allowing an amendment in the trial Court altering the fraction of the deceased respondent's share would necessarily be that there would be two conflicting decrees. The preliminary decree of the trial Court gave to the plaintiff 7/24 of 7/24 of the entire properties. The amendment suggested would give him 7/24th of the whole properties—a very different share. The appellate Court's decree which binds all the parties, except perhaps the legal representatives of the deceased respondent, confirms the former decree for the lesser share. It seems to me to follow that if there is to be an amendment which has the effect of enlarging the plaintiff's share, that amendment must necessarily be carried out in the appellate Court's decree if a conflict between the two decrees is to be avoided.

It is objected that this would put the legal representatives of the deceased respondent in the position having no *locus standi* to pray for the amendment of a decree affecting them, such decree being clearly vitiated by a clerical error. I do not think that this objection is insuperable. Granted that for the purpose of coming on record in a pending appeal, there is a special period of limitation provided, when we are at the execution of the final decree stage, the legal representatives of the deceased decree-holder can be brought on record at any time when the decree is alive, so far as is necessary for the purpose

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of prosecuting their rights. If once it is conceded that the decree which is to be executed is in substance the appellate Court's decree, there being no statutory prohibition against the amendment of this decree at the instance of the legal representatives of a deceased decree-holder, it seems to me to follow *ex debito justitiae* that the appellate Court must have the power to carry out the necessary amendments at the instance of the legal representatives of the deceased party.

And in this view I dismiss the revision petition with costs.

B. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Jagadambal and another .. *Petitioners* (Defendants 1 and 2)*

v.

Minor Sundarammal by next friend, Ponnusami Chettiar and others .. *Respondents (Plaintiff and Defendants 3 to 5).*

Jagadambal v. Sundarammal.

Civil Procedure Code (V of 1908), S. 115 and O. 23, r. 1 (2) (a) and (b)—Leave to file fresh suit—Order granting—Need for exercising power sparingly—Court not considering question of jurisdiction in making order—Interference by High Court in revision.

As O. 23, r. 1, Civil Procedure Code, lays down a principle which is an exception to the general rule that a fresh suit cannot be filed on the same cause of action it should be exercised very sparingly. And the grounds referred to in r. 1 (2) (*b*) of O. 23 must be, if not *ejusdem generis* with the ground specified in r. 1 (2) (*a*), at any rate analogous to it.

If the lower Court has considered whether there was a formal defect or not and had decided it wrongly the High Court will not interfere in revision. Where, however, the trial Court not only acts without jurisdiction in granting leave in a case in which it has no power to grant such leave, but further never purports to consider whether it had jurisdiction to do so, the High Court will interfere in revision and set aside the order granting leave to file a fresh suit.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge of Cuddalore dated 13th December, 1938 and made in I. A. No. 299 of 1938 in O. S. No. 68 of 1933.

K. V. Sesha Aiyangar and *T. E. Ramabhadrachariar* for Petitioners.

A. C. Sampath Aiyangar for Respondents.

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* C. R. P. No. 84 of 1939. 17th April, 1940.

Jagadambal v. Sundarammal.

The Court delivered the following

JUDGMENT.—The plaintiff is a minor represented by a next friend; and she has brought this suit as a reversioner against the widow of the last male owner, in possession, alleging acts of waste and mismanagement. A number of specific acts of waste and mismanagement were set out in the original plaint, which was filed on 2nd October, 1933. In 1934 an application was put in by the plaintiff to be allowed to amend the plaint on the ground that fresh acts of waste had come to the notice of the next friend. That petition was allowed in the High Court. In 1938, another application was put in to amend the plaint, alleging further acts of waste and mismanagement. That petition was refused on the ground that it was very belated and that the facts alleged must have come to the notice of the plaintiff's next friend long before the time alleged. The order dismissing the second application to amend was brought to the High Court in revision; and the revision petition was dismissed. The plaintiff has now filed an application to withdraw the suit with permission to file a fresh suit on the same causes of action. That petition was allowed and the defendants have preferred this revision petition against that order.

Permission can be given to a plaintiff to file a fresh suit on the same cause of action where, in the words of O. 23, r. 1 (2), the Court is satisfied (*a*) that a suit must fail by reason of some formal defect; or (*b*) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. It has been consistently held by this Court that the sufficient grounds referred to in r. 1 (2) (*b*), must be *ejusdem generis* with the ground specified in r. 1 (2) (*a*), that is, there must be some formal defect. Sadasiva Aiyar, J., sitting with Oldfield, J., in *Kannusami Pillai* v. *Jagathambal*[1], doubted whether this was the case; but Oldfield, J., reviewing the previous decisions of this Court, was satisfied that that was the rule. In all the Madras cases since then, as well as in the decisions of other High Courts, it has been held without exception that the grounds in r. 1 (2) (*b*) must be, if not *ejusdem generis* with the ground in r. 1 (2) (*a*), at any rate analogous to it. *Palikanji Chettiar* v. *Krishna Aiyar*[2], *Venkataramayya* v.

1. (1918) 35 M.L.J. 27: I.L.R. 41 Mad. 701.
2. (1925) 23 L.W. 525.

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Veerasami[1], *Niamathulla Khan Sahib* v. *Abdul Rasack Sahib*[2], *Cherukuri Nagamma* v. *Cherukuri Lakshminarasu*[3], *Ramrao Bhagwantrao* v. *Babu Appanna Samage*[4] and *Jumma* v. *Ram Sahai*[5], are among the cases quoted, where this principle has been laid down and confirmed. No cases to the contrary have been cited. It is true that a Bench of this Court in *Krishnan Somayajipad* v. *Raman Nair*[6] allowed an amendment of a plaint where the defect was apparently not a formal one; but the question whether such an amendment could be allowed or not, did not there come up for decision and the point was not considered. In *Doraisami Pillai* v. *Thungasami Pillai*[7], where a suit of a minor was withdrawn because the next friend was not possessed of sufficient funds to further conduct the suit, the Court set aside the order dismissing the petition to review the order of dismissal of the suit on the ground that the minor ought not to be prejudiced by making it impossible for him to agitate a genuine grievance merely because his next friend did not have any money. The suit was restored. Whether or no an application was put in to withdraw the suit with permission to file a fresh one we do not know; but that was a case in which it might be said that there was a formal defect or something analogous to it.

The principal argument of Sampath Aiyangar for the respondent is that this Court has no jurisdiction to interfere with the learned Subordinate Judge's order. He very rightly points out that the mere fact that the lower Court made a mistake in law is not a sufficient ground for interference by this Court. I also with respect agree with the learned Judges in *Balthasar & Son* v. *E. M. Abowath*[8] and *Jhunku Lal* v. *Bisheshar Das*[9], that if the lower Court had considered whether there was a formal defect or not and had decided it wrongly, this Court should not interfere in revision—although Mr. Sampath Aiyangar has not been able to find any Madras decision that goes so far. I am, however, satisfied that not only did the lower Court act without jurisdiction in granting leave in a class of case in which he had no power to grant leave to file a fresh suit; but

1. (1924) 21 L.W. 282.
2. (1924) 22 L.W. 535.
3. A.I.R. 1928 Mad. 1085.
4. (1939) 42 Bom.L.R. 143 (F.B.).
5. A.I.R. 1934 All. 137.
6. A.I.R. 1929 Mad. 36.
7. (1903) 14 M.L.J. 159: I.L.R. 27 Mad. 377.
8. (1919) I.L.R. 5 Rang. 1: 63 I.C. 521 (P.C.).
9. (1918) I.L.R. 40 All. 612.

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that he never purported to consider whether he had jurisdiction or not. If he had been aware of the fact that he could only grant leave to file a fresh suit if there had been something like a formal defect and he had come to the conclusion that there was only a formal defect in the plaintiff's case, then I would have doubted whether I had jurisdiction to interfere with the lower Court's order. The petition asking for permission to withdraw with permission to file a fresh suit is very vague in its terms; and the learned Subordinate Judge does not really attempt to consider whether a case had been made out for granting permission or no. He merely says:

> "It is stated in the affidavit that numerous matters came to be known to plaintiff's next friend by proceedings taken after the suit was instituted and that these have to be shown in the plaint. Under these circumstances, I hold that plaintiff should be given leave to withdraw the suit regarding A schedule properties with liberty to sue afresh."

It is therefore seen that the learned Subordinate Judge did not indicate any ground for granting permission; and there was no finding that there was a defect in the suit which prevented the plaintiff from going on. This is therefore a case in which this Court can interfere in revision.

The remaining question is whether this Court should interfere in revision. In the many cases cited above, the learned Judges of this Court felt that they ought to interfere. No doubt in some of those cases the case for granting permission was even weaker than in the present case. Evidence had been let in or there was some action on the part of the plaintiff which amounted to a fraud on the Court. But as O. 23, r. (1) lays down a principle which is an exception to the general rule that a fesh suit cannot be filed on the same cause of action, it should be exercised very sparingly. In the present case, the object of the plaintiff's next friend in asking for permission to withdraw the suit and to file a fresh one is undoubtedly to circumvent the orders passed by the lower Court on the second amendment application and of this Court in revision. It would be improper, I consider, to allow a fresh suit to be filed under these circumstances. As pointed out in the order on the amendment application, the plaintiff can file a fresh suit on such causes of action as have arisen since the filing of his earlier suit, and evidence regarding them may even be relevant in the present suit, although I do not purport to decide that point. I am therefore satisfied that this is a proper case for interference.

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The petition is therefore allowed with costs in this Court and in the Court below and the suit restored. This necessitates that the order of the lower Court that the plaintiffs should pay the costs of the suit to the defendants should be cancelled. It is ordered accordingly.

B. V. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

The President, Co-operative Credit Society, Kaikaran .. *Appellant* (3rd Defendant)*

v.

Sanam Narasimha Rao and others.. *Respondents (Plaintiff and Defendants 1 and 2 and 4 to 6).*

President, Co-operative Credit Society, Kaikaran v. Narasimha Rao.

Civil Procedure Code (V of 1908), O. 21, r. 63—Attachment in execution—Mortgagee's petition praying that sale may be subject to mortgage—Order that existence of mortgage should be notified to bidders—Suit on mortgage against auction purchaser after one year of order—If barred—Limitation Act, Art. 11—If applicable.

In proceedings before the Registrar of Co-operative Societies the appellant obtained an award entitling him to recover Rs. 1,116-6-2 from the second respondent. On 18th May, 1931, the appellant attached in execution two items of property which the second respondent had mortgaged to the third respondent. The third respondent on 15th December, 1932, filed a petition praying that the attached properties may be sold subject to his mortgage. On 25th January, 1933, an order was passed saying "The mortgage is said to be collusive. Its existence and decree-holder's allegation about it will be notified at the time of the sale which comes on on 27th February, 1933." The property was duly sold and purchased by the appellant. The assignee of the interests of the mortgagee filed a suit on 7th April, 1936, to recover the amount due on the mortgage. The appellant contended that the mortgagee's petition in the execution proceedings was a claim petition and that the order of the 25th January, 1933, amounted to an order within the meaning of O. 21, r. 63 and the suit not having been filed within twelve months of the order the rights under the mortgage were lost.

Held, the order in the execution merely directed that the existence of the mortgage should be brought to the notice of the bidders at the auction. The order does not fall within the purview of O. 21, r. 63, Civil Procedure Code and is not within Limitation Act, Art. 11. The assignee of the mortgagee is entitled to a mortgage decree.

Venkataratnam v. *Ranganayakamma*, (1917) 35 M. L. J. 335: I. L. R. 41 Mad. 985 (F.B.), distinguished.

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* Appeal No. 316 of 1937. 9th April, 1940.

President, Co-operative Credit Society, Kaikaran v. Narasimha Rao.

Appeal against the decree of the Court of the Subordinate Judge of Ellore in O. S. No. 8 of 1937.

V. Suryanarayana for Appellant.

Ch. Raghava Rao and *M. Sriramamurthy* for Respondents.

The Court delivered the following

JUDGMENTS. *The Chief Justice.*—On the 7th April, 1936, the first respondent filed the suit out of which this appeal arises in the Court of the Subordinate Judge of Ellore to recover the sum of Rs. 7,248-10-8, which he claimed to be due on a mortgage created by the second respondent in favour of the third respondent, who had assigned his interest to him. On the 2nd March, 1931, the appellant, who was the third defendant in the suit, obtained in proceedings before the Registrar of Co-operative Societies an award entitling him to recover Rs. 1,116-6-2 from the second respondent. On the 18th May, 1931, the appellant attached in execution proceedings in the Court of the District Munsif of Ellore two items of the properties covered by the mortgage in suit. On the 15th December, 1932, the third respondent filed a petition asking that the District Munsif should direct the properties attached by the appellant to be sold subject to his mortgage. On the 25th January, 1933, the District Munsif passed this order on the third respondent's petition: Leach, C. J.

"Heard pleaders. The mortgage is said to be collusive. Its existence and decree-holder's allegation about it will be notified at the time of the sale which comes on on 27th February, 1933. No further order."

The attached properties were in due course put up for sale by auction and the appellant purchased the second respondent's equity of redemption in them. The appellant defended the mortgage suit on the ground that the first respondent had lost all interest in the two items by reason of the fact that the suit was not filed within twelve months of the order dated the 25th January, 1933. His argument was that the petition filed by the third respondent asking that the property be sold subject to his mortgage was a claim petition and that the order of the 25th January, 1933, amounted to an order against him within the meaning of O. 21, r. 63. The Subordinate Judge rejected this contention and granted the first respondent a mortgage decree for Rs. 3,475 with interest and costs.

O. 21, r. 58 provides that, where any claim is preferred, or any objection is made to an attachment on the ground that

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the property attached is not liable to attachment, the Court shall proceed to investigate the claim or objection. R. 60 deals with the circumstances in which the Court shall release the property from attachment and r. 61 the circumstances in which it shall disallow the claim. R. 62 says that, where the Court is satisfied that the property is subject to a mortgage or charge in favour of some person not in possession, and thinks fit to continue the attachment, it may do so, subject to the mortgage or charge. R. 63 says that where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of a suit, the order shall be conclusive. Art. 11 of the Limitation Act provides that a suit to set aside an order falling within O. 21, r. 63, shall be filed within one year from the date of the order. If the order of the 25th January, 1933, is an order which falls within the purview of r. 63, the suit is out of time. The first respondent, however, contends that the order of the 25th January, 1933, is not an order against him and that therefore the case does not fall within Art. 11 of the Limitation Act.

For the appellant great reliance is placed upon the decision of a Full Bench of this Court in *Venkataratnam* v. *Ranganayakamma*[1]. In that case a Zamindarini applied for the removal of the attachment of property which was about to be sold in execution, claiming it as her own. The District Munsif passed an order on this petition in these terms:

> "As this petition was filed late, this claim is ordered to be notified to the intending bidders."

A further petition was then presented and the District Munsif passed this order:

> 'The allegations of the Zamindarini will be notified to the bidders with the remark that the Zamindarini did not take steps for her claim being enquired into during the last ten months."

The Full Bench, which consisted of Wallis, C.J. and Oldfield and Seshagiri Aiyar, JJ., held that the second order amounted to a rejection of the Zamindarini's claim on the ground that it had been filed late. The Court was there considering a particular order and the decision which it gave must be confined to the facts of that case. It is true that Seshagiri Aiyar, J., said that an order on a claim petition which

1. (1917) 35 M.L.J. 335: I.L.R. 41 Mad. 985 (F.B.).

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expresses no final judgment upon the right put forward, but simply directs the sale after notifying the claim, is an order against the claimant and the claimant is bound to institute a suit under Art. 11 of the Limitation Act, but that was not the decision of the Court. The decision of the Court was expressed in the concluding words of the judgment of Wallis, C.J., which are these:

"Though the order only was that the allegations of the Zamindarini would be notified to bidders, we think it amounted, and was understood to amount, to a rejection of the claim on the ground that it was filed too late."

Both Oldfield and Seshagiri Aiyar, JJ., agreed with this statement. This decision has been read in the same way in *Abdul Kadir* v. *Somasundaram Chettiar*[1], *Assanma* v. *Moideen*[2], *Kandasami Mudaliar* v. *Sivagurunatha Mudaliar*[3], *Manicka Mudali* v. *Abdul Karim Sahib*[4] and *Seetaramayya* v. *Subramanyam*[5].

Before Art. 11 of the Limitation Act applies, there must be an order *against* the applicant, whether claimant or decree-holder. If the order is not adverse, Art. 11 of the Limitation Act can have no application. The observations of Varadachariar, J., in *Manicka Mudali* v. *Abdul Karim Sahib*[4], are very much in point. After he had discussed the Full Bench decision in *Venkataratnam* v. *Ranganayakamma*[6], the learned Judge went on to say:

"Neither the learned Chief Justice nor any of the other Judges of the Full Bench suggested how a mere rule of conclusiveness as against a successful claimant is to be evolved or implied from a previous order which merely refused to investigate the claim. It seems reasonable to conclude that the conclusiveness even as against a defendant can arise only if an order on the merits had been passed under rr. 60, 61 and 62. Even assuming that a dismissal may be interpreted as an implied adjudication against a claim, it will be unreasonable to regard an order like that passed on the first occasion in the present case merely recording the petition as an implied adjudication on the merits against the claim, so as to preclude the executing Court on a later occasion from investigating the claim on the merits."

Now, can it be said that the order of the 25th January, 1933, passed in this case is an order dismissing the third respondent's petition or an order prejudicial to him? It obviously cannot be construed as an order of dismissal and I am emphatically of the

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1. (1922) 43 M.L.J. 467: I.L.R. 45 Mad. 827.
2. (1923) 45 M.L.J. 690: I.L.R. 47 Mad. 160.
3. (1934) 41 L.W. 500.
4. (1935) 42 L.W. 710.
5. (1934) 68 M.L.J. 518: I.L.R. 58 Mad. 936.
6. (1917) 35 M.L.J. 335: I.L.R. 41 Mad. 985 (F.B.).

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opinion that it is not an order against him. The third respondent did not ask for the attachment to be removed. All that he wanted to make sure of was that his position as mortgagee was not going to be prejudiced by the sale. Whether the property was sold expressly subject to his mortgage or whether it was sold without reference to it would not be detrimental to him. All that the Court could confer upon the auction-purchaser was the right, title and interest of the judgment-debtor and all that the judgment-debtor possessed at the time of the sale was the equity of redemption in the property put up for auction. The District Munsif satisfied the third respondent by directing that the existence of the mortgage should be brought to the notice of the bidders at the auction. As I am of the opinion that the order does not fall within the purview of O. 21, r. 63 it follows that I do not regard it as being within Art. 11 of the Limitation Act. To hold otherwise would be to do immense injustice to the first respondent who is the assignee of the mortgage. Each case must be decided according to its own facts. If the order is of the nature of that considered in *Venkataratnam* v. *Ranganayakamma*[1], the Full Bench decision will be binding, but not otherwise.

I would dismiss the appeal of the first respondent with costs.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I agree.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Abdul Kudus and others .. *Petitioners* (Appellants)*

v.

Abdul Gani and others .. *Respondents (Respondents).*

Abdul Kudus v. Abdul Gani.

Court-fees—Suit for possession—Decree for possession subject to payment of a sum of Rs. 3,000 as share of debts binding the property—Appeal against order for payment of the amount—Court-fee payable.

Plaintiff who sued for possession was awarded a decree for possession but subject to his paying Rs. 3,000 being his share of debts binding the property. In an appeal against the order requiring him to pay the amount,

Held, the appellant-plaintiff who seeks only to get rid of an order for payment of a sum of money should value his appeal at the amount of that sum of money.

Case-law discussed.

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1. (1917) 35 M.L.J. 335: I.L.R. 41 Mad. 985 (F.B.).

* C. R. P. No. 1052 of 1938. 11th April, 1940.

Abdul Kudus v. Abdul Gani.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the District Court of Bellary dated 25th March, 1938 and made in Appeal No. nil of 1938 (O. S. No. 153 of 1937, District Munsif's Court, Bellary).

D. R. Krishna Rao for Petitioners.

The Government Pleader (*B. Sitarama Rao*), *M.S. Ramachandra Rao* and *A. Bhujanga Rao* for Respondents.

The Court delivered the following

JUDGMENT.—This petition raises a question of the court-fee payable on an appeal preferred by the plaintiff against an order requiring him to pay a sum of Rs. 3,000 and odd being his share of debts binding the property, the possession of which has been decreed to him subject to this payment. The question is whether the plaintiff should value his appeal on the same basis as he valued his suit, namely, as if possession were the subject-matter, or whether he should value it on the basis of the value of the order which he seeks to get rid of in the appeal. Obviously, a contention such as that which has been raised before me would never be raised were it not for the fact that the suit itself has been filed on a fictitious value much less than its real value. Consequently, it is to the advantage of the petitioner to get the appeal relating to only a portion of the subject-matter of the suit valued at the value of the whole of the subject-matter of the suit. The absurdity of this position should not, in my opinion, govern the decision of the question at issue.

What is it which the appellant seeks to get rid of by means of his appeal? Quite clearly, it is not a decree refusing him possession, but a decree which, while recognising his right to possession, requires him to pay Rs. 3,000 and odd as a condition precedent to getting possession. Logically, therefore, the appeal should be valued at the value of the payment the necessity for which he desires to remove. Once this necessity is removed, the decree for possession which has already been granted to him remains.

Numerous cases have been quoted before me. Those upon which the petitioner relies are all of them cases in which the *defendant* has been granted a certain sum as compensation and appeals against the decree generally, asking for a larger sum of compensation or alternatively for the dismissal of the suit.

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In such cases, quite clearly since the defendant asks for the dismissal of the suit the subject-matter of the appeal must be the subject-matter of the suit, the amount payable as compensation being merely incidental thereto. Such cases are: In re *Seethayamma*[1] and *Pathumma Umma* v. *A. Mohideen*[2]. The first case quoted contains an *obiter dictum* to the effect that even though the only question raised in the appeal is the value of improvements the subject-matter of the appeal would be the possession of the property. The decision has been frequently quoted and in several instances, it has been pointed out that his observation is *obiter* and need not be followed. On the other hand, I have been referred to three cases in which the plaintiff is the appellant and seeks to get rid of that portion of the decree which requires him to pay a sum of money as a condition precedent to the enforcement of his decree for possession which amount has been held to determine the value of the appeal. The case in In re *Porkodi Achi*[3] is the decision of a single Judge on facts almost identical with those before me. The decision of the Bench in *Mahadevi* v. *Veerarayan*[4] relates to a Malabar Compensation case, but the point is essentially the same, the plaintiff being the appellant. The learned Judges who decided this case criticise the *obiter dictum* in the case in *Reference under Court-Fees Act, S. 5.*[5] They also follow another bench decision in a case arising out of the redemption of a kanom where the plaintiff appealed against the order requiring him to pay compensation for improvements—*vide* In re *Paidal Nayar*[6]. This latter decision also criticises the *obiter dictum* referred to and approves the decision of Kumaraswami Sastri, J., in In re *Porkodi Achi*[3] that the value of the appeal is the value of the payment to which the appellant objects.

Thus it will be seen that there is ample authority for adopting that which appears to me to be the logical view, namely, that the appellant-plaintiff who seeks only to get rid of an order for payment of a sum of money should value his appeal at the amount of that sum of money. This is the view taken by the Court below. The revision petition therefore is

1. (1924) 47 M.L.J. 919: I.L.R. 48 Mad. 652.
2. A.I.R. 1928 Mad. 929. 3. (1921) 41 M.L.J. 587: I.L.R. 45 Mad. 246.
4. (1938) 2 M.L.J. 840: I.L.R. (1939) Mad. 328.
5. (1899) I.L.R. 23 Mad. 84. 6. A.I.R. 1926 Mad. 225: 22 L.W. 691.

dismissed with costs of the Government Pleader. Time allowed till the reopening day of the lower Court after the summer recess for payment of the deficit court-fee.

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K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUNHI RAMAN.

Gokuldoss Jamnadoss & Co. .. *Appellants** (*Defendants*)

v.

M. Lakshminarasimhalu Chetti and others .. *Respondents* (*Plaintiffs*).

Gokuldoss Jamnadoss & Co. v. Lakshmi-narasimhalu Chetti.

Trust—Completed dedication of property—Effect of misapplication of income by donor—Limitation Act (IX of 1908), Art. 134—Applicability—Simple mortgage of trust property and sale to mortgagee in 1924 in discharge of the debt—Suit for recovery of the property on behalf of the trust—Art. 134 as amended in 1929 applicable.

Where there is a complete divestiture by reason of an absolute dedication of properties for religious purposes, the subsequent misapplication of the income by the donor would not affect its validity and reinvest the property in the donor.

Sunder Singh-Mallah Singh Sanatan Dharam High School Trust, Indaura v. *Managing Committee, Sunder Singh-Mallah Singh Rajput High School, Indaura*, (1938) 1 M.L.J. 359: L.R. 65 I.A. 106: I.L.R. (1938) Lah. 63 (P.C.), followed.

Certain properties dedicated by a father for religious purposes, were mortgaged in 1916 and 1921 by his son as his absolute property. There was a mortgage decree on 7th March, 1924 and a sale of the properties to the mortgagees on 11th October, 1924, in satisfaction of the decree and the mortgagees were put in possession. A suit was filed by the sons of the mortgagor on 23rd April, 1934, claiming possession of the properties as endowed properties. It was contended on behalf of the defendants that Art 134 of the Limitation Act as it stood before the amendment of 1929 was applicable and the 12 years' period of limitation began to run from the dates of the mortgages.

Held, as the mortgages were simple mortgages and the mortgagees were not put in possession until 11th October, 1924, when the property was conveyed to them the old Art. 134 is not applicable and the article as amended is applicable.

Mulla Veetil Seeti Kutti v. *K. M. K. Kunhi Pathumma*, (1917) 33 M.L.J. 320: I.L.R. 40 Mad. 1040 (F.B.), relied on.

On appeal from the judgment and decree of the Honourable Mr. Justice Wadsworth dated 21st September, 1937 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 257 of 1934 (Pauper).

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* O. S. A. No. 84 of 1937. 22nd August, 1939.

Gokuldoss Jamnadoss & Co. v. Lakshmi-narasimhalu Chetti.

T. R. Venkatarama Sastriar and *V. Radhakrishnayya* for Appellants.

K. E. Rajagopalachari and *K. S. Champakesa Aiyangar* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—There are two questions raised in this appeal. The main question is whether certain immovable property has been dedicated absolutely for religious purposes or only made subject to a charge. The second question is whether the suit out of which the appeal arises is barred by the law of limitation. The plaintiffs in the suit were the first and second respondents, both of whom were minors at the time of the institution of the suit on the 23rd April, 1934. The first respondent attained majority soon after the plaint was filed. The grandfather of the first and second respondents one Munnalur Narasimhalu Chetti, was a resident of Madras and possessed three lots of immovable property within the City, namely, a house known as Nos. 101 and 102 in the Devaraja Mudali Street, seven houses and shops known as Nos. 133 to 139 in the same street, and a garden known as Nos. 27 and 28, Mundakanniamman Temple Street. The suit was filed to recover possession of the property known as Nos. 101 and 102 in Devaraja Mudali Street. It was the respondents' case that this property was dedicated by their grandfather in 1890 to the deity Sri Tholasingaperumal Swami of the Sri Parthasarathi Temple, Triplicane, and that he constituted himself the trustee of the property. The grandfather died in the month of December, 1892, leaving a widow and an adopted son Venkataraghavalu Chetti, the father of the first and second respondents. All the properties owned by the grandfather came into the hands of the adopted son, who by a deed of mortgage dated 28th September, 1916, mortgaged the property in suit for Rs. 10,000 to the appellants, treating it as his own property. On the 10th January, 1921, he mortgaged the same property to the appellants to secure a further advance of Rs. 15,000. He was unable to discharge these mortgages and the appellants filed a suit to enforce them. A mortgage decree was passed on the 7th March, 1924. On the 11th October, 1924, with the consent of the Court the mortgaged property was conveyed to the appellants absolutely, the consideration being the satisfaction of the mortgage decree. The appellants were unaware that

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there had been any dedication of the property for religious purposes, but admittedly nothing turns on this.

On the 21st October, 1890, the grandfather applied to the Deputy Collector of Madras for the issue of an 'A' form certificate declaring the title to the property to be in the deity. Such a certificate is of the nature of a *patta* and sets out the name of the owner of the property and the land-tax payable to Government. The application was made because the grandfather had decided to dedicate this property to the deity mentioned. The application has been put in evidence and prays:

"That an A form certificate may be issued to Tholasingaperumal of Triplicane after the usual enquiry under the rules of the Registration Department."

The application also embodies the following statement:

"The certificate of the house herein mentioned is in my name and as I set apart this house as a perpetual gift to Tholasingaperumal of the Parthasarathi temple, Triplicane, I request your honour to issue the certificate in the name of Tholasingaperumal of the Parthasarathi Temple of Triplicane. The property herein mentioned is one of my self-acquired properties and the income (deducting the taxes and the necessary repairs) to be derived from the house herein mentioned is to be used and spent to the daily charities and the second Vidayati Utsavam of the aforesaid Tholasingaperumal of Triplicane. The abovementioned charities are to be conducted by me till my death and afterwards by my heirs, executors, administrators, assigns or legal representatives under the supervision of the aforesaid Tholasingaperumal's Trustees or Dharmakarthas."

The application was granted and on the 21st February, 1891, the grandfather "for Tholasingaperumal Swami Temple, Triplicane" executed a deed in favour of the Secretary of State undertaking to pay the land-tax due to Government in respect of the property. This document constituted the 'A' form certificate. There can be no doubt that this deed was executed by the grandfather as trustee of the temple. In addition to there being the words which I have just quoted the witness clause is in the following terms:

"Signed, sealed and delivered by the abovenamed Munnalur Narasimhalu Chetti for Tholasingaperumal of Parthasarathiswami Temple, Triplicane, in the presence of . . . . "

The grandfather at the same time made a similar application in respect of the property known as Nos. 27 and 28, Mundakanniamman Temple Street and although the document has not been produced it is not disputed that he also signed a similar deed in respect of that property.

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The grandfather died leaving a will dated 26th November, 1892. The appellants claim that the will shows that there was not an absolute dedication of the property to the deity, but that the property was only charged for the purpose of providing funds for specified religious services. It is therefore necessary to examine in some detail the provisions of the will on which this argument is based. In the first paragraph of the will the testator sets out and describes his immovable properties. The second paragraph reads as follows:

"The Deputy Collector's Office Certificate bearing No. 2826 for the houses and bazaars having door Nos. 101 and 102 in Devaraja Mudali Street, and the Deputy Collector's Office Certificate bearing No. 2825 for the garden having door Nos. 27 and 28 in Mundakanniammal's Street, Mylapore, out of the above immovable properties were issued in the name of Triplicane Singaperumal on 21st February, 1891 A.D. In the aforesaid Singaperumal's temple shall be conducted from and out of the balance left after deducting from the income coming from these aforesaid houses, bazaars and gardens, expenses for repairs, taxes, gumastas and others, *Nityapadi* or daily offerings of three-fourths of a measure of *sandal* or boiled Bengal gram including the offering at Thirumalvada time at a cost of Rs. 4 (Rupees four) per mensem, one palam of Chandanam or sundal paste at a cost of Re. 1 (Rupee one) per mensem, *thirtham* or blessed water and spices therein and light at Tholasujammah plant at a cost of Rs. 1-8-0 (Rupees one and a half), cardamoms and cloves at a cost of As. 8 (Annas eight) per mensem, and *Netti Pushpamala* or garland of flowers round the head of the Swami at a cost of Rs. 2 (Rupees two) per mensem. These charities shall be conducted daily. Moreover, in the second Vidayati Utsavam in Vidayati festival following Brahma Utsavams the offerings of eight gunus of Akkaravadisal (sugar rice), eight gunus of Bakalabath (curd rice), six Pongal Taligas, three-fourths of a measure of *Dosays* (rice cakes), two measures of *sundals*, three-fourths of a measure of Vadapadi, one measure of Vadapappu, one viss of jaggery for panakam, and pattis, chandanam, spices and abbishekam and all the expenses shall be conducted at a cost of Rs. 125 (Rupees One hundred and twenty-five). From and out of the balance left after deducting from the income of immovable properties which are in the name of the aforesaid Triplicane Tholasingaperumal, the taxes, repairs, gumasta and other charges, the charities written above shall be performed permanently and without obstruction by my heirs, executors and administrators. Should there arise any increase or decrease in the income of the said houses, shops and gardens by any reason other than the default of the said persons it shall on such occasions be conducted suitably to such amounts as are realised."

In the next paragraph the testator directs the money required to defray the costs of other religious charities which are specified should be paid out of the income of the house and shop known as No. 138 in Devaraja Mudali Street. As I have indicated in this block of property are seven houses and shops but only one of the buildings is charged with these expenses.

Any excess of income from this property is to be enjoyed by the testator's "heirs", etc. The testator then directs that if his adopted son should prove to be wise and behaved properly the estate should be delivered to him upon his attaining 25 years of age. If at that time he was in "wicked ways" he should only be paid Rs. 15 per mensem for his maintenance. In paragraph 7 the testator gives these directions:—

"My wife Lakshmamma should enjoy for her life the balance left after deducting taxes and other charges from the income of the houses and bazaars having Nos. 133 to 139 in Devaraja Mudali Street and she may appropriate as she pleases the jewels which she is at present wearing."

There are other provisions but these have not been stressed in the arguments.

The suit was tried by Wadsworth, J., who held that the testator before his death had made an absolute dedication of the property in suit and that the will so far as the dedicated property is concerned should only be read as containing directions for the guidance of future trustees in the administrations of the trust. The plea of limitation was raised by the appellants before the learned Judge but rejected. The appellants admit that if the property has been dedicated absolutely the only other question is that of limitation.

There is no evidence of the manner in which the income of the property in suit was applied from the date of the "A" form certificate, namely, 21st February, 1891, to the date of the testator's death, nor is there any evidence as to what became of the income after his death until about the years 1919 or 1920. There is evidence that for five or six years before 1926 the income was applied for the purposes declared by the testator but it is not disclosed whether the income was applied in whole or only in part. If the grandfather's application for a certificate in form "A" and the certificate can be read as completing the dedication it matters not what became of the income. If there was a completed dedication the misapplication of the income would not affect its validity. In *Sunder Singh-Mallah Singh Sanatan Dharam High School Trust, Indaura* v. *Managing Committee, Sunder Singh-Mallah Singh Rajput High School, Indaura*[1], the Judicial Committee accepted, subject to a qualification, the following statement of the law made by the Lahore High Court:

"It is not disputed that for the foundation of a charitable endowment by a Hindu in the province no writing is required. What is necessary is that

1. (1938) 1 M.L.J. 359: L.R. 65 I.A. 106: I.L.R. (1938) Lah. 63 (P.C.).

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the purpose be clearly specified and that the property intended for the endowment should be set apart as dedicated to that purpose. It is necessary that the donor should divest himself of the property. Whether he has done so is to be determined by his subsequent acts and conduct. All these propositions are well established. It is not disputed that a valid endowment once created cannot be revoked by the donor."

The qualification of the Board was in these terms:—

"Their Lordships agree with this statement, except that the evidence of divestiture may be contemporaneous, as in this case, and, in such a case, the subsequent acts and conduct of the donor are irrelevant and cannot reinvest him."

Now what is the position here? The grandfather, the absolute owner of the property in a written application to the Collector stated that he had set apart the property as a perpetual gift to the deity and asked that a certificate should be issued showing that the title to the property was in the deity. This application was granted and a deed was drawn up and executed by the grandfather as the trustee of the property vested in the deity by which he covenanted for himself, his heirs, executors, administrators, personal representatives, and assigns to pay the land-tax to the Secretary of State for India. These documents clearly show that the grandfather had divested himself of all personal interest in the property and obtained from the Secretary of State recognition that the title was in the deity. This is not a case of a colourable transaction. It is true that here we do not know whether the grandfather utilised the income for the trust purposes but this does not matter as there was complete divestiture.

Mr. Venkatarama Sastri on behalf of the appellants has contended that in view of the provisions of the will the proper construction to be placed on the application to the Collector and the "A" form certificate is that there was merely an intention to dedicate. He has argued that a contrary construction would mean that there would be nothing left for the heirs and the testator could never have intended this. I am unable to agree that this would be the case. Of the seven shops and houses known as Nos. 133 to 139 only one was charged for religious purposes and the wording of the will indicates that it was anticipated that there would be surplus income even from this one item of property. In any event there were six houses and shops entirely uncharged. It is true that the testator directed that his widow should enjoy the income of this property for her life and there is no reference to any provision for the adopted son. The adopted son

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was at that time a boy and it may very well be that the testator considered that the income from the uncharged property was sufficient to support both the mother and son. But be this as it may, the second paragraph of the will is in itself opposed to the contention that there was to be merely a charge. The words "should there arise any increase or decrease in the income of the said houses, shops and gardens, by any reason other than the default of the said persons it shall, on such occasions, be conducted suitably to such amounts as are realized" mean in my opinion that if there was more income than was anticipated more should be spent on the religious objects which the testator had in mind and if the income showed a decrease less should be spent. Then in paragraph 3 where the charge on No. 138, Devaraja Mudali Street, is created there is a special direction that the balance left over after meeting the expenses referred to should be enjoyed by the testator's heirs. There is no such provision in the clause relating to the property in suit. For these reasons I am unable to accept Mr. Venkatarama Sastri's argument that the will shows that in 1890 and 1891 the grandfather had only an intention of dedicating the property and that the dedication which only amounted to a charge was given by the will. The application to the Collector itself negatives this argument and by the deed of the 21st February, 1891, the intention was carried into effect. Accordingly I hold that there was a completed dedication and that the appellants acquired no title to the property. There is no doubt that they were misled. The father of the first and second respondents when the property came in his possession, succeeded in getting an A form certificate which disclosed merely a title in him, but the appellants if they had taken the prudent course of searching the registers in the Registrar's office before accepting his title would not have been in the predicament which they are now in.

The point of limitation does not require much discussion as there is the authority of this Court which bound the learned Judge and binds us. The appellants say that the article of the Limitation Act which applies in this case is Art. 134 as it stood before its amendment by the Indian Limitation Act, 1929, which came into force on the 1st January of that year. Before the amendment the article provided that the period of limitation for a suit to recover possession of immovable property con-

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veyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for a valuable consideration was twelve years from the date of the transfer. The amending Act makes the period run from the date when the transfer becomes known to the plaintiff. It is conceded that if the article as it now stands applies the suit was in time but it is said that it cannot apply and that the mortgages stand as the suit was filed more than twelve years after the mortgages had been entered into. The mortgages were simple mortgages and the mortgagees were not put in possession until the 11th October, 1924, when the property was conveyed to them. In *Mulla Veetil Seeti Kutti* v. *K. M. K. Kunhi Pathumma*[1], which was decided before the amendment of the Limitation Act, a Full Bench of this Court held that Art. 134 of the Limitation Act did not apply to a transfer from a trustee or mortgagee under which possession was not taken by the transferee. Mr. Venkatarama Sastri has conceded that in the face of this ruling he cannot maintain in this Court that the old Art. 134 applies.

The appeal fails and must be dismissed with costs in favour of the first and second respondents. The fourth and fifth respondents will be granted their costs out of the trust property and we fix the amount at Rs. 50.

K. S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Vedala Vallabhacharyulu .. *Petitioner** (*Petitioner*)

v.

Vedala Rangacharyulu and another .. *Respondents* (*Respondents*).

Vallabhacharyulu v. Rangacharyulu.

Madras Agriculturists Relief Act (IV of 1938)—Court hearing appeal from decision in a suit wherein plaintiff seeks to escape liability from a decree of another Court—If has jurisdiction to scale down the decree attacked.

The Court hearing an appeal from a decision in a suit wherein the plaintiff seeks to escape liability from a decree of another Court, has no jurisdiction under S. 19 or any other section of Madras Act IV of 1938 to scale down the decree which is being attacked at the instance of the plaintiff.

Petitions under S. 115 of Act V of 1908, praying the High Court to revise the orders of the District Court of Kistna dated

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1. (1917) 33 M.L.J. 320: I.L.R. 40 Mad. 1040 (F.B.).

* C. R. Ps. Nos. 1123 and 1124 of 1939. 23rd July, 1940.

27th January, 1939 and made in I. A. No. 89 of 1939 in A. S. No. 133 of 1938 and I. A. No. 88 of 1939 in A. S. No. 110 of 1938 respectively (O. S. Nos. 431 and 212 of 1935 respectively, District Munsif's Court, Masulipatam).

C. Rama Rao for Petitioner.

P. V. Vallabhacharyulu for Respondents.

The Court delivered the following

JUDGMENT.—It seems to me apparent that the Court hearing an appeal from a decision in a suit wherein the plaintiff seeks to escape liability from a decree of another Court, has no jurisdiction under S. 19 or any other section of Madras Act IV of 1938 to scale down the decree which is being attacked at the instance of the plaintiff. The petitions are dismissed with costs in C. R. P. No. 1123 of 1939.

K. S. —— *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Thiravia Nadar .. *Petitioner** (*Petitioner-1st Defendant*)

v.

Paulraj Chelliah Nadar and others .. *Respondents* (*Respondents-Plaintiffs 1 to 3 and 3rd Defendant*).

Madras Agriculturists Relief Act (IV of 1938)—Judgment-debtor depositing under O. 21, r. 89, Civil Procedure Code, the amount necessary to have sale set aside and decree-holder drawing amount in full satisfaction of decree—Application for scaling down—Sustainability—Deposit on date when Act IV of 1938 came into force—Effect.

The petitioner deposited under O. 21, r. 89 of the Code of Civil Procedure the amount necessary to have the sale set aside and this amount was withdrawn by the decree-holder in full satisfaction. The deposit was made on the date when Act IV of 1938 came into force but the application for scaling down was made long after.

Held, there no longer remained a debt to found an application under Act IV of 1938 or a decree to scale down. There is no subsisting sale to set aside and the fact that the deposit was made on the day the Act came into force has no bearing as the application was made long after.

Petition under Ss. 115 and 151 of Act V of 1908 and S. 224 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of

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* C. R. P. No. 131 of 1939. 29th July, 1940.

Thiravia Nadar v. Chelliah Nadar.

Srivaikuntam dated 9th August, 1938 and made in I. A. No. 318 of 1938 in O. S. No. 347 of 1934.

J. S. Vedamanickam for Petitioner.

Respondents not represented.

The Court delivered the following

JUDGMENT.—The petitioner having deposited under O. 21, r. 89 of the Code of Civil Procedure the amount necessary to have the sale set aside and this amount having been withdrawn by the decree-holder in full satisfaction, there no longer remains a debt to found an application under Madras Act IV of 1938 or a decree to scale down. No refund of amounts paid can be ordered except under provisions of Ss. 22 to 25, which have no application when there is no subsisting sale to set aside. And the fact that the deposit under O. 21, r. 89 of the Code of Civil Procedure was made on the day when the Act came into force has no bearing, when once it is conceded that the application under the Act was made long after the decree had been satisfied.

The petition is dismissed.

There will be no costs.

K. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

The Public Prosecutor .. *Appellant**

v.

Chelliah Tevan and another .. *Respondents (Accused).*

Public Prosecutor v. Chelliah Tevan.

Madras Borstal Schools Act (V of 1926), S. 7—Submitting proceedings to Joint Magistrate under S. 7 (1) with opinion that the convicted persons were proper persons to be detained in a Borstal School—Joint Magistrate's powers under S. 7 (2).

A conviction has to be recorded before the proceedings are submitted by a Sub-Magistrate under S. 7 (1) of the Madras Borstal Schools Act and when the proceedings reach the Joint Magistrate he has to deal with a person who has been convicted. The powers conferred by S. 7 (2) of the Act are neither appellate nor revisional and only such order as can be passed upon a convicted person is permissible. It is not permissible for the Joint Magistrate to acquit the accused.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondents (accused) by the Joint Magistrate of Tuticorin in C. C. No. 173 of 1939 on his file.

N. T. Ragunathan for Accused.

* Crl. App. No. 172 of 1940. 9th August, 1940.

Public Prosecutor v. Chelliah Tevan.

The Court delivered the following

JUDGMENT.—The respondents were convicted by the Sub-Magistrate of Tuticorin for offences punishable under Ss. 323, 324 and 114 of the Indian Penal Code and the proceedings were submitted to the Joint Magistrate of Tuticorin under S. 7 (1) of the Madras Borstal Schools Act with the opinion of the Sub-Magistrate that the respondents who are adolescent offenders as defined in S. 2 (1) of the Act are proper persons to be detained in a Borstal School. The Joint Magistrate acquitted the respondents and the question is whether this is permissible.

The proceedings were submitted under S. 7 (1) of the Madras Borstal Schools Act which provides that when a Magistrate not empowered to pass sentence under that Act is of opinion that an adolescent offender is a proper person to be detained in a Borstal School he may without passing sentence record such opinion and submit his proceedings and forward the adolescent offender to the District Magistrate or Sub-Divisional Magistrate to whom he is subordinate and the Joint Magistrate to whom the proceedings were submitted has to dispose of the case as prescribed in S. 7 (2) of the Madras Borstal Schools Act. That section provides that he may make such further enquiry if any as he may think fit and pass such sentence or order dealing with the case as he might have passed if the adolescent had been tried by him, and as pointed out in *The Public Prosecutor* v. *Malaipathi Gurappa Naidu*[1], with reference to the analogous provision in S. 380 of the Code of Criminal Procedure, it is not permissible to the Joint Magistrate to acquit the accused. A conviction has to be recorded before the proceedings are submitted under S. 7 (1) of the Madras Borstal Schools Act as otherwise there would be no "adolescent offender" and when the proceedings reach the Joint Magistrate he has to deal with a person who has been convicted. The powers conferred by S. 7 (2) of the Madras Borstal Schools Act are neither appellate nor revisional, and the order permissible under S. 7 (2) is only such as can be passed upon a convicted person. The order of acquittal is therefore set aside and the case will go back to the Joint Magistrate for disposal according to law.

K. S. *Order of acquittal set aside.*

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1. (1933) 65 M.L.J. 405: I.L.R. 57 Mad. 85.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Katachikandi Thiyyathikandi
Abdulla Kaka .. *Appellant** (*Respondent*)

v.

Kadumandra K. Muthanna .. *Respondent* (*Petitioner*).

Abdulla Kaka *v.* Muthanna.

Civil Procedure Code (V of 1908), Ss. 40 and 67 (2)—Rule promulgated in Coorg province embodying restrictions on sale of land in execution—If applicable to Coorg decree transferred to Court in Madras Presidency for execution.

Under S. 67 (2) of the Civil Procedure Code the Chief Commissioner of Coorg has promulgated a rule to the effect that 'lands, houses and other buildings and all immovable property shall not be liable to attachment or sale in execution of decrees of Civil Courts in Coorg with the exception of such immovable property as shall have been mortgaged or otherwise specifically pledged as security for the debt which is the subject-matter of the decree sought to be executed."

Where a decree from Coorg was transferred to the Court of the District Munsif of Cannanore for execution,

Held, the rule embody the restriction upon sales of land in execution of decrees of Civil Courts, applies only to sales of land within the jurisdiction of the local Government of Coorg. Therefore a decree-holder can execute his decree in the Madras Presidency by the sale of land situated there in spite of the restrictions under the special rule upon its execution within the province of Coorg.

Appeal against the order of the District Court of North Malabar dated 29th October, 1936 and made in A. S. No. 134 of 1936 preferred against the order of the Court of the District Munsif of Cannanore dated 8th June, 1936 and made in R. E. P. No. 196 of 1936 (O. S. No. 48 of 1935, Coorg Sub-Court).

O. T. G. Nambiar and *C. K. Kerala Varma* for Appellant.

B. Sitarama Rao for Respondent.

The Court delivered the following

JUDGMENT.—This appeal raises the question of the effect of a special rule promulgated by the local Government of Coorg to govern the execution of decrees in that province, upon the execution of such decrees when transferred to a Court in British India. The appellant is the judgment-debtor. The Subordinate Judge of Coorg passed a money decree against him and that decree was transferred for execution to the Court of the

* A. A. A. O. No. 42 of 1937. 15th August, 1939.

Abdulla Kaka v. Muthanna.

District Munsif of Cannanore. Under S. 67 (2) of the Code of Civil Procedure, the Chief Commissioner of Coorg has promulgated a rule to the effect that 'lands, houses and other buildings and all immovable property shall not be liable to attachment or sale in execution of decrees of Civil Courts in Coorg with the exception of such immovable property as shall have been mortgaged or otherwise specifically pledged as security for the debt which is the subject-matter of the decree sought to be executed.' The argument of the appellant is that this rule must be read as restraining the execution of a Coorg decree for money by the sale of lands even when the decree has been transferred for execution in British India. As the rule stands, the words 'in Coorg' might be read either as qualifying 'decrees of Civil Courts' or as qualifying the words 'shall not be liable to attachment or sale in execution.' The former interpretation is possibly the more natural reading of the English words. But I am of opinion that it cannot be the proper interpretation of the clause. The reason for the rule is doubtless the curious tenures in Coorg whereunder the person in separate enjoyment of land commonly has no power of alienation without the consent of distant relatives, who are all notionally regarded as having an interest in land given for enjoyment to each member of a large family. Sub-S. (1) of S. 67, Civil Procedure Code, expressly restricts the power of making special local rules regarding the sale of any class of interest in land in execution of decrees for money, to those cases in which the interests are so uncertain or undetermined as, in the opinion of the local Government, to make it impossible to fix their value. Sub-S. (2) does not contain any such restriction but it empowers the local Government to re-enact any special rule already in force before the Code came into operation in the Province. It is reasonable to suppose that the object of the second sub-section is to deal with cases substantially similar to those dealt with in the first sub-section. Having regard to the language of S. 67 (2), one must, I think, read this rule as a rule merely governing the execution of decrees within the province of Coorg, for the power to re-enact such special rules seems to contemplate only the enactment of rules restricting execution of money decrees within the local area. One may even doubt whether any local rule purporting to restrict or control the execution of decrees in another province would have any validity, having regard to the provisions of S. 40

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which prescribes that where the decree is sent for execution in another province, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that province. Clearly the Code contemplates the exercise of the rule-making power with reference to execution in any province by the Government of that province. One must therefore read this special rule in the light of the general provisions of the Code of Civil Procedure and in so far as it is ambiguous, it must be interpreted having regard to the powers which the local Government of Coorg could legally exercise under the Code of Civil Procedure. In my opinion, the local Government of Coorg had not the power, nor is it likely to have intended to frame rules to restrict the execution of its decrees when transferred to a Court in the Madras Presidency.

I am therefore of opinion that the rule embodying the restriction upon sales of land in execution of decrees of Civil Courts, applies only to sales of land within the jurisdiction of the local Government of Coorg. It follows therefore that the Courts below are right in holding that the decree-holder can execute his decree in the Madras Presidency by the sale of land situated there, in spite of the restrictions under the special rule upon its execution within the province of Coorg. The appeal is therefore dismissed with costs. Leave to appeal is refused.

K. S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KUNHI RAMAN.

M. L. N. Mahalingam Chettiar, minor by Rao Sahib R. Krishna Aiyar, interim Guardian .. *Petitioner** (*Defendant*)

v.

Raja Srimanthu Muthu Vijia Raghunatha Doraisingam *alias* Gowri Vallabha Thevar Avergal, Zamindar of Sivaganga, through his Diwan and authorized agent, R.M. Sundaram, Esq., I.C S. .. *Respondent* (*Plaintiff*).

Mahalingam Chettiar v. Zamindar of Sivaganga.

Madras Elementary Education Act (VIII of 1920), Ss. 34 and 36—Education-tax levied by District Board—If tax levied by Government—Local authority if Government.

* C. R. P. No. 1262 of 1936. 19th July, 1939.

Mahalingam Chettiar *v.* Zamindar of Sivaganga.

Where a lease deed leasing five villages in a Zamindary, provided that the lessee should be liable for the *road cess* and the *mahimai* payable in respect of the villages and further provided that the lessee "shall deliver the account asked for as well as *the tax, etc, levied from time to time by the Government*", the lessee is not bound thereby to pay the education-tax imposed by the District Board under the powers vested in it by the Madras Elementary Education Act, 1920, as the District Board is not "the Government" and the tax is levied not for the benefit of the Government but for the purpose of elementary education in the particular district.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Sivaganga dated 28th July, 1936 and made in S.C.S. No. 462 of 1935.

T. M. Ramaswami Aiyar for Petitioner.

C. Narasimhachari and *M. E. Rajagopalachari* for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—On the 20th March, 1887, the respondent's predecessor-in-title granted to the petitioner's predecessor-in-title a lease in perpetuity of five villages in the Sivaganga Zamindari in the Ramnad District at an annual rental of Rs. 5,000. The deed provided that the lessee should be liable for the road cess and the *mahimai* payable in respect of the villages. It contained the further provision that the lessee should "deliver the account asked for as well as the tax, etc., levied from time to time by the Government." At the time of the execution of the document the only local tax was the road cess, but as the result of the passing of the Madras Elementary Education Act, 1920, the District Board imposed an education-tax. The respondent was compelled by the local authority to pay this tax and he filed the suit out of which this revision application arises in the Court of the Subordinate Judge of Sivaganga to recover from the petitioner what he had paid by way of education-tax for faslis 1342, 1343 and 1344. He averred that by reason of the terms of the document the petitioner was bound to pay the tax. The Subordinate Judge held in favour of the respondent and granted him a decree for Rs. 250. This suit was a small cause suit and as no appeal lay the petitioner filed this application in revision. His contention is that the Subordinate Judge has misread the document. He says that it imposes no liability on him to pay the education-tax.

The petitioner's case is well founded. The document states what the petitioner shall pay. He has to pay the road cess and

Mahalingam Chettiar v. Zamindar of Sivaganga.

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any tax levied from time to time by the Government. The education-tax is not a tax levied by the Government. It is levied by the District Board. It is true that S. 34 (2) of the Madras Elementary Education Act, 1920, provides that a District Board must obtain the previous sanction of the local Government, unless it is directed by the local Government to levy the tax, but in any event the levy is by the District Board and not by the Government. The tax is levied not for the benefit of the Government, but for the purpose of elementary education in the particular District. S. 36 read with S. 34 (2) provides that the tax shall be deemed to be an addition to a tax levied under all or any of the following heads, namely, land cess, profession-tax and house-tax. But in no sense is the tax levied by the Government.

Mr. Narasimhachariar has asked the Court to hold that the word "Government" should be interpreted as including the District Board. To do so would in my opinion be to distort the true meaning of the word. Moreover S. 3 (21) of the General Clauses Act, 1897, says that "Government" or "the Government" shall include the local Government as well as the Government of India. No reference is made to local authorities. There is a further answer to Mr. Narasimhachariar's argument. If one turns to the sentence which precedes the provision in the deed with regard to the levy of tax by the Government one sees that the parties used the word "Government" in its proper sense. The lessee shall "monthly, deliver in the taluk cutcherry the accounts relating to Avari (indigo), cotton, etc., regarding the said villages to be submitted to the Government." These accounts have not been submitted to a local authority. No provision having been made in the document for the payment by the lessee of any local tax other than the road cess the respondent cannot in law claim to recover his payments in respect of the education-tax from the lessee by virtue of the deed, and the decree passed against the petitioner on the basis of the deed is contrary to law.

Mr. Narasimhachariar has asked that he be given leave to amend his plaint in order to plead the right to recover half the amount under the provisions of S. 88 of the Madras Local Boards Act, 1920. Mr. T. M. Ramaswami Ajyar, the learned advocate for the petitioner, has no objection to the amendment being allowed provided he is allowed to plead to the amended

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plaint. As a matter of fact, in the grounds of appeal he raised the same contention himself as an alternative to his plea of complete non-liability. In these circumstances we will grant the respondent leave to file an amended plaint in the trial Court with liberty to the petitioner to amend his written statement should he so desire.

The case will be remanded to the trial Court to be dealt with according to law after amendment of the pleadings. The decree which has been passed is set aside and the petitioner is entitled to his costs in this Court. The costs in the trial Court will abide the further hearing.

S. V. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Chidambaram Chettiar .. *Appellant* (Plaintiff).*

Chidambaram Chettiar, *In re.*

Court-Fees Act (VII of 1870), S. 12 (ii) and Sch. II, Art. 17-A—Suit for declaration filed before District Munsif—Transferred to Subordinate Judge's Court to be tried with another suit—Dismissal of the suits by the Subordinate Judge—Appeals therefrom, one to District Court and another to High Court—Court-fee under Art. 17-A if payable as a District Munsif's decree or a Subordinate Judge's decree—District Court accepting fee paid as correct—High Court if can call upon appellant to pay additional Court-fee when the appeal comes before it—Scope of S. 12 (ii), Court-Fees Act.

C filed a suit in a District Munsif's Court for a declaration that a certain alienation was a fraud on creditors and a similar suit in respect of another alienation in the Subordinate Judge's Court. The suit filed in the District Munsif's Court was transferred to the Subordinate Judge's Court and both the suits were tried together and both were dismissed by a common judgment. *C* then filed an appeal to the High Court against the Subordinate Judge's Court suit and an appeal was filed to the District Court against the decree in the suit originally filed in the District Munsif's Court paying a Court-fee of only Rs. 15 under Art. 17-A treating it as a decree of the District Munsif. The District Judge accepted the Court-fee paid as being correct. The appeal was transferred to the High Court for being heard with the other appeal and the High Court then called on the appellant *C* to pay deficit Court-fee of Rs. 85 treating the decree as one of the Subordinate Judge only.

Held, that the decree was a decree of the Subordinate Judge and not that of the District Munsif though passed in a suit first instituted before the District Munsif and the proper Court-fee is Rs. 100 under Art. 17-A of the Court-Fees Act, as the value of the suit is less than Rs. 10,000.

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*Appeal No. 251 of 1939. 21st November, 1939.

Chidambaram Chettiar, *In re.*

Held, further, that the High Court as an appellate Court has got power under S. 12 (*ii*) to correct a mistake made below and that even though the District Court decided that the fee paid was proper.

Appeal against the decree of the Court of the Subordinate Judge of Coimbatore dated 22nd November, 1937, in O. S. No. 176 of 1937.

K. V. Ramachandra Aiyar for Appellant.

T. Krishna Rao for *The Government Pleader* (*B. Sitarama Rao*) for Government.

The Order of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal has been placed before us to-day on a question raised with regard to the Court-fee payable. The memorandum of appeal bears a Court-fee stamp of Rs. 15 and the Deputy Registrar has called upon the appellant to day an additional fee of Rs. 85, on the ground that the memorandum should be stamped with a fee of Rs. 100 under the provisions of Art. 17-A of the Second Schedule of the Court-Fees Act. As the appellant questioned the validity of the Deputy Registrar's decision a notice was issued to the Government Pleader. The facts are these. The appellant filed a suit in the Court of the District Munsif of Dharapuram for a declaration that a certain alienation was a fraud on creditors. He filed a similar suit in respect of another alienation in the Court of the Subordinate Judge of Coimbatore. The suit filed in the Court of the District Munsif was subsequently transferred to the Court of the Subordinate Judge and tried along with the suit which the appellant had filed in that Court. By a common judgment the two suits were dismissed. The appellant then filed an appeal to this Court against the decision in the suit which he had filed in the Court of the Subordinate Judge and filed an appeal to the Court of the District Judge of Coimbatore in respect of the decree of the Subordinate Judge in the suit which was originally filed in the Court of the District Munsif. This is the appeal which has given rise to the question of stamping.

The memorandum of appeal was stamped with a fee of Rs. 15 when it was presented to the Court of the District Judge and the District Judge accepted it as being correct. Art. 17-A provides that the Court-fee on a memorandum of appeal in a suit for a declaration without consequential relief in a District Munsif's Court shall be Rs. 15. The District Court, however, erred in accepting the memorandum as having been properly

Chidambaram Chettiar, *In re.*

Leach, C.J.

stamped. The decree which was challenged was a decree of the Court of the Subordinate Judge and not of the Court of the District Munsif and Art. 17-A clearly states that in the case of a memorandum of appeal against a decree of a District Court or a Sub-Court the fee shall be Rs. 100 if the value for purposes of jurisdiction is less than Rs. 10,000, as in this case. The argument of the appellant that the fact that the suit was originally filed in the Court of the District Munsif makes it a decree of that Court cannot be accepted. The decree was passed by the Court of the Subordinate Judge and is rightly declared to be a decree of that Court.

The learned Advocate for the appellant has suggested that this Court has no jurisdiction to require payment of the difference between Rs. 15 and Rs. 100 by reason of S. 12 of the Court-Fees Act. He says that there was no question raised when the appeal was filed in the Court of the District Judge and, not having been raised there, it cannot be raised here. This argument ignores the facts and the wording of the section. The District Court in accepting the memorandum of appeal at Rs. 15 did decide that that was the proper fee. S. 12 (*ii*) gives an appellate Court power when an appeal comes before it to correct a mistake made below, and this mistake was corrected by the direction of the Deputy Registrar. There is no substance in the appellant's objections and they must be overruled. As he has insisted on these questions being argued and as the Government Pleader has been served the appellant must pay costs which we fix at Rs. 50. The appeal will not be accepted until both the Court-fee and the costs which we have now awarded have been paid.

S.V.V. *Court-fee question answered against the appellant.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

Venugopal Pillai and others .. *Appellants** (*Defendants 1 and 3 to 6*)

v.

Thirugnanavalli Ammal .. *Respondent* (*Plaintiff*).

Venugopal Pillai *v.* Thirugnanavalli Ammal.

Civil Procedure Code (V of 1908), O. 2, r. 2 and S. 149—Earlier suit for cancelling a lease in respect of suit properties—Later suit for past mesne

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* Appeal No. 338 of 1937. 2nd August, 1940.

Venugopal Pillai v. Thirugnanavalli Ammal.

profits—Whether barred—Civil Procedure Code, S. 149—Grant of time for payment of deficit court-fee after claim barred by limitation—Effect.

After an earlier successful suit for cancelling a certain lease the plaintiffs filed a suit for past mesne profits. It was contended that this suit was barred by Civil Procedure Code, O. 2, r. 2 on the ground that the claim for mesne profits should have been included in the earlier suit inasmuch as it arose out of the same cause of action. In the plaint in the earlier suit the plaintiff had stated that he intended to bring a separate suit in respect of past mesne profits.

Held, following *Ponnammal* v. *Ramamirda Aiyar*, (1914) 28 M.L.J. 127: I.L.R. 38 Mad. 829 (F.B.) and *Khuddus* v. *Mahammad Hussain*, (1926) 51 M L.J. 252, that the claim for mesne profits need not be included in a suit for recovery of possession of property in respect of which mesne profits are claimed by reason of O. 2, r. 2, Civil Procedure Code.

Naba Kumar Hazra v. *Radhashyam Mahis*, (1931) 61 M.L.J. 294 (P.C.), distinguished.

Held, further, whatever the reasons for the Courts granting time for payment of deficit court-fees, the effect of the grant of time, even if it is after the claim is barred by limitation, is that the plaint takes effect as if it had been presented along with the full court-fee on the date of its first presentation.

Basavayya v. *Venkatappayya*, (1926) 51 M.L.J. 90, relied on.

Appeal against the decree of the Court of the Subordinate Judge of Cuddalore in O. S. No. 4 of 1933.

K. Bashyam Aiyangar and *J. R. Gundappa Rao* for Appellants.

T. R. Venkatarama Sastriar and *T. E. Ramabhadrachari* for Respondent.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—This is an appeal by defendants 1 and 3 to 6 from the decree of the Subordinate Judge of Cuddalore dated 11th October, 1937, in O. S. No. 4 of 1933, a suit to recover mesne profits for fasli 1333 in respect of certain properties together with interest thereon. There was an earlier suit between the parties which related to these very properties for cancelling a certain lease granted in respect of them by the plaintiff's great-grandmother (second defendant) on the 8th of August, 1923, for three years in favour of the first defendant. The properties in question belonged to the plaintiff who was then a minor under the testamentary guardianship of the second defendant, the great-grandmother who had been appointed to manage the properties by the will of the plaintiff's father, one Thangaswami, dated 6th July, 1915. The testator died a few days later and in the previous suit there was no dispute as to the genuineness of the will. That suit was decreed and the appeal from the decree of the first Court was dismissed by the

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High Court on 30th August, 1932. There was some attempt made to take the matter to the Privy Council but the idea was finally abandoned and the decree of the High Court which dismissed the appeal with costs was the final decision in that suit. The present suit was instituted on the 14th of October, 1932, that is to say, one and a half months after the High Court had decided the suit in favour of the plaintiff who claims to have attained majority, being till then a ward of the Court under the Guardian and Wards Act, only after attaining her 21st year which, according to her, was on the 15th October, 1929. The present suit was thus instituted just before the lapse of the period of three years after attaining majority. The suit has been decreed by the Subordinate Judge and the present appeal is, as stated already, by defendants 1 and 3 to 6.

As in the Court below, in this appeal also, a good deal of argument has been directed to the point of the alleged bar imposed by O. 2, r. 2, Civil Procedure Code, to the present suit, the appellants' contention being that the present claim for mesne profits for fasli 1333 should either have been included or had actually been included in the earlier suit inasmuch as it arose out of the same cause of action. This point has been discussed by the Court below somewhat briefly and rightly so because the point is really concluded by the Full Bench decision in *Ponnammal* v. *Ramamirda Aiyar*[1], which has been subsequently followed in *Khuddus* v. *Mahammad Hussain*[2] and it may also be added that no other High Court has taken a different view, and on the other hand there are several decisions of other High Courts which take the same view, namely, that a claim for past mesne profits need not be sued for in a suit for recovery of possession of the property in respect of which mesne profits are claimed by reason of O. 2, r. 2, Civil Procedure Code. The only important reason given to us by the learned advocate for the appellants for not accepting the view of the lower Court on this point which merely followed the Full Bench decision in *Ponnammal* v. *Ramamirda Aiyar*[1] is that in view of certain observations and the decision in a later Privy Council case *Naba Kumar Hasra* v. *Radhashyam Mahis*[3], it must be held that the view taken by the Full Bench in *Ponnammal* v. *Ramamirda Aiyar*[1] is not correct. No doubt, it was also argued

1. (1914) 28 M.L.J. 127: I.L.R. 38 Mad. 829 (F.B.).
2. (1926) 51 M.L.J. 252.
3. (1931) 61 M.L.J. 294 (P.C.).

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that as a matter of fact the claim to past mesne profits had been made in the earlier suit and therefore the present claim was not maintainable. There is, however, no substance in this contention. A perusal of the plaint in the former suit makes it perfectly clear that in so many words the past mesne profits due to the plaintiff in respect of the plaint properties was not included in the suit and that the plaintiff intended to bring a separate suit in respect of the same. In view of this specific statement, and in the absence of any language in the prayer portion of the plaint to show that any claim to past mesne profits was included in the plaint, it is impossible to accept this contention.

As regards the main argument, namely, that the Full Bench decision in *Ponnammal* v. *Ramamirda Aiyar*[1] is not good law, it is enough to say that nothing in the Privy Council judgment in *Naba Kumar Hasra* v. *Radhashyam Mahis*[2] is really contrary to what has been stated by the Full Bench decision in *Ponnammal* v. *Ramamirda Aiyar*[1]. The Privy Council case does not deal with a claim to mesne profits in the first place. Secondly, it is a case in which the prayer that was made in the subsequent suit, namely, for taking accounts, was a prayer that could have been made on the same foundation of fact and law as the claim in the earlier case which was to declare that a certain trust existed and for reconveyance of certain properties. It is not as if this contention that the Full Bench decision in *Ponnammal* v. *Ramamirda Aiyar*[1] is not correct in view of the Privy Council decision in *Naba Kumar Hasra* v. *Radhashyam Mahis*[2] is a new argument put forward for the first time. A similar contention appears to have been pressed in *Ramiah* v. *Thathiah*[3] and repelled in that case by Venkataramana Rao, J. It is not necessary to repeat the reasons given by the learned Judge for repelling this contention. We are in general agreement with what he has said in that case and we need only repeat some of the references which he has made in the judgment, namely, In re *Kantheeswaram Ekanathalingaswami Koil through its trustee Vedanayagam Pillai*[4], *Rama Kallappa* v. *Saidappa Sidrama*[5] and *Ram Karan Singh* v. *Nakchhed Ahir*[6]. In the last of these cases, there is a

1. (1914) 28 M.L.J. 127: I.L.R 38 Mad. 829 (F.B.).
2. (1931) 61 M.L.J. 294 (P.C.).
3. A.I.R. 1937 Mad. 849.
4. (1936) 71 M.L.J. 677: I.L.R. (1937) Mad. 284.
5. (1934) I.L.R. 59 Bom. 454.
6. (1931) I.L.R. 53 All. 951 (F.B.).

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comparatively full discussion of the subject. It is enough to add that the law as laid down by the decision in *Ponnammal* v. *Ramamirda Aiyar*[1] merely reiterated and reaffirmed the law prevailing in Madras since *Tirupati* v. *Narasimha*[2], which is a case of 1888 and the Full Bench decision in *Ponnammal* v. *Ramamirda Aiyar*[1], which is a case of 1914 has held the field without any judicial expression of any doubt regarding its correctness all these years. A further point is that no other High Court has sounded a different note, and on the other hand there are several decisions which take the same view. In these circumstances and having regard to the state of the authorities which are practically unanimous for so many years, it is impossible for us to accept the contention put forward on behalf of the appellants in this case. We therefore find that there is no bar imposed by O. 2, r. 2, Civil Procedure Code, on the plaintiff's claim for mesne profits in this case.

The other points raised in this appeal on behalf of the appellants can be disposed of somewhat briefly because there is really no substance in them. One of the two points is one of limitation which was sought to be based on two grounds. These are dealt with in paragraphs 64 to 86 of the lower Court's judgment and paragraph 88 respectively, and there is little to add to what the lower Court has said on these points. The first ground is a pure question of fact, namely, the date of the birth of the plaintiff. There is an extract from the Birth Register which is not attacked on the ground of forgery or the like which shows that the plaintiff was born as alleged by her on 15th October, 1908. This practically unimpeachable evidence and other evidence which points in the same direction has been sought to be attacked on the ground that the Birth Register extract relates not to the plaintiff but to a younger sister of hers who died a few days after birth. This story has been sought to be established by the evidence of witnesses who were not accepted by the lower Court as witnesses of the truth. No attempt was made to file any extract of the Birth Register or Death Register relating to this alleged younger sister of the plaintiff, and as the learned Subordinate Judge points out, if for any reason such an extract could not be got, it was open to the appellants to have examined at least the Village Munsif of

1. (1914) 28 M.L.J. 127: I.L.R 38 Mad. 829 (F.B.).
2. (1887) I.L.R. 11 Mad. 210.

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the village in which the plaintiff, according to the appellants, is alleged to have been born, namely, the village of Movur. On the whole, we see no reason to differ from the conclusion come to by the trial Judge on this pure question of fact and in respect of which the unimpeachable documentary evidence is all on the side of the plaintiff ahd there is only unreliable oral evidence on the side of the appellants.

As regards the other ground, very little was said to us in support of the contention and obviously the contention is without force. The contention is that the suit is barred by limitation because the Court gave improperly and without sufficient cause time for payment of court-fee after the plaint had been presented. Whatever might have been the reasons for the Court's granting time, the effect of the grant of such time is clear, namely, that the plaint takes effect as if it had been presented along with the full court-fee on the date of its first presentation, a proposition put beyond doubt by S. 149 of the Code—*vide also* the decision in *Basavayya* v. *Venkatappayya*[1]. The contention therefore that this claim is barred by limitation has no substance and must be repelled.

The remaining point of any substance is that the value of paddy fixed by the Court below is excessive. The value has been fixed at Rs. 2-10-0 per kalam, a kalam being said to be 24 measures. This estimate is, in our opinion, in accordance with the weight of the evidence which has been fully discussed. There has been no omission on the part of the Court below to deal with any material part of the evidence bearing on this point and we do not see any error of judgment in assessing the value to be given to the evidence on both sides. It is a point worthy of mention that the first defendant himself when he claimed rent in respect of these very properties from his sub-tenants claimed the value of paddy at Rs. 4 and at Rs. 3-8-0. Even allowing for some exaggeration, it is impossible for it to be contended now that Rs. 2-10-0 is excessive. The estimate is mainly based on the evidence given in the previous suit by a clerk of a paddy merchant whose disinterestedness is not questioned and his evidence was obviously based on the accounts which he had in his possession. That is really the best evidence available in the present case on this point, and the lower Court

1. (1926) 51 M.L.J. 90.

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could not be said to have gone wrong in relying mainly on that evidence.

Something was said to us on the award of interest on the amount of mesne profits, calculated on this basis, namely, at Rs. 2-10-0 a kalam in the lower Court's decree. The definition of 'mesne profits' in the Civil Procedure Code itself shows that interest is included; in other words, interest can rightly be awarded by the Court as mesne profits.

It was also stated that by the delay in the filing of the present suit, the claim on the score of interest has proved to be much larger in amount than it would otherwise have been. This does not, however, show that the plaintiff is not entitled to the interest which she claims. On the other hand, the appellants, have, in our opinion, not the slightest claim on the indulgence of this Court. Their conduct as found in the previous suit was extremely reprehensible. There was a conspiracy to defeat the rights of the plaintiff who was then a minor to which her testamentary guardian herself was a party. A grosser case of fraud could hardly be imagined and the present suit is practically for mesne profits in respect of the very property which was attempted to be alienated by means of a lease for a very low rent in favour of one of the appellants, namely, the first defendant.

We see therefore no reason whatever to interfere with the decree of the Court below. That decree is affirmed and this appeal is dismissed with costs of the respondent (plaintiff). We are informed that an application has been made to scale down the decree debt in the Court below, and it is enough to say in connection with this that the decree in this appeal will not prejudice in any way the disposal of the application, if any, to scale down the debt.

K.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

Haji Muhammad Shadak Koyi Sahib.. *Petitioner* (Appellant)*

v.

Burra Venkata Komaraju and others.. *Respondents (Respondents).*

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Civil Procedure Code (V of 1908), S. 110—Leave to appeal to Privy Council—Question in appeal not one raised in the High Court or trial Court—

* C. M. P. No. 2456 of 1939. 28th July, 1939.

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If leave can be granted—Minor—If can set aside a decree on ground of mere gross negligence of guardian ad litem.

Leave to appeal to Privy Council could not be given where the only question sought to be raised before the Privy Council was one which was not raised at any time in the trial Court or in the appeal before the High Court.

Semble.—A minor can challenge a decree passed against him on the ground of the gross negligence of his guardian *ad litem* without proof of fraud and collusion.

Krishna Doss v. *Vithoba*, I.L.R. (1939) Bom. 340 (F.B.), doubted.

Petition under Ss. 109, 110 and O. 45, rr. 2, 3 and 8 of the Civil Procedure Code praying that the High Court will be pleased to grant leave to the petitioner herein to appeal to His Majesty in Council against the judgment and decree of the High Court in A. S. No. 330 of 1936 preferred to the High Court against the decree of the District Court of Vizagapatam in O. S. No. 13 of 1936.

K. V. Krishnaswamy Aiyar and *P. Panini Rao* for Petitioner.

Y. Suryanarayana for Respondents.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—This is an application for leave to appeal to His Majesty in Council from the decree of this High Court made in Appeal No. 330 of 1936 on the 14th February, 1939. That decree merely confirmed the decree of the trial Court, the finding of both the Courts being concurrent on the main question in the suit, namely, whether there was gross negligence on the part of the Court guardian appointed to defend the suit in which a decree had been passed against the minor, the present litigation being one to have that decree set aside as against the minor. The entire litigation proceeded in the trial Court as well as in this Court on the basis that gross negligence, if proved, would be sufficient to entitle the plaintiff to have the earlier decree set aside, and neither in the grounds of appeal in this Court nor during the arguments at the hearing of the appeal was it stated that gross negligence by itself would not be sufficient in the absence of fraud and collusion. But it is this point and this point alone that is sought to be raised in the present application for leave to appeal. The petitioner wants an opportunity of having this question settled by the highest judicial tribunal and it would appear that they have been emboldened to do that by reason of a Full Bench decision of

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the Bombay High Court reported in *Krishna Doss* v. *Vithoba*[1], which appears to have been reported only after the High Court's judgment was pronounced. That however is a detail which need not affect our decision in this matter. Even in that case it is pointed out that there is a preponderance of authority among the High Court Judges in India in favour of the view that a minor can challenge a decree passed against him on the ground of the gross negligence of his guardian *ad litem*. This majority view appears to have been dissented from by the Full Bench of the Bombay High Court on the ground that the majority view was based mainly on the consideration that such an action would lie under the English law, and the Full Bench of the Bombay High Court was of opinion that under the English law itself no such action would lie. We find however that apart from the dictum in *Gregory* v. *Molesworth*[2] of Lord Hardwicke which is quoted in some of the reported cases in India, at least since 1874 when In re *Hoghton*[3] was decided by the Vice-Chancellor Malins, it has been understood to be well settled law in England that such an action would lie. It is sufficient to refer in this connection to the passages quoted from Macpherson on Infants and Simpson on the Law of Infants in *Brij Raj* v. *Ram Surup*[4] and also to the passage from Halsbury's Laws of England, Vol. 17, page 138 on the same page. We find also in the later edition, that is, the Hailsham edition of the Laws of England, the same proposition of law laid down; that is to say, that an infant is as much bound as an adult by a judgment unless there has been fraud or gross negligence on the part of his next friend. We feel therefore some hesitation in expressing the view that under the English law an action would not lie in the case of gross negligence only of the guardian. We are unable to accept the position as being one in which any real doubt remains about the maintainability of a suit of this kind. We however do not base our final decision which is to dismiss the petition on this ground. It is enough for our purposes to say that leave to appeal could not be given in a matter like this for the simple reason that leave is asked for for the purpose of raising for the first time a question which was not raised at any time while the litigation was pending in this country; that is to say, either in the

1. I.L.R. (1939) Bom. 340 (F.B.).
2. (1747) 26 E.R. 1160.
3. (1874) L.R. 18 Eq. 573.
4. (1925) I.L.R. 48 All. 44 at 53.

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trial Court or in this Court. The resort to the provisions which permit a party to apply for leave to appeal for a purpose like this, namely, for raising a point for the first time after the whole case has been disposed of, would be, in our opinion, an abuse which should not be encouraged. It might also be mentioned that if this new point had been raised earlier, the plaintiffs would have had an opportunity of meeting this point by alleging as an additional ground of claim actual fraud and collusion.

In the circumstances we feel that there is no other alternative than to refuse leave to appeal. The petition is therefore dismissed with costs.

S. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE VENKATARAMANA RAO.

Khaji Muhammad Hussain Sahib .. *Appellant** (*Defendant*)

v.

The Masjiday Mahmood Jamait Managing Committee of Pudupet, by its Secretary Shahul Hamid Marakkayar .. *Respondent* (*Plaintiff*).

Khaji Muhammad Hussain Sahib v. Masjiday Mahmood Jamait Managing Committee of Pudupet.

Societies Registration Act (XXI of 1860)—Charitable purposes—One of the objects of the society to manage affairs of a mosque—Valid registration—Committee can hold muthavalli's *rights—Adverse possession—Right to manage acquired.*

Where there can be no doubt that the paramount object of a society registered under Act XXI of 1860 is charitable, the fact that one of the purposes is the management of the affairs of a mosque cannot take away from it the character of the society as a charitable society.

Where the objects of the plaintiff society were the following:—" Towards the expenses for conducting all the affairs of the said Masjiday, the *jamaitdars* capable of giving subscriptions for ever, must pay subscriptions for the maintenance of the Masjiday. From the amount of the subscriptions received from the *jamaitdars* the expenses mentioned in columns 1 and 2 should be met with, and the remaining balance amount should be utilised for the propaganda of Islami education, for rendering possible pecuniary help to the poor, mussafars and worthy Alims and Ulemas, for removing their difficulties, for other necessary and proper charities, settled then and there by Hanafi and Shafi and for conducting all affairs and for purchasing immovable properties for the perpetual maintenance of the said Masjiday".

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* C. C. C. A. No. 36 of 1935. 6th September, 1939.

Held, that it could not be denied that the improvement of Islamic education and rendering of pecuniary help to the poor musaffars, etc., were charitable purposes. The fact that one of the objects of the society was also to conduct the affairs of the mosque which did not involve the performance of any religious service by the members of the society could not render the society, a society formed for religious purposes. Therefore the plaintiff society was a charitable society within the meaning of the Act and the registration thereunder was perfectly legal and valid.

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A *muthavalliship* can be held by a single individual or two or more individuals [vide *Mahomed Ghouse Siddikh* v. *Sheik Moideen Siddikh*, (1913) 18 M.L.T. 48 at 53] or by a body of persons constituting a committee (*vide* Tyabji's Muhammadan Law, 2nd edition, S. 499 at p. 607). There is nothing to prevent an incorporated society performing functions of a *muthavalli*. A corporation can be a trustee of a charity (Tuder on Charities, p. 284).

Held, further, the plaintiff society having been for a period of 14 years in undisputed management of the mosque in derogation of the right of the defendant should be deemed to have acquired that right. Having surrendered his right in favour of the plaintiff society and lost it, the defendant was not entitled to interfere with plaintiff's management (vide *Jamiat Dawat* v. *Mohammad Shariff*, A.I.R. 1938 Lah. 869 at 877).

Appeal against the decree of the Court of the City Civil Judge, Madras, in O. S. No. 926 of 1932.

K. Rajah Aiyar and *K. Subramaniam* for Appellant.

V. T. Rangaswami Aiyangar for *P. Viswanatha Aiyar* and *S. K. Ahmed Meeran* for Respondent.

The judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.—This is an appeal from the judgment and decree of the learned City Civil Judge restraining the defendant by a perpetual injunction from interfering with the plaintiff's right of management, control and possession of the mosque, Masjiday Mahmood Jamait, situate in Pudupet, Madras. The facts relating to the suit out of which this appeal arises may be briefly stated. The said mosque was founded about 85 years ago. It is the plaintiff's case that it was built out of public subscriptions collected from the residents of Pudupet and was primarily intended for the benefit of the residents of the said locality. The defendant's case is that it was built by one Gulam Mohammad, but there is no reliable evidence in support thereof except some evidence of tradition. But it is immaterial who founded it because the evidence establishes that it was the Mohammadan residents of the locality who were taking interest in the said mosque and contributing to its upkeep. There is no deed of foundation prescribing any rules for the management of the affairs of the mosque or for the

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appointment of a *muthavalli* or any servant of the mosque. From a document of 1863 (Ex. VII), it is evident that there was a *muthavalli* to the mosque and he was one Kasim Ali who was maternal grandfather of the defendant. Kasim Ali appears to have died in 1888. The defendant states that a year before his death the said Kasim Ali executed a will (Ex. I) in favour of the defendant in and by which he appointed the defendant as the *muthavalli* and on the death of Kasim Ali in pursuance of the will the defendant succeeded to the office of *muthavalli* and was functioning as such. It appears from the evidence that Kasim Ali was the Pesh Imam of the mosque and on his death the defendant continued to be the Pesh Imam and was doing the duties as such till the date of suit. The genuineness of Ex. I is challenged by the plaintiff. The learned City Civil Judge did not record any finding in regard to it but in a later suit between the parties it was found not to be genuine. It is no doubt a document more than thirty years old, but there are certain improbabilities which cast some doubt on the genuineness of the document. It is stated that the defendant was appointed *muthavalli* with the consent of Ghulam Mohammad who is alleged to have signed the document. From the stone inscription, a copy of which has been filed as Ex. B in the case, the mosque appears to have been built in 1849, and Ex. I is dated August, 1887. It is very improbable that Ghulam Mohammad was alive on that date and there is no reliable evidence of his having been alive on that date. The defendant was admittedly a minor of 12 or 13 in 1887 and it is hardly likely that a minor was appointed either as a *muthavalli* or Pesh Imam and under Mohammadan Law such an appointment would be invalid. Further, if Ghulam Mohammad had been alive, there is no necessity for Kasim Ali to make the appointment and the appointment could have been made by Ghulam Mohammad himself. Some of these improbabilities render it unsafe for any Court to act on it. If this document cannot be relied on, there is nothing to show how the defendant came to be appointed and was functioning as *muthavalli* and Pesh Imam. The probabilities are that he, being the daughter's son of Kasim Ali, was permitted by the congregation of Pudupet to do the duties of the said offices. There is no denying the fact that, at any rate from 1890 until 1918, for a period of nearly 30 years the defendant was managing the affairs of the mosque and collect-

ing subscriptions and making disbursements thereof and generally attending to the affairs of the mosque. He was also functioning as Pesh Imam. In 1918 the then circumstances necessitated a change of management of the mosque and it was thought desirable by the jamait or congregation of Pudupet to have the management put on a sound and legal basis. The main reason which apparently led to it was the trouble they had from the Hindu residents of the locality who wanted to put up a Bajana Mandir near the mosque in respect whereof a litigation was commenced, O.S. No. 484 of 1918 on the file of the High Court, Madras. The plaint in the said suit was filed on the 11th November, 1918. In view of this common danger everybody including the defendant conceived the idea of forming a society and getting it registered under the Societies Registration Act and vesting the management of the mosque in a governing body of the society. Accordingly a society was formed and registered under the name and style of Masjiday Mahmood Jamait Managing Committee with twelve members, the defendant being one of them. It was registered on 2nd December, 1918. The memorandum of association is marked as Ex. A-2 in the case and the rules and bye-laws as Ex. A-3. It is clear from them that one of the main objects of the association was to conduct the affairs of the mosque by collecting subscriptions, pay the salaries of the servants and incur expenses for the upkeep of the mosque and do everything which a manager of a mosque is required to do. From the date of the incorporation down to the date of the suit the said society was in undisputed management of the affairs of the mosque and the defendant ceased to function as *muthavalli*. It was the society that was collecting subscriptions, paying salaries of the Pesh Imam, Muzzein Sahib and the sweeper and directing the performance of the services in the mosque and paying taxes, effecting repairs and generally doing everything which a manager or a *muthavalli* of a mosque would do. The defendant was only acting as a Pesh Imam under directions given by the society from time to time and he or his son was for sometime acting as a bill collector. In or about June, 1932, misunderstandings arose between the defendant and the Secretary of the Society, apparently due to the fact that the Shafi element in the Committee became predominant and wanted to control the institution. At the inception of the society and for some time thereafter the

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Committee members consisted of equal number of representatives from each of the two sects, namely, Hanafi and Shafi. In consequence of the preponderance of the Shafi element in the Committee, there seemed to have been some attempt at innovation in regard to the recitation of prayers which was resented by the Hanafi section to which the defendant belonged. Ultimately the disputes between the Committee members led to the resignation of the defendant from the membership of the society. He tendered his resignation on the 5th July, 1932 and began to dispute the authority of the Committee and purported to abolish it. It may also be noted that meetings and counter-meetings were held by the two factions in the Committee and one of the factions purported to call a meeting of the Jamait and abolish the Committee—*vide* Ex. XXXI. In consequence of these disputes the plaintiff had to file this suit because the defendant began to interfere in the management of the affairs of the mosque by asserting his powers as *muthavalli*. The defendant's case is that it was only with his consent that the society was formed and it could not have been constituted the sole and exclusive manager of the mosque in derogation of his right as *muthavalli*, that he was the duly constituted *muthavalli* and continued to be such. The society according to him was not a validly incorporated society and the initial registration thereof under Act XXI of 1860 was illegal and *ultra vires*; further he says that, as the Committee had been abolished, even if he ceased to function as *muthavalli* during the period the Committee was in management, his powers of *muthavalli* never terminated and therefore he could function as such and nobody has any right to interfere with his management. He further submits that the Committee has also become defunct because the original members who formed the society are all dead and they have not been validly replaced. The plaintiff's case is that the society is a duly incorporated body and that the defendant not having exercised the management for a period of six years from 1918 his rights as *muthavalli*, if any, were lost, that he accepted the subordinate position of a servant under the mosque while continuing to be a member of the Committee and that he is estopped from questioning the right of the plaintiff to manage the mosque. On the evidence the learned City Civil Judge came to the conclusion that the plaintiff society was properly registered under Act XXI

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of 1860, that the defendant lost his rights as *muthavalli* and that the plaintiff would therefore be entitled to the injunction prayed for.

The main ground on which Mr. Rajah Aiyar the counsel for the defendant-appellant assailed the decision of the learned City Civil Judge is that the plaintiff society is not competent to sue for or claim the relief sought in the plaint. He formulated his contention thus: (1) the society was a religious society and therefore incapable of incorporation under the Societies Registration Act as only charitable societies could be incorporated thereunder; and (2) even if the society was a validly incorporated society it could not acquire by prescription the office of *muthavalli*, as the right of a *muthavalli* is a personal right which the *muthavalli* is incapable of surrendering or relinquishing and the defendant never divested himself of it. In regard to the first contention Mr. Rajah Aiyar submits that both according to the preamble and S. 20 of Act XXI of 1860, it is only a society formed for a charitable purpose that could be validly registered under the Act, that the plaintiff's society was formed for a religious purpose, namely, the management of the affairs of the mosque and that the purpose being solely religious, the society can in no sense be considered to be a society formed for a charitable purpose or a charitable society within the meaning of the Act. He was frank enough to bring to our notice a decision of the Allahabad High Court reported in *Anjuman Islamia of Muttra* v. *Nasir-ud-din*[1], which is against the view he is contending for. That was a case of a religious society called the Anjuman Islamia of Muttra registered under Act XXI of 1860. It was contended in that case that the registration of the society was not legal because it was a society formed for religious purposes and not for charitable purposes. This contention was negatived and it was held that a society for religious purposes would ordinarily be a society for charitable purposes and the society in question was a society for charitable purposes and therefore the registration of the said society was legal. Mr. Rajah Aiyar however submitted that that case proceeded upon a view which is not tenable, namely, that the Indian Legislature made no distinction between religious and charitable purposes. In support of his contention that this view is erroneous he referred to a number of statutes framed by the

1. (1906) I.L.R. 28 All. 384.

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Indian Legislature subsequent to 1860 where the Legislature drew a distinction between charitable and religious purposes in drafting for the purpose of those enactments. The question therefore for our decision is whether the plaintiff society is a charitable society or a society formed for charitable purposes within the meaning of Act XXI of 1860. We are not sure that the Legislature in using the word 'charitable' in the Act meant to draw a distinction between a charitable purpose and society and a religious purpose and society. The Act was passed in 1860 when according to English Law a gift for the advancement of religion or promotion of public worship or providing or maintaining a place of public worship would be a charitable purpose and a society formed for such a purpose would be a charitable society. According to that law therefore a religious society would be a charitable society, the only condition required was that it should be for the benefit of the public. Most of the enactments relating to that period were framed by English lawyers well conversant with English law. The Indian enactments which related to the charitable and religious endowments before 1860 were the Bengal, Bombay and Madras Regulations, the Madras Regulation being Regulation VII of 1817. In the heading of the Madras Regulation, the language used is "for the support of the mosques, Hindu temples and colleges or other public purposes" and in the preamble "for the support of mosques, Hindu temples, colleges and choultries, and for other pious and beneficial purposes." It will be seen from the context that the words 'public' and 'pious' were meant to connote both religious and charitable institutions. In 1817 according to the law of England public purposes connoted charitable purposes including religious purposes and the word 'pious' was not confined purely to religious purposes because religious purposes were one class of charitable purposes. (Vide *Commissioners for Special Purposes of Income-tax* v. *Pemsel*[1].) No doubt in statutes enacted subsequent to Act XXI of 1860 the legislature used both the words 'charitable' and 'religious' but the definition of those words was expressly stated to be for the purpose of those Acts. The subsequent legislation could hardly therefore be a guide for the interpretation of the term 'charitable' in Act XXI of 1860. The question is,

1. (1891) A. C. 531 at 558, 559.

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what did the term mean in 1860? We however think it unnecessary to go into the question whether an exclusively religious purpose is a charitable purpose and whether a society formed for such a purpose would be a charitable society within the meaning of the Act because in our opinion where a society is formed for certain purposes whose paramount object is charitable, the fact that some of the purposes may not be strictly charitable but religious would not render the society any the less a charitable society, if the purpose was one intended to benefit the public or a considerable portion of the public. In the present case the objects of the society are outlined in paragraphs 2 and 3 of Ex. A-2 thus:

"Towards the expenses for conducting all the affairs of the said Masjiday, the jamaitdars capable of giving subscriptions for ever, must pay subscriptions for the maintenance of Masjiday.

From the amount of the subscriptions received from the jamaitdars the expenses mentioned in columns 1 and 2 should be met with, and the remaining balance amount should be utilised for the propaganda of Islamic education, for rendering possible pecuniary help to the poor, mussafars and worthy Alims and Ulemas, for removing their difficulties, for other necessary and proper charities, settled then and there by Hanafi and Shafi and for conducting all affairs and for purchasing immovable properties for the perpetual maintenance of the said Masjiday.";

It cannot be denied that the improvement of Islamic education and rendering pecuniary help to the poor mussaffars, etc., are charitable purposes. The fact, that one of the objects of the society was also to conduct the affairs of the mosque which does not involve the performance of any religious service by the members of the society cannot render the society, a society formed for religious purposes. The society concerns itself only with the management of the secular affairs of the institution. So far s religious services are concerned which only consist in the recitation of prayers in the mosque, they are done through the Pesh Inam who is paid a salary. What the society does is what exactly a *muthavalli* could have done and a *muthavalli* is only concerned with the management of the secular affairs of the mosque. The society itself does not concern itself with the performance of prayers. There can therefore be no doubt that the paramount object of the society is charitable and therefore the fact that one of the purposes is the management of the affairs of the mosque cannot take away from it the character of the society as a charitable society. We are therefore of the opinion that the plaintiff's society is a charitable society within the meaning of the Act and the registration thereunder is perfectly legal and valid.

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In regard to the second point that the plaintiff's society has not acquired right of management we are equally of the opinion that it is also untenable. A *muthavalli* according to Mahomedan Law is only a manager or a superintendent of a religious institution. As already pointed out, he administers the temporal affairs of the institution. His liability is that of a trustee. A *muthavalliship* can be held by a single individual or two or more individuals, *Mahomed Ghouse Siddikh* v. *Sheik Moideen Siddikh*[1], or by a body of persons constituting a Committee. (*Vide* Tyabji's Mohammadan Law, 2nd Edition, S. 499 at p. 607). In the *Advocate-General of Bombay* v. *Moulvi Abdul Kadir Jitaker*[2], a committee of ten persons was entrusted with the management of a mosque with rules framed to fill up vacancies on the death or removal of any one of them. Therefore there is nothing to prevent an incorporated body performing the functions of a *muthavalli*. A corporation can be a trustee of a charity. (*Vide* Tudor on Charities, page 284.) It is conceded by Mr. Rajah Aiyar that the right of *muthavalli* can be . . . . lost by adverse possession. There can be no doubt in this case that the defendant has lost his right. It is also not disputed by Mr. Rajah Aiyar that the right to manage a religious institution is a right which is recognisable and enforceable in a Court of law. Such a right can be acquired by prescription. The plaintiff society, having been for a period of 14 years in undisputed management of the mosque in derogation of the right of the defendant must be deemed to have acquired the said right. Having surrendered his right in favour of the plaintiff and lost it, the defendant is not entitled to interfere with the plaintiff's management. (Vide *Jamiat Dawat* v. *Mohammad Sharif.*)[3]

Another contention that was advanced was that the society must be deemed to have become defunct because most of the original members died and there is no rule providing for filling up vacancies in case of death. It was contended that the only rule for filling up vacancies was r. 6 which does not provide for the contingency of death. We are not inclined to agree with

1. (1913) 18 M.L.T. 48 at 53.
2. (1894) I.L.R. 18 Bom. 401.
3. A.I.R. 1938 Lah. 869 at 877.

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this contention. R. 6 runs thus:

"At the desire of two-thirds of the members of the Committee, and on a motion made by one jamaitdar and seconded by the others, the Committee shall have power to remove one person from one of such sides and appoint another person in his place."

What is contended is that this only confers power of removal and appointment in the vacancies resulting from that removal. It seems to us that the principle underlying this rule is that a power is vested in the Committee to co-opt members who are liable to be removed, no matter for what cause; it may be death. In fact from time to time vacancies were filled up and the Registrar of the Joint Stock Societies was informed of the change in the membership. The defendant himself was a party to several resolutions filling up vacancies in case of death. We must presume that it was done in pursuance of the power conferred on the Committee by r. 6. We must therefore overrule this contention also.

Lastly it was urged that the understanding come to when the society was formed was that equal numbers of Shafis and Hanafis should be members of the Committee but now the Shafi element preponderates and dissensions have arisen which if allowed to continue would be the ruin of the society and it was contended that there is no provision in the rules as to what should be done in case of dissensions and how the matter should be regulated. All these are matters with which we have no concern. They may be properly agitated before the learned Judge who would be trying the suit which has been filed under S. 92 for framing a scheme for the proper management of the mosque. It is open to the learned Judge to take note of all the facts and circumstances and consider whether it would be in the interest of the mosque that this society should be allowed to continue in management or whether any scheme should be framed vesting the management in a committee of individuals instead of in an incorporated society. (*Vide* Tudor on Charities, p. 581.)

In the result the appeal fails and is dismissed with costs.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE VENKATARAMANA RAO.

M. M. Shahul Hameed Marakayar and others .. *Appellants* (Defendants 1 to 6 and 10, 11 and 12)*

v.

Kazi Mohammad Hussain Sahib and others .. *Respondents (Plaintiff and Defendants 7 and 9).*

Shahul Hameed Marakayar *v.* Kazi Mohammad Hussain Sahib.

Mahomedan Law—Mohammadan Mosque—Office of peish imam—*Registered society—Power of dismissal whether vesting in the comm ttee of the members of the mosque staff—Nature and the powers of the committee.*

In a mosque founded by a Muhammadan and financed from its inception by public subscriptions, a committee began to exercise the functions of *muthavalli* as a result of the action of the leading members of the congregation forming themselves into a registered society for the purpose of managing the affairs of the mosque and raising subscriptions to finance it. The plaintiff, one of the *peish imams* of the mosque was dismissed by the committee for having repudiated the authority by the committee. On the question whether such a disciplinary action over a *peish imam* of the mosque was permissible under the circumstances,

Held, that in spite of the surrender originally of the functions of *muthavalli* by the plaintiff himself to the committee, as alleged, it could not vest the committee with a power of dismissal over the plaintiff, which he himself could not have exercised.

The committee having been an independent self-constituted society owing no formal allegiance to any general body, it could not therefore have any disciplinary powers over the staff of the mosque by force of the Mohammadan Law.

Ameer Ali 'Mahomedan Law' (4th Ed.), p. 465, referred to.

Moreover there having been no acquisition during the period in which the committee had been functioning of a power to dismiss a *peish imam* of the mosque, the committee was not clothed with such a power. The plaintiff was entitled to restrain the committee by injunction which he sought of the Court.

Appeal against the decree of the Court of the Additional City Civil Judge, Madras, in O. S. No. 651 of 1936.

P. Viswanatha Aiyar and *S. K. Ahmed Meeran* for Appellants.

C. Srinivasachari and *C. A. Muhammad Ibrahim* for Respondents.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This appeal arises out of a suit brought by the first respondent for an injunction restraining the defendants

* C. C. C. A. No. 39 of 1937. 6th September, 1939.

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(appellants) from interfering with him in performing his services as *peish imam* in the Masjiday Mahmood, Pudupet, Madras. He also prayed for damages. The suit was decreed and the defendants appeal.

We are this day passing judgment in a connected appeal (C. C. C. A. No. 36 of 1935 *Muhammad Hussain* v. *M. M. J. Managing Committee, Pudupet*[1]) from a suit brought by the present defendants against the present plaintiff for an injunction restraining him from interfering with the defendants' management of the same mosque and from collecting subscriptions in the guise of *muthavalli* of that mosque. It is alleged that the Pudupet Mosque was founded by one Ghulam Mohammad in 1849 and has been financed from its inception by public subscriptions. It was founded to serve the needs of the Mohammadans living in the neighbourhood of Pudupet. The first *muthavalli* was the maternal grandfather of the plaintiff. The plaintiff bases his title to the offices both of *muthavalli* and *peish imam* on what is called a *towliatnama* (Ex. I) of the year 1887 in which the plaintiff's grandfather purports to assign to the plaintiff the offices of *muthavalli* and *peish imam.* The instrument purports to be attested by Ghulam Mohammad, the original founder of the mosque. The lower Court has given various reasons for rejecting this document as a forgery. Besides those reasons set forth by the learned Judge, there are two circumstances which in our opinion go to confirm this conclusion. One is the improbability that Ghulam Mohammad who founded this mosque in 1849 would have been alive in 1887. There is of course no evidence of his death, but ordinarily the founder of a mosque would be a man of some standing in the community and it is unlikely that in 1849 he was very young. Even if he was in early middle age, it is hardly probable that he would have been alive 38 years later. The more decisive circumstances is the fact that the plaintiff at the time of his *towliatnama* appears to have been only about 12 years old and it is not very probable that the offices of *muthavalli* and *peish imam* would have been conferred upon an immature boy. The probability therefore seems to be that this document is not genuine.

In our opinion, however, this does not seriously affect the plaintiff's case, for it is common ground that the plaintiff did

1. (1940) 2 M.L.J. 436: I L.R. 1940 Mad. 671.

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exercise the functions of ***muthavalli*** and ***peish imam*** of this mosque without challenge to his title for very many years up to the year 1918, when the leading members of the congregation including the plaintiff himself formed themselves into a registered society for the purpose of managing the affairs of the mosque and raising subscriptions to finance it. It is indubitable that this society known as the Masjiday Mahmood Jamait Managing Committee was in control of the business affairs of the mosque from 1918 until the quarrels started in 1932. During this period it appears that the office of ***muthavalli*** was treated as having lapsed, the function of the ***muthavalli*** being performed by the Committee. The plaintiff, though he ceased to describe himself as the ***muthavalli*** and ceased to exercise the functions of that office, continued to be one of the two ***peish imams*** of the mosque and in that capacity he was paid a salary by the Committee. He also functioned for a considerable period as the Assistant Secretary of the Committee and received additional emoluments for that office. In 1932 quarrels began and the plaintiff resigned from the Committee and repudiated its authority. He also attempted to revive the office of ***muthavalli*** which he had not in fact exercised for a period of about 14 years. In the connected appeal we have held that the Jamait Committee, whatever be the defects of its original constitution, has prescribed for the right to manage the secular affairs of the mosque and to perform those functions which had hitherto been performed by the ***muthavalli*** and that it is not open to the present plaintiff to revive the lapsed office of ***muthavalli*** by virtue of which he claims the right of exercising those functions which have in effect been established as the legitimate functions of the Jamait Committee.

It is contended for the appellants in the present appeal that once their Committee is recognised as the legitimate successor of the ***muthavalli*** with his powers of control over the mosque and its servants, it follows that the Committee has the right to dismiss the plaintiff from his office of ***peish imam*** of the mosque; and that the plaintiff having repudiated the authority of his master, there can be no question as to the propriety of his dismissal. It seems to us that this argument overlooks the weakness of the position of the Committee based as it is on prescription. It does not appear that any powers were conferred upon the Committee at its inception otherwise than by the

general consent of the congregation of the mosque including the plaintiff himself. The nature of the objects with which this Committee started its work can be ascertained from its memorandum of association. Quite clearly it was intended firstly to collect subscriptions for the maintenance of the mosque and secondly to pay the expenses of the Committee and of the mosque and utilise any balance for religious, educational and charitable purposes connected with the mosque and for the creation of endowments for the mosque. The rules purport to carry out these objects, but do not expressly confer upon the Committee any disciplinary powers. The proceedings of the Committee throughout the following years indicate that the Committee has exercised a general control over the servants of the mosque including the two *peish imams*, has required that they should not absent themselves without leave, has reproved them for unpunctuality and has paid the wages and when subscriptions were insufficient to meet the wages, has decided on the proportionate reductions. There is a record of the removal from service of an acting muazzin, but even that is not clearly shown to have been a disciplinary act. Taking the history of this period as shown in the records, it must be conceded that there is no instance of an assertion by the Committee of a right to punish the *peish imam*, though there are instances of the exercise of a general supervision over him along with other servants.

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It is contended that if the Committee has power to supervise and control, it must necessarily have a power of dismissal in case its authority is flouted. It is doubtful whether this proposition is sound. The *peish imam* was certainly not appointed by this Committee. Whatever be the origin of the plaintiff's appointment, he had certainly been in unquestioned enjoyment of the office of *peish imam* for very many years before the Committee came into being. Although the Committee took over the functions hitherto exercised by the *muthavalli*, it never described itself as a *muthavalli* of the mosque and there are obvious difficulties in asserting that the surrender by the plaintiff himself of the functions of *muthavalli* to the Committee automatically invested this Committee with the power of dismissal of the *peish imam*. Doubtless it is customary in many mosques for the *muthavalli* to exercise full disciplinary powers over the servants of the mosque. But this power cannot have

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vested in the *muthavalli* of the suit mosque, for the *muthavalli* was himself the *peish imam* and it is absurd to contemplate the exercise of the power of dismissal by the individual who is himself liable to be dismissed. It seems therefore necessary to postulate that at the time when the plaintiff was the *muthavalli*, the disciplinary control over him in his capacity of *peish imam* must ultimately have resided elsewhere, whether in the congregation as a whole or in the descendants of the founder or in the Court as representing the Kazi. The natural conclusion therefore is that the surrender by the plaintiff of his functions as *muthavalli* to the Committee cannot have invested that Committee with a power of dismissal over the plaintiff, which he as *muthavalli* could not have exercised.

Ameer Ali in his Mohammadan Law (4th Edition, p. 465) states that in the absence of a *muthavalli* the power of nomination and appointment of an *imam* to a mosque is given to the wakif's descendants and the members of his family preferentially to others. At p. 467 it is suggested that if the person appointed by the wakif is incompetent or unfit, the congregation have a right to select a more fit person but with the proviso that an application will have to be made to the Kazi for the removal of the incompetent servant and the appointment of the person selected by the congregation. Now, in this case though the Committee has doubtless for many years functioned with the consent and approval of the congregation, it is not constitutionally a representative body acting for the congregation, but an independent self-constituted society owing no formal allegiance to any general body. It cannot therefore have any disciplinary powers over the staff of the mosque by the force of Mohammadan Law. Any powers which it has must have been acquired by prescription or by grant. There is no evidence of any valid grant of powers to this Committee. The extent of its powers must therefore be governed by the extent to which it has established those powers by the exercise of them during the fourteen years during which those powers were unquestioned. There having been no acquisition during this period of a power to dismiss a *peish imam* of the mosque, the necessary conclusion is that the Committee is not clothed with such a power.

It is contended that the absence of such a power will make the proper control of the mosque impossible. The answer to that contention is that there is now pending a suit for framing

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a scheme for the proper control of the mosque in which any defects in the system whereunder it is administered can be put right. For the present we are onlv concerned with the powers of the parties as they stood at the time when these disputes began. Our conclusion must be that the plaintiff was in lawful possession of the office of *peish imam* and was entitled to perform its functions and receive its emoluments and that the defendants were not clothed with any authority to remove him from that office.

It follows therefore that the dismissal of the plaintiff was without authority and that the plaintiff is entitled to the injunction which he seeks. It is represented that the plaintiff does not press for the nominal damages of Rs. 25 awarded by the trial Court. The decree will therefore be modified by the exclusion of the relief of damages. In other respects the appeal is dismissed with costs. We desire to observe that this judgment in no way affects the relation between the Committee and the other *peish imam* who is not a party.

K. C. *Appeal dismissed but decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Puthanveettil Cheeru .. *Appellant** (*Petitioner*)

v.

Chenenkeel Punnoron Chathu Nambiar and another .. *Respondents* (*Respondents*).

Cheeru *v.* Chathu Nambiar.

Madras Agriculturists' Relief Act (IV of 1938), S. 15—Assignee from original tenant not personally liable for rent prior to assignment to him—If entitled to benefit under S. 15.

The appellant was an assignee of the original tenant and in a claim for arrears of rent by the lessor he claimed that by his payment of the rent due for Faslis 1346 and 1347 all the arrears were wiped out under S. 15 of Act IV of 1938.

Held, though the arrears are not payable personally by the assignee he can take full advantage of S. 15 and an assignee is in no worse position than an original lessee.

Appeal against the order of the District Court of North Malabar dated 7th January, 1939 and made in A. S. No. 237 of 1938 preferred against the order of the Court of the District Munsif of Badagara dated 8th August, 1938 and made in R. I. A. No. 344 of 1938 in O. S. No. 673 of 1937.

C. K. Viswanatha Aiyar for Appellant.

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* C. M. S. A. No. 14 of 1939. 24th July, 1940.

Cheeru v. Chathu Nambiar.

P. Govinda Menon for Respondents.

The Court delivered the following

JUDGMENT.—This appeal relates to a claim for arrears of rent by the respondent and a claim by the present tenant (the appellant) that by his payment of the rent due for Faslis 1346 and 1347 all those arrears have been wiped out under S. 15 of the Madras Agriculturists' Relief Act. The appellant was not the original tenant but an assignee from him in 1936. The question is whether the arrears of rent claimed by the respondent are 'rent payable' by the appellant. It is true that appellant is not personally liable to pay rent for the period before the assignment to him, but it is to my mind clear that, apart from the Agriculturists' Relief Act, respondent could in the final accounting between himself and appellant insist upon the appellant's paying him the whole of the arrears as a set off against whatever might be payable to appellant as compensation for his improvements. In a very real sense therefore the whole of the arrears is 'payable' by appellant; and I cannot accept respondent's further argument that money claimed by him as rent and payable by appellant ceases to be rent when he pays it merely because he was never personally liable to pay it. I am of opinion that S. 15 of the Act is a section of which the appellant can take full advantage and regard it as clearly in accordance with the policy of the Legislature that an assignee should be in no worse position in this respect than an original lessee. The appeal will be allowed and the order of the District Munsif restored with costs throughout.

Leave to appeal granted.

K. S. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—LORD THANKERTON, LORD JUSTICE GODDARD AND MR. M. R. JAYAKAR.

P.C.

Thakur Bhagwan Singh v. Bishambhar Nath.

Thakur Bhagwan Singh and others .. *Appellants**

v.

Bishambhar Nath (minor) and others.. *Respondents.*

Hindu Law—Debts—Mortgage by father—Suit against father and sons—Plea that mortgage was not supported by consideration—Legal necessity—Onus of proof.

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* P. C. Appeal No. 24 of 1938. Allahabad Appeal No. 15 of 1936. 2nd May, 1940.

P.C.

Thakur Bhagwan Singh *v.* Bishambhar Nath.

In a suit to enforce a mortgage by a Hindu father against the father and his sons,

Held, the onus of proof on the question whether there was consideration or whether the full consideration stated in the mortgage had in fact passed is wholly on the defendants and it is not for the plaintiffs to prove this matter affirmatively; on the other hand when the question is whether there was legal necessity for the borrowing, the onus of proving that there was is on the plaintiffs.

C. Sidney Smith for Appellants.

L. P. E. Pugh and *T. B. W. Ramsay* for Respondents.

2nd May, 1940. Their Lordships' judgment was delivered by

Lord Justice Goddard.

LORD JUSTICE GODDARD.—This is an appeal from a judgment of the High Court of Allahabad dismissing an appeal by the present appellants and allowing an appeal by the first three respondents from a judgment of the Subordinate Judge of Agra. The action was brought to recover Rs. 44,000 the principal sum secured by a mortgage dated 17th August, 1924, with interest thereon at 5½ per cent. This mortgage was in fact the last in a series by way of renewal of an original mortgage dated 22nd July, 1892, whereby Durjan Sal, the father of the first appellant and great grandfather of the second and third appellants, had mortgaged some of his ancestral lands to one Bhoraj the father of the fourth respondent, for Rs. 25,000. The consideration for the mortgage is stated in the deed to be the discharge of two promissory notes with interest amounting to Rs. 6,221-8-0 and Rs. 18,778-8-0 cash, for payment of a debt due under a bond. On the same day the mortgagor executed a bond for Rs. 2,000 payable in two years in favour of the mortgagee. This mortgage was renewed on 26th April, 1895, again on 29th July, 1910 and finally on 17th August, 1924, by the mortgagee which is the subject of the present suit. The execution and completion of the original mortgage and the receipt of Rs. 6,221-8-0 were admitted by the mortgagor in the presence of the Sub-Registrar, who certified that the cash payment of Rs. 18,778-8-0 and the two promissory notes were given to the mortgagor in his presence. Between August, 1912 and January, 1917, various payments, four in all, were made on account of interest due on the mortgage. On 30th September, 1932, the respondent Khetpal in whom the mortgage was then vested assigned all his rights therein to the father of the first and third respondents.

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Seven issues were framed, but for the purpose of the present appeal, only the first is material and was the only one argued, namely: "Was the bond in suit executed for consideration and is it not binding on the defendants?" The case made for the defendants was that the original mortgage was not made for any legal necessity, but to procure money to enable the mortgagor to pursue a course of immoral living and debauchery, and that the true consideration was not Rs. 25,000 in as much as the promissory notes were merely fictitious documents, the sum of Rs. 6,200 never having been advanced at all, nor had the Rs. 2,000 ever been paid to the mortgagor. The Subordinate Judge found against the defendants on their plea as to there being no legal necessity for the borrowing, and his finding on that point was upheld by the High Court and is not now the subject of appeal. But the Subordinate Judge held that the sum of Rs. 6,221-8-0 never was advanced on the promissory notes and that there was no consideration for the bond for Rs. 2,000, and there was thus a failure of consideration to the extent of those two sums. He accordingly granted a decree for the amount of the principal and interest less these two sums, and, having recalculated the interest, he deducted in all Rs. 25,488. On this point the High Court reversed the learned Subordinate Judge and granted a decree for the full amount claimed.

Now there seems to have been some misunderstanding as to the onus of proof in this case. In their judgment the High Court said: "We are of opinion that the burden of showing that consideration had passed under the mortgage of 1892 had been discharged by the plaintiffs and the defendants did not produce any satisfactory evidence to show that the money was returned to the mortgagee". But in the opinion of their Lordships the onus of proof on the question whether there was consideration, or whether the full consideration stated in the mortgage had in fact passed, is wholly on the defendants and it is not for the plaintiffs to prove this matter affirmatively; on the other hand when the question is whether there was legal necessity for the borrowing, the onus of proving that there was is on the plaintiffs. Now the only evidence that part of the consideration stated in the mortgage was not in fact paid, was that of a witness named Ganesh Prasad, a man, 73 years old, formerly in the service of the mortgagor, who stated that he

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had been present when the transaction was completed. In substance he deposed to three matters, firstly as to the immoral life of the mortgagor; secondly that the money which the Sub-Registrar certified was paid over to the mortgagor in his presence was never paid at all and thirdly that the Rs. 2,000 secured by the bond for that amount was produced in two bags and given by the Sub-Registrar to the mortgagor who did not keep it but returned it to the mortgagee. The learned Subordinate Judge rejected this witness's evidence on the first two matters to which he deposed and accepted it as to the Rs. 2,000. The High Court rejected this witness's evidence entirely and their Lordships do not think it necessary to add anything to the reasons they gave for so doing as it is obvious that no reliance could be placed upon it. So far as the fictitious character of the two promissory notes was concerned, there was really no evidence of this at all, but the learned Subordinate Judge appears to have based his findings on certain circumstances which appeared to him suspicious and which need not be set out in detail because even if they gave rise to suspicion there was no evidence which would justify a finding that the sums secured by the notes had not in fact been paid. Ganesh Prasad's evidence having been rejected as untrustworthy there was nothing left in the case, and it was really unnecessary for the plaintiffs to have called any evidence on the issue as to consideration, for, as has already been pointed out, the burden of proof was entirely on the defendants. Not only did they wholly fail to discharge this onus, but the evidence which was called by the plaintiffs was indeed overwhelming. Had the defendants led any evidence sufficient to shift the onus of proof, that produced by the plaintiffs would, in their Lordships' opinion, have afforded a complete answer.

The second appellant who was a minor when the suit was heard has presented a petition asking that the case might be remitted for rehearing. He bases his application on the ground that his guardian was negligent in failing to make proper inquiries into the facts of the case and to procure evidence to prove that a part of the money was borrowed for gambling in litigation, and for immoral purposes, in not taking steps in time to procure the examination of the first defendant and in failing to apply for a summons for the production of the mortgagee's account books. Both the petition and the affidavit in support are in the vaguest possible terms.

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There is not the smallest indication of the identity of the witnesses whom it is alleged might have been called, nor to what they could have deposed if they had been. The first defendant deliberately abstained from giving evidence and to pretend that it was the duty of the guardian to have forced him to testify is fantastic. Nor is there any substance in the complaint as to the mortgagee's account books more especially as during the case the defendant Khetpal, who ought to have had them had there been any, swore they were not in existence.

It is impossible to entertain an application for re-trial on such vague and unsubstantial grounds as these.

In the result their Lordships will humbly advise His Majesty that both the appeal and the petition should be dismissed. The appellants will pay the costs of the respondents Nos. 1 to 3 (plaintiffs), who alone appeared.

Solicitors for Appellants: *Douglas Grant and Dold.*

Solicitors for Respondents: *T. L. Wilson & Co.*

K. S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE ABDUR RAHMAN.

Chinni Venkatachalam Chetti .. *Appellant** (*Plaintiff*)

v.

Athivarapu Venkatrami Reddi .. *Respondent* (*6th Defendant*).

Venkatachalam Chetti v. Venkatrami Reddi.

Mortgage—Mortgage of crops—Incidents—Rights of mortgagee.

Under S. 3 of the Transfer of Property Act immovable property does not include growing crops. Therefore deeds of mortgage in respect of produce on the land will operate as a mortgage of movable property which is valid under the Indian Law. The moment the crop comes into existence the mortgagee gets title to the crop in equity.

No person who takes an assignment with notice of such mortgage can defeat the mortgagee's title to the crops or its value deposited in Court by a receiver appointed at the instance of the mortgagee in his suit on the mortgage.

Appeal against the decree of the Court of the Subordinate Judge (Additional) of Nellore dated 25th January, 1937 and passed in O. S. No. 138 of 1936 (O. S. No. 33 of 1936, District Court, Nellore).

* Appeal No. 253 of 1937. 26th April, 1940.

Venkatachalam Chetti v. Venkatrami Reddi.

V. Govindarajachari for Appellant.

M. S. Ramachandra Rao and *D. R. Krishna Rao* for Respondent.

The judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.—This appeal arises out of a suit to enforce two deeds of mortgage dated 24th June, 1924 and 24th April, 1930, executed by the deceased father of defendants 1 to 3 to the plaintiff. Both the deeds of mortgage not only gave security to the plaintiff over the immovable property comprised therein but also over the produce realised therefrom every year. The operative portions in the deeds of mortgage run thus:

"The produce realised therefrom every year have been hypothecated to you."

The question for decision in this appeal is whether the plaintiff is not entitled to enforce his mortgage security over a sum of Rs. 364 which was deposited into Court during the pendency of the suit being the net sale proceeds of the crops of Fasli 1345 on lands which are items 1, 2, 8, 9, 10 and 11 of Schedule A to the plaint comprised in the deeds of mortgage. The question arises in this way. On the 14th of May, 1933, the father of defendants 1 to 3 executed a registered lease deed of the said lands in favour of defendants 7 and 8 for a period of five years commencing from Fasli 1343. The rent reserved thereunder was 10 putties of paddy and 80 bundles of hay worth Rs. 10. The sixth defendant in execution of a money decree obtained by him against defendants 1 to 3 as representatives of their father in O. S. No. 149 of 1934 on the file of the District Munsif's Court of Nellore attached the immovable properties, which were comprised in the deeds of mortgage. Objections were raised as regards the sale of the properties in pursuance of that attachment and the matter was compromised by the mother of defendants 1 to 3 executing a deed of transfer of the said lease in favour of the sixth defendant for the unexpired period of three years in satisfaction of his decree and the sale and other proceedings were stayed. The deed of transfer is dated 24th September, 1935. The sixth defendant full well knew that the property comprised in the lease deed was subject to the two mortgages in favour of the plaintiff because it was distinctly recited in the counter-affidavit filed by the guardian of defendants 1 to 3 objecting to the sale that the property was subject to two mortgages in favour of the plaintiff. The plain-

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tiff also obtained a money decree against defendants 1 to 3 in S. C. S. No. 117 of 1934 on the file of the District Munsif's Court of Nellore in respect of an unsecured debt due by their father and in execution of that decree attached the standing crops on the lands which were the subject-matter of the lease. Two claim petitions were put in, one by the tenants, defendants 7 and 8 and the other by the sixth defendant. Both the claims were allowed on the ground that the possession of crops was not with the plaintiff. The crops were thereafter harvested and before they could be removed they were again attached by the eleventh defendant in execution of a money decree. The plaintiff filed the present action and applied for the appointment of a receiver to take possession of the said crops. By an order dated 7th July, 1936, the crops were directed to be sold and after meeting certain outgoings the balance was directed to be deposited into Court and from and out of the amount so deposited defendants 7 and 8 were asked to take their lessees' share. It is with respect to the remaining amount that a controversy has arisen between the plaintiff and the sixth defendant. Under both the deeds of mortgage the plaintiff is given security over the produce. Under S. 3 of the Transfer of Property Act immovable property does not include growing crops. Therefore the deeds of mortgage will operate in respect of the produce on the land as a mortgage of movable property. Under the Indian Law there can be a valid mortgage of movable property. (Vide *Misri Lal* v. *Mozhar Hossain*[1].) The moment the crop comes into existence the mortgagee gets title to the crop. The principle of law that is usually applied is that enunciated by Jessel, M.R., in *Collyer* v. *Isaacs*[2], namely:

> "A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign them becomes a complete arrangement."

This principle was applied in a case reported in *Baldeo Parshad Sahu* v. *A. B. Miller*[3], where the validity of a mortgage of the produce of a factory, namely, indigo cakes that were manufactured, came into question. The learned Judges Brett and Mitra, JJ., referring to *Collyer* v. *Isaacs*[2], observed thus:

> "The property hypothecated was the indigo cakes manufactured every season by the Pupri Indigo Factory from the crops grown on the lands of

1. (1886) I.L.R. 13 Cal. 262.
2. (1881) 19 Ch. D. 342.
3. (1904) I.L.R. 31 Cal. 667.

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the factory from the date of the mortgage deeds, until such time as the total mortgage money with interests and costs of Court shall be paid by the mortgagor."

They held in that case that the title secured under such mortgage would prevail over the title of a purchaser under a later mortgage of the said cakes. The facts of that case were as follows: On the 22nd September, 1891, there were two mortgages executed of the factory and its produce by the proprietor Mr. Wilson in favour of one Chowdhry Mahadeo Pershad who obtained decrees thereon and thereafter assigned his interest in those decrees to Messrs. Moran & Co. Messrs. Moran & Co. subsequently became bankrupt and the interest of the firm was represented by the Official Assignee. In 1896 Mr. Wilson mortgaged only the indigo cakes to be manufactured in 1895 and 1896 and in 1896 and 1897 to the plaintiffs who were aware of the prior mortgage in favour of Chowdhry Mahadeo Pershad. Subsequent to the date of the mortgage in 1896 Mr. Wilson made over to the plaintiffs in that case a quantity of indigo cakes manufactured in 1896 and 1897. The Official Assignee intervened and claimed them and the question of title was made the subject-matter of a legal proceeding. Pending the adjudication the cakes were sold and the money was brought into Court. It was held that the Official Assignee was entitled to the money in preference to the plaintiffs. The ground on which the learned Judges decided is thus put:

"We think that it is clear that where, as in this case, there were mortgages to the creditor of property which was to come into existence in future, and when the creditor had already paid the consideration, the property, that is to say, the indigo cakes, were bound from the moment that Mr. Wilson acquired them, and from that moment he became the trustee of the property for the creditor, who as *cestui que trust* acquired an equitable estate or interest in the property. The delivery after acquisition of the cakes to the plaintiff's servant, if there was in fact such a delivery, could not have destroyed the equitable interest of Messrs. Moran & Co. already existing in them, unless indeed the plaintiffs were *bona fide* transferees for value without notice."

It seems to us that the principle of this decision would apply to the present case. The sixth defendant took the assignment with notice of the mortgages in favour of the plaintiff. The standing crop on the land before it was removed was claimed by the plaintiff. Therefore the plaintiff's title to the moneys in Court must prevail over that of the sixth defendant.

But it is contended by Mr. Ramachandra Rao that so long as the plaintiff as mortgagee did not take possession of the

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crop, the mortgagor would be entitled to deal and dispose of it and in this case as the mortgagee never interfered with the possession of the mortgagors the sixth defendant was entitled to receive the rent from the crop and in lieu thereof its value in preference to the plaintiff and he relied on a case in Ex parte *National Mercantile Bank*: In re *Phillips*[1], where Jessel, M. R., stated that under the ordinary law prevailing in England rents and profits of land in mortgage belong to the mortgagor so long as he is allowed to remain in possession and therefore the mortgagor is entitled to sever the crops, which when severed became chattels under the deed and vested in his trustee in bankruptcy. It seems to us that before applying the principle of the English decision we must make note of the fact that in England the growing crop is treated as an interest in land and therefore immovable property. Jessel, M.R., recognises this in the decision relied on. A mortgage of land operates as an absolute conveyance of the property. But in India mortgages such as these in question in the suit do not operate as an absolute conveyance of the property mortgaged. Further the mortgagee is not entitled to possession of the property unless possession is stipulated for as in the case of a usufructuary mortgage. Having regard to these differences let us see how far the contention of Mr. Ramachandra Rao is well founded. Even in English Law in the case of a mortgage of a growing crop on the land a mortgagee is not entitled to claim the crop when it has been removed by the mortgagor but before removal if the mortgagor intervenes and claims it and takes appropriate proceedings, the mortgagee will become entitled to it. (*Vide* Fisher on Mortgage, 8th Edition, page 716.) In *Wilson* v. *Wilson*[2], Vice-Chancellor Malins defines the right of a mortgagee thus:

> "We know perfectly well that a mortgagee of land has a right, from the very day of his mortgage, to receive the rents. We also know that if he does not choose to enter into possession or give notice to the tenants, but regards his security as sufficient and allows the mortgagor to receive the rents, those rents can never be recovered back again as rents. The mortgagor has a continuing right to receive the rents until the right is intercepted by some action on the part of the mortgagee."

Here the mortgagee has really intercepted the sixth defendant from removing the crops. Again, the argument based on the question of possession is not sound. Even in English Law

1. (1880) 16 Ch. D. 104.
2. (1872) L.R. 14 Eq. 32 at 40.

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a distinction is drawn between a case of mortgage of chattels and a case of mortgage of lands. In Ex parte *Official Receiver*: In re *Morrit*[1], Cotton, L.J., in considering the exact rights of sale which a mortgagee of personal chattels possesses remarked thus:

> "A pledge of personal chattels as a rule is and must be accompanied by delivery of possession. It is out of the possession given him under the contract that the pledgee's rights spring . . . . A mortgage of personal chattels involves in its essence, not the delivery of possession, but a conveyance of title as a security for the debt."

Much more so in India where, as pointed out above, the plaintiff mortgagee will not be entitled to claim possession. His right is only to enforce the mortgage by suing for a sale of the property or by the appointment of a receiver to secure possession of it in order that his security may be realised. He applied for the appointment of a receiver before the crops were removed from the land and it was on this application for the appointment of a receiver that a consent order was made by which the crops were sold and the sale proceeds deposited into Court. It may be that so long as he allows the mortgagor to remove the crops and does not secure them during the year the crops were raised, he loses his right to them. His rights will not also prevail against a *bona fide* assignee from the mortgagor without notice of the mortgage in favour of the plaintiff. Therefore the case in 16 Ch. D. is not of much assistance to the sixth defendant.

In the result we set aside the judgment of the lower Court in this behalf and allow the appeal with costs Rs. 100 to be paid by the respondent in the appeal. He will pay back whatever costs were paid by the appellant to the respondent in the lower Court.

K. S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

T. P. Chandrasekara Aiyar .. *Petitioner** (*40th Defendant*)

v.

The Official Receiver, West Tanjore .. *Respondent* (*Decree-holder*).

Chandrasekara Aiyar *v.* Official Receiver, West Tanjore.

Madras Agriculturists Relief Act (*IV of 1938*), *S.* 3—"Jodi, kattubadi *and* poruppu *or the like*"—*If include payments for* "kaval", "*road-cess*" *and* "*water-cess*".

1. (1886) 18 Q.B.D. 222.

* C. R. P. No. 1257 of 1939. 23rd July, 1940.

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The petitioner admitted possession of eight villages in respect of which he pays as *jodi* Rs 6-4-0 only, though he pays approximately Rs. 72, Rs. 339 and Rs. 244, respectively for *kaval* fees, road-cess and water-charges. In an application for scaling down a debt by the petitioner claiming to be an agriculturist,

Held, in "*jodi, kattubadi* and *poruppu* or the like" the words 'or the like' must be taken to denote any other payment in the nature of quit rent on an inam, whatever be the names by which they are denoted and does not include charges for police (*kaval*), for roads, for water and similar dues levied for services rendered by the State or by a local authority. The petitioner is therefore an agriculturist.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the District Court of West Tanjore at Tanjore dated 7th July, 1938 and made in E. A. No. 149 of 1938 in E. P. No. 25 of 1934 in O. S. No. 3 of 1919.

S. Panchapakesa Sastri and *T. K. Sundararaman* for Petitioner.

K. S. Desikan for Respondent.

The Court delivered the following

JUDGMENT.—The only question for decision in this Civil Revision Petition is whether the petitioner can be deemed to be an agriculturist with reference to the definition in S. 3 of Madras Act IV of 1938. The objection raised was that he was the landholder of an estate in respect of which a sum exceeding Rs. 100 was paid as "quit rent, *jodi, kattubadi, poruppu* or the like." The learned District Judge has not given a precise finding as to the amount payable by the petitioner in respect of the eight villages of which he admits possession but has come to the conclusion that on his admissions the petitioner is disqualified from claiming to be an agriculturist. In the Memorandum dated 6th July, 1938, the petitioner has admitted possession of eight villages in respect of which he pays as *jodi*, Rs. 6-4-0 only, though he pays approximately Rs. 72, Rs. 339 and Rs. 244 respectively for *kaval* fees, road-cess and water-charges. The learned District Judge has lumped all these four charges together and has treated them as coming within the description of "quit rent, *jodi, kattubadi, poruppu* or the like", so as to disqualify the petitioner from claiming to be an agriculturist. I do not know the source from which the phrase just quoted was taken in drafting this Act, but a similar phrase is found in the Full Bench ruling of this Court reported at *Lakshmi-*

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narayana Pantulu v. *Venkatrayanam*[1], where Mr. Justice Subramanya Aiyar refers to "the amount of quit rent or *kattubadi, jodi, poruppu* or by whatever other name it may be known, payable by them to Zamindars or others under grants creating inams." Wilson's Glossary defines *jodi, kattubadi* and *poruppu* all as meaning quit rent; and it is, I think, a matter of common knowledge that in revenue parlance these four terms are used according to precedent or local custom without any appreciable difference in their significance, that is to say, all four terms denote quit rent on inams payable to a superior landlord or to the Government. When it is conceded that the four specified terms all mean quit rent, I think it follows that the phrase "or the like" must also be taken to denote any other payment in the nature of quit rent on an inam. If it had been the intention to take into consideration payments to Government for services rendered such as *kaval* fees, payments to local authorities for the maintenance of communications such as road-cess or payments to the Revenue Department for the supply of additional water such as water cess, the Legislature would have indicated more clearly that such charges had to be taken into consideration. I am therefore of opinion that the phrase "quit rent, *jodi, kattubadi, poruppu* or the like" refers only to payments in the nature of quit rent on inams, whatever be the name by which they are denoted and does not include charges for police, for roads, for water and similar dues levied for services rendered by the state or by a local authority. The revision petition is therefore allowed with costs and the District Judge will be directed to dispose of the petition after recording findings on the several contentions raised. Both sides will be permitted to adduce evidence. Costs here will come out of the insolvent's estate.

K. S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMY AIYANGAR.

Seth Balakisonlal Jankiprasad v. Debt Conciliation Board, Kovvur.

Seth Balakisonlal Jankiprasad .. *Petitioner**

v.

The Debt Conciliation Board, Kovvur, by its Chairman and others .. *Respondents.*

Madras Debt Conciliation Act (XI of 1936)—Creditors representing more than 50 per cent. of the debts objecting to settlement—Proper procedure.

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1. (1897) 8 M.L.J. 43: I.L.R. 21 Mad. 116 at 122 (F.B.).

* C. M. P. No. 4929 of 1939 27th March, 1940.

Seth Balakisonlal Jankiprasad v. Debt Conciliation Board, Kovvur.

It is the duty of the Board to dispose of the application with reasonable promptitude and if it becomes apparent that there are creditors representing more than fifty per cent. of the debts who object to the settlement and there is no hope of an amicable settlement, it will be the duty of the Board to dismiss the application of the debtor for settlement of his debts.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to direct the issue of a *writ of certiorari* calling upon the first respondent herein to submit to the High Court the records relating to D. C. B. Application No. 144 of 1939 on the file of the Court of the Debt Conciliation Board, Kovvur, West Godavari District, and to quash the order of the said Board dated 11th August, 1939 and passed in the said D.C.B. Application No. 144 of 1939 on its file refusing to dismiss the petition of the second respondent and adjourning the matter for further enquiry.

V. V. Srinivasa Aiyangar and *P. V. Subramaniam* for Petitioner.

C. A. Vaidyalingam and *P. Somasundaram* for Respondents.

The order of the Court was delivered by

Leach, C.J.

The Chief Justice.—The second respondent in these proceedings applied to the Debt Conciliation Board of Kovvur for the settlement of his debts under the provisions of the Madras Debt Conciliation Act, 1936. His application disclosed fourteen creditors of whom the present petitioner is one. According to the petition of the second respondent the total amount owing by him was Rs. 1,51,000 and of this Rs. 1,25,000 was owing to the petitioner. The amount due to the petitioner was payable under a mortgage decree dated 16th November, 1937, passed by the Court of the Subordinate Judge of Ellore. The petitioner obtained an order for sale of the mortgaged property on the 14th April, 1939 and the sale was fixed for the 17th July, 1939. A fortnight before the date fixed for the sale the second respondent made his application to the Debt Conciliation Board. Notice of the application was served upon all the creditors, who appeared before the Board on the 11th August, 1939.

The petitioner and another creditor, the Standard Bank of [India], took a preliminary objection. They said that in as much [as they] represented more than fifty per cent. of the debts owing [to the] second respondent and they objected there could be no

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settlement of his debts under the Act and therefore the petition should be dismissed *in limine*. The Board overruled the preliminary objection and decided to proceed with the hearing of the second respondent's application. The reason given for this decision was that it was nowhere stated in the Act that if fifty per cent. of the creditors did not agree the application should be rejected. Here the Board erred because S. 17 expressly provides that if no amicable settlement is arrived at under sub-S. (1) of S. 14 within twelve months from the date of the application under S. 4, the Board shall dismiss the application. The petitioner asks the Court to quash the order of the 11th August, 1939, on the ground that it has passed it without jurisdiction. It is not suggested that the Board has in any way acted *mala fide* and it cannot be said that the Board had no jurisdiction to pass the order objected to. All that the Board decided was that the application of the second respondent should be heard. We have been informed by the learned Counsel appearing for some of the other creditors that the amount claimed by the petitioner is disputed. By virtue of the proviso to S. 12 (2) the fact that the Subordinate Court has passed a decree for a sum of Rs. 1,22,000 cannot be disputed, but the Court has been given to understand that there is some question as to whether the decree-holder has not received payment in part of the decretal amount. In these circumstances the petitioner is clearly not entitled to an order quashing the Board's order of the 11th August, 1939. At the same time we would point out that it is the duty of the Board to dispose of the application with reasonable promptitude, and if it becomes apparent that the petitioner, and other creditors who support him represent more than fifty per cent. of the debts and that there is no hope of an amicable settlement, it will be the duty of the Board to dismiss the application. The petitioner has got an order for sale of the mortgaged properties and that order should not be stayed a moment longer than is necessary.

The application will be dismissed but there will be no order as to costs.

K. S. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Sundara Reddiar .. *Petitioner** (*Petitioner*)

v.

Alagappa Chettiar, by agent Veeraraghava Aiyangar .. *Respondent* (*Respondent*).

Sundara Reddiar v. Alagappa Chettiar.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 19 and 20—Death of judgment-debtor just before expiry of the sixty days time allowed under S. 20 for applying for scaling down—Legal representative—If entitled to file a fresh application for stay under S. 20—Procedure.

A judgment-debtor died on 4th June, 1938, just before the expiry of the sixty days time allowed under S. 20 of Act IV of 1938 without an application under S. 19. His son was impleaded as legal representative on 19th October, 1938, when he asked for time to oppose the execution. On 14th December, 1938, he filed a fresh application under S. 20.

Held, the fresh application did not lie. The son succeeds to the rights and liabilities of his father in the litigation. His father had already exhausted his remedy under S. 20 and by express terms of that section the decree must be executed against him as it stands. The legal representative is subject to the same liability.

Petition under Ss. 115 of Act V of 1908 and 224 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Cuddalore in M. P. No. 534 of 1938 in E. P. R. No. 85 of 1938 in O. S. No. 94 of 1926.

T. E. Ramabhadrachariar for Petitioner.

S. Panchanatha Mudaliar for Respondent.

The Court delivered the following

JUDGMENT.—Petitioner is the son and legal representative of the 19th defendant against whom the decree was being executed when he got a stay by means of an application dated 9th April, 1938, under S. 20 of Act IV of 1938. The 19th defendant did not follow up his stay application with an application under S. 19, but he died on 4th June, 1938, just before the expiry of the sixty days time allowed under S. 20. Petitioner was impleaded as legal representative on 19th October, 1938 and on that day asked for time to oppose the execution. On 14th December, 1938, he filed a fresh application under S. 20. I am of opinion that the application does not lie. The petitioner succeeds to the rights and liabilities in the litigation of his father. His father had already exhausted his

* C. R. P. No. 15 of 1939. 23rd July, 1940.

remedy under S. 20 and by the express terms of that section the decree must be executed against him as it stands. The legal representative is subject to the same liability. The petition is dismissed with costs.

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K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Gandikota Kamanna .. *Petitioner* (Defendant)*

v.

Tondapu Satti Reddy .. *Respondent (Plaintiff).*

Kamanna v. Satti Reddy.

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (ii), Proviso B—Exclusion from definition of "agriculturist"—Assessment to profession tax for four consecutive half years from October, 1935—If necessary—If debtor should be validly 'assessed' to exclude him from definition of 'agriculturist'.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Cocanada in S. C. S. No. 15 of 1938.

P. Somasundaram and *P. Suryanarayana* for Petitioner.

K. Kameswara Rao for Respondent.

The Court delivered the following

JUDGMENT.—I see no ground for revision. It is quite clear from the language of S. 3 (*ii*), Proviso B of Act IV of 1938 that assessment for four consecutive half years from October, 1935 to September, 1937, is not required—as if that were so, the word 'throughout' would be found in the place of the word 'within'. The second argument is that it is only a person who has been *validly* assessed who is excluded from the definition of agriculturist. I see nothing in the language of the proviso to support this view. The words are simple 'has been assessed' and they are qualified by no adverb relating to the correctness or validity of the assessment.

The petition is dismissed with costs.

K. S. *Petition dismissed.*

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* C. R. P. No. 863 of 1939. 24th July, 1940.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Kamakshi Chetti .. *Petitioner* (1st Defendant-Petitioner)*

v.

A. S. Alaganan Chettiar .. *Respondent (Plaintiff-Respondent).*

Kamakshi Chetti *v.* Alaganan Chettiar.

Madras Agriculturists' Relief Act (IV of 1938), S. 27—Certificate given by Local Board—If conclusive of the facts which it states.

A certificate given by a Local Board is not conclusive of the facts which it states. It is open to the other side to let in evidence that the certificate is not true—whether the error alleged relates to the amount of the tax or the nature of the income in respect of which it was levied.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Dindigul dated 29th July, 1938, in M. P. No. 117 of 1938 in O. S. No. 17 of 1935.

S. Panchapagesa Sastri and *K. R. Krishnaswami Aiyar* for Petitioner.

T. P. Gopalakrishna Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—There is nothing in S. 27 of Madras Act IV of 1938 to warrant the view that a certificate given by a local board is conclusive of the facts which it states. It is open to the other side to let in evidence that the certificate is not true—whether the error alleged relates to the amount of the tax or the nature of the income in respect of which it was levied. The petition is allowed and remanded to the trial Court for disposal in the light of this judgment after receiving such evidence as the parties may adduce. The costs of this petition will abide by the result.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Kesava Reddi and another .. *Appellants† (Accused 1 and 2).*

Kesava Reddi, *In re.*

Criminal trial—Conviction founded on evidence of approver—Jury not told that the evidence of accomplice must be corroborated in material particular—Sustainability of conviction.

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* C. R. P. No. 9.5 of 1938. 29th July, 1940.

† Crl. Ap. No. 170 of 1940. 24th July, 1940.

Kesava Reddi, *In re.*

A conviction was founded on the evidence of the approver which was not corroborated in any material particular bearing upon the implication of the first accused. The jury was not told that the evidence of an accomplice must be corroborated in some material particular bearing upon the implication of the accused in the crime.

Held, the conviction cannot be sustained.

Appeal against the order of the Court of Session of the South Arcot Division in Case No. 47 of the Calendar for 1939.

N. Somasundaram for Appellants.

A. S. Sivakaminathan for *The Public Prosecutor* for the Crown.

The Court delivered the following

JUDGMENT.—The appellants have been convicted under Ss. 457 and 395 read with S. 109 of the Indian Penal Code and sentenced to rigorous imprisonment for 5 and 3 years respectively.

The trial was by jury and the verdict was unanimous. But the conviction is founded on the evidence of the approver and as rightly conceded it is not corroborated in any material particular bearing upon the implication of the first appellant. The only piece of corroboration against the second appellant is the finding of an umbrella in his family house, and the jury was not told that the evidence of an accomplice must be corroborated in some material particular bearing upon the implication of the accused in the crime. The conviction of the appellants cannot therefore be sustained and having regard to the evidence on record a re-trial is not desired. The appellants are therefore acquitted and their bail bonds will be cancelled.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Vemuri Ramjee Rao .. *Appellant** (*Plaintiff*)

v.

The Municipal Council, Masulipatam represented by its Commissioner .. *Respondent* (*Defendant*).

Ramjee Rao *v.* Municipal Council, Masulipatam.

Indian Contract Act (IX of 1872), S. 72—Person paying property tax to Municipality upon demand in a wrong belief that he was bound to pay—If entitled to recover it in Court of law.

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* S. A. No. 70 of 1937. 29th February, 1940.

Ramjee Rao v. Municipal Council, Masulipatam.

A person who makes a payment of tax under a misapprehension as to his liability to do so cannot recover it in a Court of law, although one would expect a corporate body to refund voluntarily any amount which had been paid to it in error.

Appeal against the decree of the Court of the Subordinate Judge of Masulipatam in A. S. No. 89 of 1936 preferred against the decree of the Court of the District Munsif of Masulipatam in O. S. No. 24 of 1935.

Ch. Raghava Rao and *V. V. Sastry* for Appellant.

V. Govindarajachari for Respondent.

The Court delivered the following

JUDGMENT.—The only question that arises in this appeal is whether the plaintiff, who had paid property tax to the defendant municipality upon demand in a wrong belief that he was bound to pay that tax, is entitled to have it refunded. Both the lower Courts held that as the payment was a voluntary one, he is not entitled to have any such refund. His suit was therefore dismissed and his appeal to the Subordinate Judge, Masulipatam, was also dismissed.

Mr. Raghava Rao, in his very able argument, has put forward two contentions. They are that under S. 72 of the Indian Contract Act the plaintiff is entitled to a refund of money paid by mistake of law and that even though S. 72 would debar a person from recovering money paid under a mistake of law in a quasi-contract, there would still be open to such a person the equitable relief that a Court can give to a person who has wrongly parted with money independently of any contract.

Municipal Council, Dindigul v. *Bombay Co., Ltd.*[1], is a decision on which Mr. Raghava Rao has placed great reliance. It discusses the English principles to be applied in a case somewhat similar to the present one, in which a person made a payment to a corporate body under protest and then claimed it back. The question that arose was whether the suit was in time; because it had been filed more than six months after the payment had been made, six months being the period allowed by S. 350 of the Madras District Municipalities Act for bringing a suit against a Municipality in certain classes of suits. Both Coutts-Trotter, C. J. and Madhavan Nair, J., held that

1. (1928) 56 M.L.J. 525: I.L.R. 52 Mad. 207.

Ramjee Rao v. Municipal Council, Masulipatam.

the suit claim was not one arising out of a contract and that therefore principles of the English Courts of Equity could be applied; for in Indian Courts no distinction had ever been drawn between equitable jurisdiction and legal. Such equitable principles being applied, it was considered by these learned Judges that the suit was one for "money had and received" and not an action for damages and compensation. It was held therefore that S. 350 of the Madras District Municipalities Act did not apply, but Art. 62 of the Limitation Act. It has therefore been argued by Mr. Raghava Rao that it is unnecessary to apply the principles of the Common Law Courts of England, which, he says, have been reproduced in S. 72 of the Indian Contract Act and that this suit may be looked upon as one in the general equitable jurisdiction of Civil Courts. *Municipal Council, Dindigul* v. *Bombay Co., Ltd.*[1], may be regarded as an authority for the position that either a cause of action arises independently of S. 72 of the Contract Act or that when applying S. 72 of the Indian Contract Act, one should not be bound by the somewhat narrower principles of the Common Law Courts of England; but may well have regard to the decisions of the Court of Equity.

That a suit for "money had and received" will lie apart from S. 72 of the Contract Act, has been held in *Narayanasami Reddi* v. *Osuru Reddi*[2], where a person was obliged to pay his landlord some money which was really not due, in order to avert a summary sale of his land. It was held that although the money was not paid by mistake, yet the person who paid it was entitled to have it back. But even if we regard this suit as one to which S. 72 of the Contract Act does not apply, I do not consider that the plaintiff's claim would be any stronger; because Courts have generally held that where a payment is made by mistake of law, there is no room for the application of equitable principles. The person who makes the payment is under no obligation to do so; and if he, of his own free will and accord, having the same opportunity of knowing the general law as the person to whom he pays it, makes such a payment, there is no injustice done which Courts of Equity should remedy. It is pointed out in Halsbury's Laws of England (Vol. 23 at page 168, in paragraph 246 and Vol. 7 at page 278

1. (1928) 56 M.L.J. 525: I.L.R. 52 Mad. 207.
2. (1901) I.L.R. 25 Mad. 548 (F.B.).

Ramjee Rao v. Municipal Council, Masulipatam.

in paragraph 249) that it is not an absolute rule that a payment made under a mistake of law cannot be recovered. A few exceptions do exist, especially where the person who makes the payment has much less opportunity of knowing the law than the person to whom he pays it and relies on the word and experience of the person paid. It has however never been held, even by Courts of Equity, that a payment made under circumstances like the present is recoverable in a Court. Mr. Raghava Rao has been at some pains to point out that in more recent decisions in England there has been a tendency to interpret more liberally the rule against the recovery of money paid by mistake of law; but Ramesam, J., who was apparently dealing with the same argument in *Appavoo Chettiar* v. *The South Indian Railway Co.*[1], thought that the recent decision of the House of Lords and the remarks of Lord Justice Scrutton indicated that there had been no modification of the general principle against forcing a person to return money paid under a mistake of law.

Returning to S. 72 of the Contract Act, it has been held in a number of cases that payments made in India by mistake of law cannot be recovered. *Appavoo Chettiar* v. *The South Indian Railway Co.*[1], is a direct authority with regard to a payment of the kind here made. In *Rajah of Ramnad* v. *Secretary of State for India*[2], it was held that a wrong payment of income-tax could not be recovered for the same reason. In recent cases the principle that a person who makes payment under a mistake of law cannot recover it back again has been accepted without question—see *The Municipal Council, Tuticorin* v. *Ralli Brothers*[3] and *Chairman, Municipal Council, Rajahmundry* v. *Subba Rao*[4].

I have therefore no doubt that as the law stands at present, a person who makes a payment of tax under a misapprehension as to his liability to do so cannot recover it in a Court of Law, although one would expect a corporate body to refund voluntarily any amount which had been paid to it in error.

The appeal is accordingly dismissed with costs.

K. S. —— *Appeal dismissed.*

1. (1928) 56 M.L.J. 269.
2. (1928) 55 M.L.J. 770: I.L.R. 52 Mad. 12.
3. (1933) 67 M.L.J. 566.
4. (1937) 1 M.L.J. 496.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Kannabhiran Pillai .. *Petitioner** (*Petitioner*)

v.

Govindaswami Pillai .. *Respondent* (*Counter-Petitioner*).

Kannabhiran Pillai v. Govindaswami Pillai.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Appeal after Act came into force declaring a liability for the first time—Appellate judgment reserving debtor's right to apply under Act when there was no formal application before him—Effect on debtor's right to apply under the Act—Procedure.

An appeal was filed after Act IV of 1938 came into force against a dismissal of a suit before the Act came into force. But there was no application for scaling down before the appellate Court. But the appellate judgment reserved the defendant's right to apply for relief under Act IV of 1938. This reservation was not included in the appellate decree. Thereafter the petitioner applied to the trial Court to scale down the appellate decree under S. 19 of the Act.

Held, a decree passed after the Act came into force cannot be scaled down.

Kotayya v. *Punnayya*, (1940) 2 M.L.J. 202, followed.

Held, further, when a liability is being declared in the appellate Court's decree for the first time and a plea is open to the defendant under the Madras Act (IV of 1938), there should be a written application raising this plea before the appellate Court and on such application the appellate Court should either give its own decision or reserve in its decree the right to have the matter decided by the Court below. But in the absence of reservation in the appellate decree, the proper course for the defendant is to have the appellate decree brought in accordance with the judgment embodying a direction to the trial Court to deal with the application for relief under Act IV of 1938.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Trichinopoly dated 5th August, 1939 and made in I. A. No. 1281 of 1939 in O. S. No. 776 of 1935.

A. V. Viswanatha Sastri and *S. Amudachari* for Petitioner.

K. V. Srinivasa Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition raises the question of the proper procedure in a matter arising under Madras Act IV of 1938. The present petitioner was a defendant in a suit which was dismissed on 30th November, 1937, that is to say, before the Act came into force. There was an appeal by the plaintiff and the appellate Court after Act IV of 1938 came into force reversed the decision of the lower Court and gave a

* C. R. P. No. 903 of 1940. 16th August, 1940.

Kannabhiran Pillai v. Govindaswami Pillai.

decree. The last sentence of the judgment of the appellate Court is as follows:

> "This judgment will not preclude the defendants from applying to the lower Court for scaling down the debt under the provisions of Madras Act IV of 1938 if they are entitled to have such relief."

It is common ground that no formal application under Madras Act IV of 1938 was before the learned Judge when he disposed of the appeal. It is not clear whether any oral representation was made at the time of passing judgment that the defendants' rights under Act IV should be reserved. But it seems to me probable that something must have been said to cause the learned Judge to make this reservation in his judgment. After the pronouncement of this judgment a decree was drawn up which contains no provision for a reservation such as the judgment contains. Thereafter the present petitioner applied to the trial Court to scale down the appellate Court's decree under S. 19 of Act IV. At the time when this application was made there was a good deal of difference of opinion on the question whether a decree passed after the Act came into force could be scaled down. That doubt has, I hope, been finally set at rest by our decision reported in *Kotayya* v. *Punnayya*[1]. In the light of that decision, it must be held that the application to the lower Court to scale down the appellate Court's decree under S. 19 was not the proper procedure. At the same time it does not seem equitable merely because the petitioner has adopted a wrong procedure and has not understood what is the right procedure to leave him without a remedy if a legal remedy is open to him.

Now it is doubtful whether the order of the Subordinate Judge reserving a plea under Act IV of 1938 for subsequent adjudication should have been passed in the absence of an express prayer for the benefits of the Act. Assuming, however, that the Judge had the intention of reserving a plea which was open to the defendants and which would have been taken in writing had the necessity therefor been made plain, the irregularity, if irregularity it be, should not deprive the defendants of their remedy when both parties have treated the order of the Subordinate Judge as binding upon them (vide *Hriday Nath Roy* v. *Ramchandra Barna Sarma*[2] and *Tuljaram Row* v. *Gopala Aiyan*[3]). The Subordinate Judge having granted the defendants

1. (1940) 2 M.L.J. 202.
2. (1920) I.L.R. 48 Cal. 138 (F.B.). 3. (1916) 32 M.L.J. 434.

leave to raise in the trial Court the question of the relief to which they may be entitled under Act IV of 1938 this order binds both parties and cannot be treated as void merely by reason of an alleged irregularity. I would, however, observe that, though no procedure has been laid down in the Act, in a case of this kind when a liability is being declared in the appellate Court's decree for the first time and a plea is open to the defendants under Madras Act IV of 1938 there should be a written application raising this plea before the appellate Court and on such application the appellate Court should either give its own decision or reserve in its decree the right to have the matter decided by the Court below. On the facts of the present case it seems to me clear that the Court below could not proceed with the enquiry under Act IV of 1938 in the face of the appellate Court's decree which makes no provision therefor. The proper procedure therefore appears to be for the petitioner to apply to the appellate Court to have the decree brought in accordance with the judgment by embodying therein a direction to the trial Court to deal with the application for relief under Act IV of 1938 and amend the decree according to its decision. If and when the petitioner makes such an application to the appellate Court it will of course be open to the respondent to urge any objections which may be available to him to the amendment of the decree. Should the appellate Court carry out the desired amendment, the petitioner will then be at liberty to apply to the trial Court—not under S. 19 which really has no application to a decree passed after the Act came into force—but under Ss. 8 and 9 as in a pending litigation, the matter having been reserved in the appeal for separate disposal.

The revision petition against the order of the District Munsif must be dismissed, his order being correct on the frame of the petition, though he might perhaps have given to the petitioner some guidance as to the course which he should follow. In the circumstances I make no order as to costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Karanan Syama Rao .. *Petitioner** (*Petitioner-Defendant*)

v.

V. Hanumantha Rao, minor by guardian and maternal grandfather Nittur Ramaswamayya .. *Respondent* (*Respondent-Plaintiff*).

Syama Rao *v.* Hanumantha Rao.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 11 and 19—Compromise decree—Gross amount agreed to be payable in full satisfaction of suit claim and costs—If can be reopened and scaled down—Appropriation towards costs which would have been payable—Permissibility.

Where parties enter into a compromise agreeing that a certain sum should be payable in full satisfaction of the suit claim and costs without allocating any part of that sum specifically to the costs of the suit, the provisions of Ss. 11 and 19 cannot be invoked by the creditor. The Court has no power in a case of that kind to reopen the compromise, tax the costs that would have been awarded if the suit had succeeded after contest and direct its payment, when the judgment debtor applies for scaling down a decree under S. 19 of the Act.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the District Court of Kurnool, dated 13th February, 1939 and made in M. P. No. 37 of 1939 in O. S. No. 14 of 1936, Sub-Court, Kurnool.

K. S. Jayaram for Petitioner.

A. C. Sampath Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition to revise the order of the District Court of Kurnool scaling down the amount due to the respondent under a compromise decree passed on 31st August, 1936, in O. S. No. 14 of 1936 on the file of the Subordinate Judge's Court, Kurnool. The compromise decree, so far as it is material here, runs as follows:

"In full satisfaction of the suit claim and costs, besides the sum of Rs. 1,000 received by the plaintiff's next friend on 22nd August, 1936, the defendant has to pay Rs. 2,100 . . . . Each party shall bear the costs incurred by him."

It was admitted that the principal sum originally advanced was Rs. 2,800, and the lower Court, applying S. 8 of the Madras Agriculturists' Relief Act, deducted the amount paid by the petitioner Rs. 3,980-8-0 from twice the principal amount

* C R P. No. 1256 of 1939. 26th July, 1940.

Syama Rao v. Hanumantha Rao.

and found that the balance payable on the date of the decree was Rs. 1,619-8-0. So far there is no dispute between the parties. The learned Judge, however, proceeded to apply the proviso to S. 19 to a payment of Rs. 140 made after the decree was passed and for this purpose taxed the respondent's costs of the suit at Rs. 347-3-0, and deducting Rs. 140 held that the balance Rs. 207-3-0 was also payable by the petitioner in addition to Rs. 1,619-8-0 with interest on the latter sum at the statutory rate. The learned Judge observed:

"Since the decree passed was a compromise decree and the terms of the compromise were 'in full satisfaction of the suit claim and costs,' when the decree is reopened, naturally the defendant cannot have the best of both the worlds and claim reduction under the Act by reopening and amending the decree and also state that the provision of the Act that all costs lawfully expended by the decree-holder should be reimbursed to him should not come into operation."

The petitioner contends that this view of the learned District Judge is erroneous, and I am inclined to agree with him. Having regard to the definition of 'debt' in S. 3 (*iii*) which expressly includes sums payable under a decree, it is clear that all amounts payable under decrees are also liable to be scaled down under the provisions of the Act. S. 11, however, excepts 'any sum decreed as costs by any Court' and S. 19 which provides the machinery for the scaling down of decree debts gives effect to this exception by providing that all payments made or amounts recovered in respect of a decree should first be applied in payment of 'all costs originally decreed to the creditor.' Reading these provisions together as they should be, it is clear to my mind that they are applicable only to cases where any specific sum is decreed as costs by the Court. It follows therefore that where parties enter into a compromise agreeing that a certain sum should be payable in full satisfaction of the suit claim and costs without allocating any part of that sum specifically to the costs of the suit, the provisions of Ss. 11 and 19 cannot be invoked by the creditor. The Court has no power in a case of that kind to reopen the compromise, tax the costs that would have been awarded if the suit had succeeded after contest and direct its payment, when the judgment-debtor applies for scaling down the decree debt under S. 19 of the Act. When a suit is compromised by the parties agreeing to pay and receive a gross sum without any allocation, they do not ordinarily contemplate any specific sum as being payable by the one side or the other towards the costs of the proceedings; and it is beyond

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the province of the Court to allocate any portion of the consolidated amount agreed to be paid to such costs or impose any fresh liability for costs as a condition of scaling down the debt. In the present case, though the compromise referred to the defendant's liability to pay Rs. 2,100 in full satisfaction of the suit claim and costs, in another place, it provided that each party shall bear the costs incurred by him. This shows, what is usually the case, that the parties had no definite idea in their mind that any part of that sum represented the liability for costs.

For these reasons, I hold that the view taken by the learned District Judge is wrong and the sum of Rs. 140 paid after the decree should go in reduction of the total sum payable under the compromise decree. With this modification, the order of the learned District Judge is confirmed.

As the petitioner also raised another point which was not however seriously pressed, I direct each party to bear his own costs of this revision petition.

K.S. *Order modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

V. Srinivasachariar and another .. *Petitioners* (Defendants 1 and 2)*

v.

The Conjeevaram Hodgsonpet Dharmarakshaka Nidhi, Limited.. *Respondents (Plaintiffs).*

Srinivasachariar v. Conjeevaram Hodgsonpet Dharmarakshaka Nidhi, Ltd.

Madras Agriculturists' Relief Act (IV of 1938), S. 10 (2) (iii)—Applicability—Liability to 'public company' as defined in Companies Act—Rate of interest together with default interest exceeding 9 per cent. per annum—Benefits under Act if available to debtor.

In respect of a mortgage loan to a Nidhi, the interest stipulated was 6¼ per cent payable every month. The bond also provided for default interest in case the interest and certain subscriptions to the Nidhi were not paid on due dates. In respect of the transaction it was found that towards a sum of Rs 1,500 borrowed in February, 1927, a sum of Rs. 1,396-3-3 had been credited as part payment and the balance of Rs. 807 13-2 was sued for on closing of accounts in March, 1932 This was due to further interest imposed under the contract for default in payment of interest and subscriptions The actual payments worked out at more than 9 per cent. per annum though the primary rate of interest was only 6¼ per cent In an application for scaling down,

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* C. R. P. No 1841 of 1939, 14th August, 1940.

Srinivasachariar v. Conjeevaram Hodgsonpet Dharmarakshaka Nidhi, Ltd.

Held, as the interest works out at more than 9 per cent. per annum S. 10 (2) (*iii*) of the Act cannot apply. The debtor can claim to have the debt scaled down under S. 8 of the Act. When money is borrowed and a larger sum is repaid the excess over principal must be treated as interest.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Chingleput dated 4th October, 1938 and made in E. A. No. 824 of 1938 in O. S. No. 245 of 1932.

D. Ramaswami Aiyangar for Petitioners.

M. E. Rajagopalachari for Respondents.

The Court delivered the following

JUDGMENT.—The question involved in this Civil Revision Petition is the interpretation of S. 10 (2) (*iii*) of Madras Act IV of 1938. The respondent is the Conjeevaram Hodgsonpet Dharmarakshaka Nidhi, Ltd., from whom the petitioner borrowed Rs. 1,500 in February, 1927, upon a mortgage bond. The suit is brought upon this mortgage bond in March, 1932, and a decree has been granted to the respondent and the mortgaged property has been sold. The petitioner has applied under S. 23 of the Act to have the sale set aside. He will not be entitled to this relief if in the words of the sub-section with which we have to deal the interest payable in respect of his liability is not more than 9 per cent. per annum as the respondent here is a public company as defined in the Indian Companies Act.

The terms of the bond are somewhat complicated. The interest chargeable upon the money borrowed is only 6¼ per cent. in the first instance but it is payable at the end of every month and there are provisions also that subscriptions are to be made to the company and those subscriptions are to be credited towards repayment of the principal. If there is no default in the payment of interest and the payment of those subscriptions there is no question but that the rate of interest will be only 6¼ per cent. but on default further interest is chargeable on both interest and the amount due for subscriptions. The learned District Munsif who tried the suit in the first instance has held that S. 10 (2) (*iii*) prevents the petitioner from taking advantage of the provisions of the Act. He says that the Legislature in drafting this sub-section is dealing only with the primary rate of interest charged and that the section cannot apply to any rate which is chargeable in case of default. I am

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unable to accept this view of the section as correct. It seems to me contrary to all logic and all principles of interpretation to limit so general a word as liability to a liability incurred only by a borrower who is guilty of no act of default. Clearly the liability in my opinion must mean whatever liability may fasten upon the borrower under the terms of the bond.

I am prepared however to concede that this matter should not be disposed of merely upon a strict interpretation of the terms of the bond and the liability which might arise in certain hypothetical circumstances but should be determined upon an examination of the actual state of accounts as between the two parties. I proceed therefore to such an examination and I find that towards the sum of Rs. 1,500 borrowed in February, 1927, a sum of Rs. 1,396-3-3 has been credited as part repayment. The suit is for the balance, namely, Rs. 807-13-2 and the accounts have been closed shortly before the filing of the suit in March, 1932. The result then is that for a debt of Rs. 1,500 incurred in February, 1927, a total sum of Rs. 1,396-3-3 plus Rs. 807-13-2, that is, Rs. 2,204-0-5 has to be repaid and this repayment is related to a period of just over five years. Of this sum, Rs. 1,500 of course represents the principal and the remaining Rs. 704 represents what is claimable in addition to the principal. It is argued for the respondent that this may not be interest in the strict sense of the word because of the provision relating to the monthly payment of subscriptions. But when we probe into the heart of the transaction it seems to me clear that is in all respects analogous to the payment of interest. When money is borrowed and a larger sum is to be repaid the excess over the principal must in my opinion be treated as interest. Therefore in this matter the sum of Rs. 704 represents the interest charged under the terms of this bond on a debt of Rs. 1,500 for a period of just over five years. Arithmetical calculation will show that this interest represents a rate of slightly more than 9 per cent. per annum. It seems to me therefore that with respect to the present claim as the interest works out at more than 9 per cent. per annum the respondent cannot successfully argue that S. 10 (2) (*iii*) applies. If it does not apply, then of course the petitioner on the assumption that he is an agriculturist can claim to have the debt scaled down under S. 8 and being thus entitled to the benefits of this Act can make an application under S. 23.

In the result therefore this petition will be allowed and the petitioner's application remanded to the learned District Munsif for being allowed or dismissed according as he finds the petitioner to be an agriculturist or not. The respondent must pay the costs of the petitioner in this petition.

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K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

G. Chokkappa Chetty .. *Petitioner** (*Plaintiff-Petitioner*)

v.

M. Santhubava Rowther .. *Respondent* (*Defendant-Respondent*).

Chokkappa Chetty v Santhubava Rowther.

Civil Procedure Code (V of 1908), Sch. II, para. 8—Time for making award—Extension of—Application made before award—Order thereon made after passing award—Validity of order.

Where the dispute between the parties was referred to arbitration, and as the award was not made on the prescribed date extensions of time were granted by the Court and the award was actually written on 26th August, 1936, but the order of Court allowing the last extension of time was not passed until 27th August, 1936, though the application for extension of time had been filed in Court some days before the award was made.

Held, that the Court was competent to pass the order for extension of time although the award was made the previous day, and that such an order related back to the date on which the application had been made.

Jetha Lal Laxmi Chand Shah v. *Amrita Lal Ojha*, I.L.R. (1938) 2 Cal. 482, relied on.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Tiruppur dated 16th November, 1936 and made in I. A. No. 852 of 1936 in O. S. No. 130 of 1936.

A. C. Sampath Aiyangar for Petitioner.

T. M. Krishnaswami Aiyar and *A. Balasubramania Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—The dispute between the petitioner and the respondent was referred to arbitration. The award was not made on the date prescribed, but extensions were asked for from time to time. The award was actually written on 26th August, 1936; but the order of Court allowing the last extension of

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* C. R. P. No. 475 of 1937. 25th April, 1940.

time was not passed until 27th August, 1936, although the application had been filed in Court some days before the award was made. The principal question argued in this Court and in the Court below was whether the Court became *functus officio* in this matter on the day the award was made and was incompetent to pass the order on 27th August, 1936, extending the time.

It seems to me that the order passed by a Court on an application must refer back to the date on which the application is put in; for it is the state of affairs on that date that the Court has to consider in making an order. If on the date of the application the Court had jurisdiction to extend the time, I cannot see how it lost jurisdiction because in the interval between the filing of the petition and the passing of orders the award is actually made. There is nothing in Schedule II of the Code of Civil Procedure which says so, and no decision has been pointed out to me in which a Court has gone so far as to say that a Court loses jurisdiction to extend the time when once the award has been made. *Raja Har Narain Singh* v. *Chaudrain Bhagwant Kuar*[1] is a Privy Council decision upon which much reliance has been placed by the learned Counsel for the petitioner. The facts of that case do not resemble those of the present nor was an order there made under the same provision of law as here; but Mr. Sampath Aiyangar relies on a few words contained in that judgment without reference to the facts of that particular case. There, the award was actually made at a time beyond the period to which the date had been extended, and their Lordships remarked that when once an award was made and delivered, the power of the Court under S. 514 was spent. The reason they gave was that

> "that contention (that the award is not valid) has to support it the express statutory enactment that no award shall be valid unless made within the period allowed by the Court."

S. 521 of the old Code did in fact say:

> "No award shall be valid unless made within the period allowed by Court."

There is no such clause in the present Act and, as has already been remarked, in the case before their Lordships the award was not made even within the extended time. In *Annamalai Chettiar* v. *Annamalai Chettiar*[2], Curgenven, J., doubted

1. (1891) 18 I.A. 55: I.L.R. 13 All. 300 (P.C.).
2. (1933) 65 M.L.J. 376.

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whether *Raja Har Narain Singh* v. *Chaudrain Bhagwant Kuar*[1] was any longer good law. In *Gopalji Kallianji* v. *Chhaganlal Vithalji*[2], where an application was put in by consent for extending the time for making the award, it was held that the date of the application must be referred back to the date when it was filed in the office of the Prothonotary and not to the date when it was signed by him. That case is not similar to the present one; but it lays down the principle that an application dates back to the day of its presentation which has, I think, a wide application. Moreover, if the contention of the learned Counsel for the petitioner is correct, then the arbitrators were *functus officio* on the date on which they should have made the award expired, and they had no power to continue the arbitration proceedings while the application was pending. If that were so, then there was no valid award made at all. It would also follow from this proposition that applications for extension would become largely fruitless because the applicants could do nothing before the applications were granted and so proceedings would drag on indefinitely. Needless to say, there is no authority, either for the original contention of Mr. Sampath Aiyangar or for any of the principles that have been deducted from it. It seems to me that the arbitrators had jurisdiction to continue the arbitration subject to the result of their application to extend the time.

It has been argued on behalf of the respondent, on the authority of *Annamalai Chettiar* v. *Annamalai Chettiar*[3], that a revisional Court has no jurisdiction to interfere with an award passed in these circumstances; but I do not find that *Annamalai Chettiar* v. *Annamalai Chettiar*[3], goes so far. There were special circumstances there which led the learned Judge to hold that the order of the lower Court filing the award was right and could not be interfered with in revision, and that the only remedy of the aggrieved person was to take separate proceedings to have the award set aside.

Jetha Lal Laxmi Chand Shah v. *Amrita Lal Ojha*[4] is a very important decision on the present paragraph 8 of Schedule II; for it holds that the section is so widely worded that an application for extension of time put in even after the award is made

1. (1891) 18 I.A. 55 : I.L.R. 13 All. 300 (P.C.).
2. (1920) I.L.R. 45 Bom. 1071.
3. (1933) 65 M.L.J. 376.
4. I.L.R. (1938) 2 Cal. 482.

Chokkappa Chetty v. Santhubava Rowther.

can be granted; and that if it is granted the award can be filed. The wording of paragraph 8 is certainly wide enough to carry this meaning and with due respect I agree. I find no reason in the present provisions relating to arbitration for supposing that once an award is made the Court ceases to have jurisdiction to extend the time. The old Code did contain such a provision; but that is absent in the present Act.

The learned District Munsif has supported his finding on another ground; and that was that one must not suppose that because the award was written on 26th August, 1936, it was necessarily made on that day. *Arumugam Chetti* v. *Arunachalam Chetti*[1], pointed out that filing is not making—filing being a mere administrative act; but it was held in *Harbhajan Singh* v. *Mewa Singh*[2], that an award has to be pronounced before it can be said to be made and that filing it in the Court is one of the ways of pronouncing it and that if the pronouncing of the award did not take place until the award was filed into Court, then the date of the making of the award was the date of the filing of it. It is unnecessary for me to consider whether this decision is correct; but it does seem to be true that the mere writing of an award would not amount to the making of the award. There can be no finality in the writing of an award and if the arbitrators choose to tear it up and write another, I can see no reason why they should not do so. It may however be argued that the signing of the award gives legal effect to it, and if so, then the award was made on the 26th, the date of writing it.

The petition fails and is dismissed with costs.

B. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Induru Pattabirami Reddi .. *Appellant** (*Plaintiff*)

v.

Kakarala Venkatappayya and others .. *Respondents* (*Defendants 1 and 3 to 5*).

Pattabirami Reddi v. Venkatappayya.

Transfer of Property Act (IV of 1882), S. 82—Contract between assignee of mortgagor and purchaser of equity of redemption—Purchaser under-

1. (1898) I.L.R. 22 Mad. 22. 2. A.I.R. 1928 Lah. 753.

* S. A. No. 30 of 1937. 12th April, 1940.

taking to discharge entire mortgage debt—Binding also on subsequent purchaser from him.

A contract between an assignee from a mortgagor and the purchaser of a part of the equity of redemption certainly falls within S. 82 of the Transfer of Property Act.

Ganeshi Lal v. *Charan Singh* (1930) 59 M.L.J. 177: L.R. 57 I. A. 189: I. L. R. 52 All. 358 (P.C.). followed.

Where by a contract between the purchaser of a part of the equity of redemption and the mortgagor the consideration for the sale was the promise by the purchaser to discharge the whole mortgage debt and the purchaser in his turn sold some items of the mortgage to the plaintiff who sued to recover the balance of mortgage money,

Held, that the plaintiff was bound by the contract of the original purchaser to discharge the whole debt.

Appeal against the decree of the Court of the Subordinate Judge of Nellore dated 16th July, 1936 and made in A. S. No. 71 of 1936 (A. S. No. 191 of 1935 on the file of the District Court of Nellore) preferred against the decree of the Court of the District Munsif of Nellore in O. S. No. 971 of 1934.

Ch. Raghava Rao for Appellant.

K. Umamaheswaram for Respondents.

The Court delivered the following

JUDGMENT.—The facts of this case are simple. On 7th November, 1922, defendant 1 mortgaged three items of property to plaintiff's father. In January, 1925, he settled the equity of redemption upon defendant 2 his mother. In September, 1925, defendant 2 sold item 1 to one Ademma, the main consideration for the sale being the promise by Ademma to discharge the whole of the mortgage debt. In 1926 and 1927 Ademma made two part-payments of Rs. 650 and Rs. 600 respectively. In January, 1932, Ademma sold item 1 to the plaintiff who had succeeded to his father's rights as mortgagee for Rs. 3,000 a sum which did not suffice to discharge the mortgage. Plaintiff accordingly sued to recover the balance, and the question at issue is whether on these facts, and with reference to S. 82 of the Transfer of Property Act, items 2 and 3 which have remained since 1925 in the possession of defendant 2, can be called upon to contribute any sum to the satisfaction of the mortgage. It is found that item 1 is five times as valuable as items 2 and 3.

The first question to decide is whether there is a 'contract to the contrary' within the meaning of S. 82. At one time it was held (see *Ramabhadrachar* v. *Sreenivasa Aiyangar*[1]), that

1. (1900) I.L.R. 24 Mad. 85.

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such a contract must be between mortgagee and mortgagor, but since the decision of the Privy Council in *Ganeshi Lal* v. *Charan Singh*[1], that is no longer good law, and a contract, as here, between an assignee from the mortgagor, and the purchaser of a part of the equity of redemption certainly falls within the section.

What is that contract? The contract clearly is that Ademma, the purchaser, shall pay the whole debt, which means that Ademma shall not be entitled to call upon items 2 and 3 for contribution.

Is that contract still in force? It would certainly be in force if this were an action between defendant 2 and Ademma. Does the sale to plaintiff make any difference? It is argued for the appellant that it does on the ground that contracts of this kind do not 'run with the land'. I have been referred to *Seshagiri Aiyar* v. *Vythilinga Pillai*[2] and other authorities for the position that the benefit of a contract of this kind does not automatically pass to an assignee but only if it itself be specifically assigned. But here it is defendant 2 herself, and not any assignee, who is opposing plaintiff. I cannot agree that because the benefit of a contract such as this does not necessarily pass to an assignee from one party, the burden of it similarly does not pass to an assignee from the other who has full notice of its existence. In *Muthiah Bhagavathar* v. *Venkatarama Aiyar*[3], it is pointed out that such an assignment cannot give the assignee rights under S. 82 which his assignor did not possess.

Muthiah Bhagavathar v. *Venkatarama Aiyar*[4] is a decision of a Bench of this Court which I think clearly binds me in deciding the present appeal. Not only on the proposition of law there laid down is plaintiff bound by the terms of Ademma's contract with defendant 2, but also, on the arithmetic of this case he can have no claim. For it is further pointed out on page 137 that if plaintiff is not bound by his predecessor's contract he cannot take advantage of payments which his predecessor has made. If in the present case, plaintiff cannot credit the sum of Rs. 1,250 as payments made by his item of property, defendant 2 will have fully discharged the 1/6th share of the mortgage debt due from her items.

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1. (1930) 59 M.L.J. 177: L.R. 57 I. A. 189: I.L.R. 52 All. 358 (P.C.).
2. (1909) I.L.R. 33 Mad. 211.
3. (1935) 69 M.L.J. 303: I.L.R. 59 Mad. 121 at 137.

Pattabirami Reddi v. Venkatappayya.

The appeal fails and is dismissed with costs.

Leave refused.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Allamsetti Venkatappadu and others .. *Appellants** (*Respondents-Decree-holders*)

v.

Manda Appalaswami .. *Respondent* (*Petitioner-1st Judgment-debtor*).

Venkatappadu v. Appalaswami.

Civil Procedure Code (V of 1908), S. 11 and O. 21, r. 92—Application by judgment-debtor for setting aside sale on the ground that property was "inalienable"—Order of confirmation of sale—If res judicata.

Appeal against the order of the Court of the Subordinate Judge of Chicacole dated 17th July, 1939 and made in C. M. A. No. 14 of 1938 preferred against the order of the Court of the District Munsif of Rajam dated 8th December, 1937 and made in E. A. No. 310 of 1937 in E. P. No. 302 of 1935 in O. S. No. 462 of 1926.

V. Govindarajachari for Appellants.

Ch. Raghava Rao for Respondent.

The Court delivered the following

JUDGMENT.—I am unable to see how *Somasundaram* v. *Kondayya*[1] can be distinguished. It is clear that the learned Judges in that case held that the decision to confirm a sale was *res judicata* against a judgment-debtor who could have raised a plea, but did not, that the land was inalienable. If the decision confirming a sale constitutes the adjudication which is binding it is clearly equally binding whatever be the nature of the subsequent proceedings in which the judgment-debtor attempts to have the sale set aside. Sitting singly I am bound to follow *Somasundaram* v. *Kondayya*[1]. I must therefore allow this appeal, set aside the order of remand and dismiss respondent's application with costs throughout.

Leave refused.

K. S. *Appeal allowed.*

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* Appeal against Order No. 398 of 1939. 30th April, 1940.

1. (1926) 49 M.L.J. 401.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

R. K. Presanna Venkatesa Rao .. *Appellant** (*Plaintiff*)

v.

The Trichinopoly District Co-operative Central Bank, Ltd., by its President Rao Bahadur T. M. Narayanaswami Pillai, and others .. *Respondents* (*1st Defendant and 2nd Defendant's L. Rs.*).

Presanna Venkatesa Rao *v.* Trichinopoly Dist. Co-operative Central Bank, Ltd.

Company—By-laws framed for gratuity to officers—Gratuity paid to an officer contrary to by-laws—Objection by Deputy Registrar of Co-operative Societies—Amendment of by-laws by Managing Board—General body resolution, sanctioning the payment of gratuity under the amended rules—Sanction not ultra vires*—Powers of Managing Board in internal matters.*

In a bank an ex-secretary was sanctioned a gratuity by the Board of Management. Under the existing rules and by-laws the gratuity could not have been sanctioned. On the objection by the Deputy Registrar of Co-operative Societies, the Board of Management was asked to get the sanction of the general body of shareholders. The Board passed new rules amending the existing rules. The general body also by a resolution of its meeting sanctioned the Board's recommendation of gratuity to the retiring officer. On the objection that such a gratuity being wrong originally could not be ratified by an amendment of the rules passed later and that the general body's sanction was itself *ultra vires*,

Held, that the matter related only to the administration and management of the affairs of the company and so long as the general body acted within the ambit of the Articles of Association, any act done by them in regard to the management of the bank will be *intra vires* and not *ultra vires*.

The fact that the Board of Management was delegated the power to frame by-laws did not take away the power of the general body to sanction any payment of gratuity in exceptional cases which had not been provided for by the by-laws framed by the Managing Board.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in A. S. No. 49 of 1937 preferred against the decree of the Court of the District Munsif of Trichinopoly in O. S. No. 669 of 1935.

K. Rajah Aiyar and *S. V. B. Row* for Appellant.

K. V. Krishnaswami Aiyar and *T. S. Krishnaswami Aiyangar* for Respondents.

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* S. A. No. 470 of 1937. 30th April, 1940.

Presanna Venkatesa Rao v. Trichinopoly Dist. Co-operative Central Bank, Ltd.

The Court delivered the following

JUDGMENT.—The question for decision in this second appeal is whether the award of the sum of Rs. 1,295 paid as gratuity to the second defendant by the first defendant Bank in pursuance of a resolution of the General Body dated 23rd November, 1935, is valid. The learned Judge in the Court below answered the question in the affirmative. The question is whether his view is sound.

Mr. Rajah Aiyar canvasses this view on two grounds: (1) The Ex-Secretary was permitted to retire on 17th March, 1935, on production of a medical certificate which stated that he was suffering from chronic bronchitis and would not be in a position to attend to his duties for a period of six months. Under the Gratuity rules which govern the payment of gratuity, the Ex-Secretary would not be entitled to claim any money as and by way of gratuity; because the rules contemplated certain conditions on fulfilment of which alone an ex-servant of the Bank can claim gratuity. However the Board of Management seems to have granted the gratuity but exception was taken by the Deputy Registrar of Co-operative Societies and the Board of Management was requested to get the sanction of the General Body to the said payment. After the receipt of that letter from the said Registrar, the Board of Management seems to have amended the by-laws by providing that in cases where the Board comes to the conclusion that an officer will have to be permanently incapacitated, though not supported by a medical certificate, it might pay gratuity. On the strength of the amended by-law, the Board of Management wanted to grant the gratuity but however by way of abundant caution, they wanted to put the matter before the General Body. They accordingly framed a resolution to the following effect:—

"To sanction a sum of Rs. 1,295 as gratuity to the Ex-Secretary Mr. S. R. Subramania Aiyar as recommended by the Board in their Resolution No. 19, dated 2nd October, 1935."

The intended resolution was circulated to the shareholders and a General Body meeting of the shareholders was held on 7th December, 1935, wherein they passed a resolution sanctioning the payment of the said gratuity. It is contended by Mr. Rajah Aiyar that the Board of Management had no power to give retrospective operation to the amended by-law and any payment of gratuity in pursuance of such an amended by-law would be illegal. Therefore, when the General Body passed a resolution

sanctioning the said sum of Rs. 1,295, they were simply sanctioning an illegal resolution of the Board of Management. It must therefore be held that the payment was *ultra vires*. I am not inclined to agree with this contention. It cannot be denied that even though the by-laws did not provide for payment of a gratuity because under the rules, the Board of Management could not grant it, still, it is always open to the General Body to sanction a gratuity which an officer according to the sense of the meeting of the General Body deserved. In the particular case, how I construe the resolution of the General Body is this. They intended to pay the gratuity of Rs. 1,295 and treat the resolution communicated to them by the Board of Management as a recommendation to them. It is perfectly competent to them to grant the gratuity or to decline it. There is a statement in the resolution circulated to the shareholders that it was recommended by the Board in Resolution No. 19 dated 2nd October, 1935. But that would not invalidate the payment sanctioned by the General Body. At the meeting of the General Body, the General Body must have been apprised that according to the old by-laws, that is, before they were amended, the payment of gratuity to the Ex-Secretary was not proper, that objection was taken by the Registrar of Co-operative Societies and that therefore the sanction of the General Body was sought. Considering all these facts, the General Body chose to pass the resolution which it is perfectly competent to do and Mr. Rajah Aiyar has not placed before me any authority to show that it was *ultra vires* of them to do so. The matter only relates to the administration and management of the affairs of a company and so long as the General Body acts within the ambit of the Articles of Association, any act done by them in regard to the management of the Bank will be *intra vires* and not *ultra vires*. It is next contended by Mr. Rajah Aiyar that the power to frame by-laws in regard to the payment of gratuity was delegated to the Board of Management and once they passed by-laws, both the Board of Management and the General Body were bound by them. I am not prepared to agree with this contention. The fact that the Board of Management is delegated the power to frame by-laws does not take away the power of the General Body to sanction any payment of gratuity in exceptional cases which have not been provided by the by-laws as framed by the Board of Management. This power

Presanna Venkatesa Rao *v.* Trichinopoly Dist. Co-operative Central Bank, Ltd.

is always vested in the General Body and by the mere fact of delegation, it cannot be taken away. Mr. Rajah Aiyar has again not placed before me any authority in support of his contention. Only these two contentions were advanced by Mr. Rajah Aiyar and I am clearly of opinion that both the contentions are unsustainable.

The appeal fails and is dismissed with costs (one set).

Leave to appeal refused.

K. C. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Ramaswami Konar .. *Petitioner** (*Accused*)

v.

Nachiar Ammal .. *Respondent* (*Complainant*).

Ramaswami Konar *v.* Nachiar Ammal.

Criminal Procedure Code (V of 1898), S. 195—Applicability—Complaint in respect of allegations contained in petitions and statement made to Magistrate—Offence under Ss. 182 and 193, Penal Code—Procedure.

Where the complaint of defamation is founded on allegations in a petition and sworn statement made to a Magistrate and the allegations are stated to be false, the offence committed would fall under S. 182 or 193 of the Indian Penal Code, and S. 195, Criminal Procedure Code, will apply. The party cannot be allowed to evade the provisions of S. 195 by filing a complaint under another provision of law.

In re *Appadurai Nainar*, (1935) 69 M.L.J. 812: I.L.R. 59 Mad. 165, relied on.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Tuticorin dated 12th April, 1939 and made in C. C. No. 21 of 1939.

N. Shanker Bhat for *G. Gopalaswami* for Petitioner.

K. R. Rama Aiyar for Respondent.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The complaint of defamation is founded on allegations in a petition and sworn statement to the Sub-Divisional Magistrate and the allegations are stated to be false. The offence committed would therefore fall under S. 182 or S. 193 of the Indian Penal Code and as held In re *Appadurai Nainar*[1], parties cannot be allowed to evade the provisions of

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* Crl. R. C. No. 442 of 1939. 3rd October, 1939.
(Crl. R. P. No. 412 of 1939).

1. (1935) 69 M.L.J. 812: I.L.R. 59 Mad. 165.

Ramaswami Konar v. Nachiar Ammal.

S. 195 of the Code of Criminal Procedure by filing a complaint under another provision of law. The revision petition is therefore allowed and the proceedings are quashed.

B.V.V. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE MOCKETT.

Karuppal *alias* Chetty Boyachi .. *Prisoner** (*Accused*).

Karuppal, *In re.*

Penal Code (XLV of 1860), S. 302—Sentence—Extenuating circumstances—Duty of Sessions Judge to consider—Conviction based on confessions—Need for considering reason for crime.

The law gives the Sessions Judge the option of sentencing a person convicted of murder either to death or to transportation for life. Where there are extenuating circumstances it is the duty of the Sessions Judge to award the lesser sentence and not to pass the sentence of death. When the only evidence that the accused took the lives of her children is derived from her confessions, it is necessary to take into account the reasons which she alleged for the act. Where a woman killed her two children for the reason that she had been very harshly treated by her husband and was living a life of utmost misery.

Held, that it was a proper case for awarding the sentence of transportation for life.

Trial referred by the Court of Session of the Coimbatore Division for confirmation of the sentence of death passed on 3rd April, 1940, upon the said prisoner in C. C. No. 33 of 1940 and appeal by the said prisoner against the said sentence of death passed upon her in the said case on 3rd April, 1940.

P. Sivarama Krishniah for Accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The judgment of the Court was delivered by

Burn, J.

Burn, J.—The appellant has been convicted by the learned Additional Sessions Judge of Coimbatore for the murder of her own two children, a little girl aged 5 and a little boy aged 2 on the 17th December, 1939. The evidence against the appellant consisted mainly of confessions of her own said to have been made to her aunt (P. W. 10) and to an acquaintance (P. W. 1, Rama Boyan) and also to the Village Munsif of Pattaramangalam, P. W. 12. The appellant according to these witnesses admitted that she had thrown her children into a well and said that she had jumped into the well herself but had afterwards, apparently repenting of her intention to take her

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* Referred Trial No. 77 of 1940. (Criminal Appeal No. 358 of 1940). 18th July, 1940.

own life, managed to get out. She said that the reason why she had decided to take her children's life and her own was that she had been very harshly treated by her husband and was living a life of the utmost misery. The learned Additional Sessions Judge has accepted these confessions of the appellant and has stated that in his opinion this was a fit case for awarding as lenient a sentence as possible but, strangely enough, he goes on to say that, having found the accused guilty of murder, he has no option but to award her the extreme penalty under law. This is of course quite incorrect. The law gives the Sessions Judge the option of sentencing a person convicted of murder either to death or to transportation for life. Where there are extenuating circumstances as in this case, it is the duty of the Sessions Judge to award the lesser sentence and not to pass the sentence of death. We agree entirely with the reasoning of the learned Additional Sessions Judge. Since the only evidence that the appellant took the lives of her children is derived from her own confessions, it is only fair to take into account also the reasons which she alleged for taking such a terrible step. Her husband was examined as P.W. 5 and he said that his wife had not been right in the head for some years before, but it must be borne in mind that according to the woman herself it was her husband's ill-treatment that drove her to take the lives of her children. There was no evidence of insanity such as would take away the criminality of the act; that is to say, there is no evidence that the woman was incapable by reason of unsoundness of mind of understanding what she was doing or the consequences of her act. The conviction for murder is correct and is confirmed. The sentence of death is in this case wrong. We set it aside and substitute a sentence of transportation for life.

The learned Additional Sessions Judge has made a separate recommendation to the Government to reduce the punishment imposed upon this appellant to a sentence of three years' rigorous imprisonment. The letter of the learned Additional Sessions Judge has already been forwarded to the Government and they will take such action as they deem fit in the exercise of their prerogative. We do not associate ourselves with the express recommendation that the sentence be reduced to three years' rigorous imprisonment but we are in agreement with the

Karuppal. *In re.*

Burn, J.

learned Sessions Judge that the sentence of transportation for life is excessive in the circumstances of this case.

B.V.V. —— *Sentence reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

S. P. Rm. M. Meyappa Chettiar.. *Petitioner** (*Plaintiff*)

v.

S. P. Rm. Rm. Ramaswami Chettiar .. *Respondent* (*Defendant*).

Meyappa Chettiar *v.* Ramaswami Chettiar.

Limitation Act (IX of 1908), Arts. 61 and 120—Stamps for a sale certificate purchased by one of the joint purchasers of property—Suit for contribution—Limitation.

The claim was for contribution in respect of a half share of the amount spent by the petitioner for purchase of stamps for a sale certificate issued in respect of properties jointly purchased by the petitioner and respondent. The stamps were purchased on 13th February, 1933 and sale certificate issued by the Court on 20th February, 1933. The suit was brought on 18th February, 1936.

Held, the cause of action did not arise immediately on the purchase of the stamps. Until the stamps are actually used the petitioner could not claim to recover any part of the purchase money of the stamps. Art. 61 which presupposes the existence of a cause of action when the payment is made cannot be applicable.

Sundara Aiyar v. *Ananthapadmanabha Aiyar*, (1922) 43 M.L.J. 271, applied.

The proper article applicable is 120 and the suit is in time.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Sivaganga, dated 30th November, 1936, in S. C. S. No. 293 of 1936.

V. Ramaswami Aiyar for Petitioner.

A. C. Sampath Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The only point for determination in this revision petition relates to the applicability of Art. 61 of the Limitation Act to the petitioner's claim for contribution in respect of a half share of the amount spent by him for purchase of stamps for a sale certificate issued in respect of properties jointly purchased by the petitioner and the respondent. The stamps were purchased on 13th February, 1933. The sale certificate Ex. A was issued by the Court on 20th February, 1933. The suit was brought on 18th February, 1936. The

* C.R.P. No. 562 of 1937. 24th July, 1940.

Meyappa Chettiar v. Ramaswami Chettiar.

Court below applied Art. 61 of the Limitation Act and reckoning 3 years from 13th February, 1933, when the petitioner actually paid the money for the purchase of the stamps held the suit barred by limitation. I cannot agree with this view. Even assuming that Art. 61 is applicable to certain classes of suits for contribution, I am clearly of opinion that it cannot apply to a suit of this description. For it is obvious that the petitioner could not have a cause of action against the defendant as soon as he purchased the stamps though he might have intended such purchase to enure to the benefit of the defendant also by the stamps being utilised for the purpose of engrossing the sale certificate to be issued jointly in the name of both the parties. Until the stamps were actually utilised for the purpose the petitioner could not, as it seems to me, claim to recover any part of the purchase money from the respondent. To a case of this kind Art. 61 which presupposes the accruing of a cause of action when the payment is made cannot be applicable. (cf. *Sundara Aiyar* v. *Ananthapadmanabha Aiyar*[1]). It is not disputed that if Art. 61 does not apply, the proper article applicable is 120, and the suit was filed in time.

The Civil Revision Petition succeeds and the petitioner's suit will be decreed with costs here and in the Court below.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HORWILL.

H. M. Ebrahim Sait .. *Appellant** (*Debtor*)

v.

The Mettupalayam Narayani Bank, Limited, by its Director in charge V. Palaniappa Chettiar and others .. *Respondents* (*Creditors*).

Ebrahim Sait v. Mettupalayam Narayani Bank, Ltd.

Powers—Construction—Authority "to attend to all the affairs and Court proceedings"—If confers power to present a petition in insolvency—Presidency Towns Insolvency Act, S. 9 (e)—Earlier attachments continuing for more than three weeks—Later similar act of insolvency—If can be relied on for adjudication.

The secretary of a banking company was authorized to attend to all the affairs of the Bank including Court proceedings relating to the Bank.

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1. (1922) 43 M.L.J. 271.

* O. S. A. No. 17 of 1939. 26th July, 1940.

Ebrahim Sait v. Mettupalayam Narayani Bank, Ltd.

It was contended that the secretary had no authority to act in insolvency on behalf of the Bank.

Held, a petition in insolvency involves proceedings in Court and the secretary had full authority to file a creditor's petition in insolvency on behalf of the Bank.

Held, further, that a debtor can commit more than one act of insolvency and even where there is an act of insolvency committed as the result of a previous attachment continuing for more than three weeks there could be a second act of insolvency of the same nature which can be relied on for adjudicating a debtor.

On appeal from the order and judgment of the Hon'ble Mr. Justice Mockett, dated 1st May, 1939 and passed in the exercise of the Insolvency Jurisdiction of the High Court in I. P. No. 64 of 1939.

V. Ramaswami Aiyar and *T V. Srinivasan* for Appellant.

E. R. Krishnan, M. S. Venkatarama Aiyar, M. Krishna Bharathi, R. Karunakaran and *U. Lakshmanna* for Respondents.

The judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—This is an appeal against an order passed by Mockett, J., adjudicating the appellant an insolvent. It is said that the person who filed the application for adjudication had no authority in law to do so and that there was no act of insolvency. Both these questions were raised before the learned Judge who has dealt with them fully in his judgment and we agree with his conclusions.

The petitioning creditor was the Mettupalayam Narayani Bank, Limited, which had obtained a decree against the appellant in the Court of the Subordinate Judge of Coimbatore for a sum of some Rs. 56,000. The decree was transferred to Madras for execution and execution proceedings were duly instituted. On the 4th March, 1939, the Bank attached the appellant's residence. The attachment continued until the 30th March, 1939, when the petition for adjudication was filed. The application was signed by V. Palaniappa Chettiar, who was the Director in charge of the Bank and also held the office of Secretary. On the 20th October, 1937, the Board of Directors passed this resolution:—

"M. R. Ry. The Director, V. Palaniappa Chettiar Avergal shall take charge on 28th November, 1937, as Director-in-charge, Secretary and attend to the duties. It has been decided that, till appointment of another Secretary, the said V. Palaniappa Chettiar Avergal himself shall attend to all the affairs and Court proceedings relating to the Nidhi."

Ebrahim Sait v. Mettupalayam Narayani Bank, Ltd.

Leach, C.J.

This resolution remained in force at the time of the filing of the insolvency petition in this case. The first contention of the appellant is that this resolution gave Palaniappa Chettiar no authority to act in insolvency on behalf of the Bank.

It is difficult to imagine what wider power could be given than was given here. Palaniappa Chettiar was authorized to attend to all the affairs of the Bank, including Court proceedings relating to the Bank. Therefore he had the authority to attend, to institute, and conduct all proceedings in Court with which the Bank was concerned. A petition in insolvency involves proceedings in Court and we agree with the learned Judge that Palaniappa Chettiar had full authority to file the petition.

Mr. Ramaswamy Aiyar has suggested that this view is inconsistent with the decisions of the Courts in England in In re, *A Debtor*[1], In re *A Debtor*: Ex parte *The Petitioning Creditors* v. *The Debtor*[2] and *Guthrie* v. *Fisk*[3]. A glance at these cases shows that they have no bearing here. In the first case it was held that a resolution of an incorporated company authorizing one of its officers to present a petition in bankruptcy against a particular debtor did not authorize the officer to present a petition founded on an act of bankruptcy committed after the date of the resolution. The decision in In re *A Debtor*: Ex parte *The Petitioning Creditor* v. *The Debtor*[2], far from helping the appellant is against him. There a Division Bench held that a company could give general authority to one of its officers to present a petition in bankruptcy in the future in respect of acts of bankruptcy which might not have been committed at the date when the authority was given. It was pointed out that the decision in In re *A Debtor*[1], dealt with the particular set of facts and did not militate against the contention that there could be a general authority to act in bankruptcy proceedings. In *Guthrie* v. *Fisk*[3], authority was given "to sue". It was held that this did not give authority to institute bankruptcy proceedings. In the resolution now under consideration the authority is not confined to the institution of suits. There is no limitation on the agent's powers to institute proceedings in Court.

The second contention is that inasmuch as there were two previous attachments subsisting when the Bank presented its attachment it could not rely on its own attachment. In other

1. (1915) 1 K.B. 287. 2. (1917) 2 K.B. 808.
3. (1824) 3 B and C. 178: 107 E.R. 700.

Ebrahim Sait v. Mettupalayam Narayani Bank, Ltd.

Leach, C.J.

words it is said that because there had already been an act of insolvency committed as the result of a previous attachment for more than three weeks there could not be a second act of insolvency of the same nature. S. 9 (*e*) of the Presidency Towns Insolvency Act says that a debtor commits an act of insolvency if any of his property has been sold or attached for a period of not less than 21 days in execution of the decree of any Court for the payment of money. A debtor can commit more than one act of insolvency and the three attachments here constituted three different acts of insolvency. There is no substance whatever in this contention.

The appeal will be dismissed with costs in favour of the opposing creditors, one set.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Periasami Pillai .. *Petitioner* (Petitioner-3rd Defendant)*

v.

Sivathia Pillai .. *Respondent (Respondent-Plaintiff).*

Periasami Pillai v. Sivathia Pillai.

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (ii), *Proviso—Burden of Proof as to whether a person comes under the exception in the Proviso to S. 3* (ii).

The initial burden is on the petitioner (the debtor) to prove that he is an agriculturist. Then the burden shifts on the respondent to prove that the debtor falls under any of the Provisos to S. 3 (*ii*). Again the burden shifts on the petitioner to prove that he does not pay a sum of Rs. 100 as *poruppu* or the like.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the order of the Court of the Subordinate Judge of Sivaganga dated 20th December, 1938 and made in I.A. No. 94 of 1938 in S. C. S. No. 830 of 1933.

A. Sundaram Aiyar for petitioner.

Respondent not represented.

The Court delivered the following

JUDGMENT.—With reference to the question of the burden of proof under S. 3 (*ii*) of Madras Act IV of 1938 and its

* C.R.P. No. 1482 of 1939. 20th August, 1940.

Periasami Pillai v. Sivathia Pillai.

provisos, it seems to us clear that the applicant has first to establish a *prima facie* case that he falls under one of the categories enumerated in Ss. 3 (*ii*) (*a*) to (*d*). Then the burden shifts to the respondent to show *prima facie* that the applicant is excluded by one or other of the provisos. When this has been done the burden again shifts to the applicant to adduce materials which are specially within his knowledge and have a bearing on the applicability of the provisos. The lower Court does not appear to have grasped the principles on which the onus should lie and a fresh finding is necessary on the question whether the applicant is an agriculturist.

If he is an agriculturist the position is clear with reference to our decision in C. R. P. No. 1607 of 1938. All interest outstanding on 1st October, 1937, has to be wiped out. Thereafter interest will have to be calculated as under S. 12 of the Act and the various payments credited as and when made. There can be no question of appropriating payments made after 1st October, 1937, to interest which was outstanding on that date.

The petition is allowed with costs and the application is remitted to the lower Court for disposal in the light of this judgment.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Karnam Subramanya Rao .. *Petitioner** (*Petitioner-1st Defendant*)

v.

Pulla Rami Reddi ... *Respondent* (*Respondent-Plaintiff*).

Subramanya Rao v. Rami Reddi.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Finding that there was no vendor's lien in respect of liability sought to be scaled down and adjournment for further enquiry—Succeeding Judge—If can go behind the finding in further enquiry.

Where the presiding Judge decided that there was no vendor's lien in respect of the liability sought to be scaled down and adjourned the application for further enquiry the succeeding Judge must proceed with the matter

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* C. R. P. No. 1252 of 1939. 2nd August, 1940.

Subramanya Rao *v.* Rami Reddi.

where his predecessor left it and cannot reopen the issue and give a contrary finding.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the District Munsif of Kurnool dated 14th July, 1939 and made in I. A. No. 638 of 1938 in O. S. No. 139 of 1937.

P. C. Parthasarathy Aiyangar for Petitioner.

P. Chandra Reddi for Respondent.

The Court delivered the following

JUDGMENT.—In this case a former District Munsif heard arguments on the question whether the petition under Madras Act IV of 1938 would lie under S. 19, having regard to the provisions of S. 10 (2) (*ii*) and he passed a considered order that there was no vendor's lien in respect of the liability and no obstacle under that section to the application. He then adjourned the matter for further enquiry. He was transferred and his successor instead of proceeding with the matter where his predecessor left it, reopened the issue which had been decided and gave a contrary finding and dismissed the application on that finding. I am of opinion that he had no jurisdiction to do that. Granting that the matter is not precisely covered by S. 11, Civil Procedure Code, that section is not exhaustive of the applicability of the principle of *res judicata*. *Hook* v. *Administrator-General of Bengal*[1]. When an issue has been made the subject of a final order by a Court, that order cannot be ignored by a succeeding Judge nor has the Court jurisdiction to alter its decision except on grounds which would justify a review (vide *Basanta Kumar Das* v. *Kusum Kumari Dasi*[2]). If the correctness of this order is to be attacked otherwise, it can only be done by way of appeal against the final order on the application, which remedy is still open. The petition is allowed with costs and the application is remitted to the trial Court for disposal on the merits.

K. S. *Petition allowed.*

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1. (1921) 40 M.L.J. 423: L.R. 48 I.A. 187: I.L.R. 48 Cal. 499 (P.C.).
2. (1916) I.L.R. 44 Cal. 28.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

V. S. Singarachariar .. *Petitioner* (Respondent-decree-holder)*

v.

Pappathi Ammal .. *Respondent (Petitioner-2nd Defendant).*

Singarachariar *v.* Pappathi Ammal.

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (ii) (*a*)—*Holder of vendor's lien—If "agriculturist".*

The holder of a vendor's lien in agricultural land has a saleable interest in land and is qualified to be an agriculturist under S. 3 (*ii*) (*a*) of Madras Act IV of 1938.

Subbaramier v. *Venkatachalapathi Aiyar*, (1940) 2 M.L.J. 515, applied.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Trichinopoly dated 14th December, 1938 and made in E. A. No. 1318 of 1938 in O. S. No. 167 of 1936.

K. S. Desikan and *K. Raman* for Petitioner.

C. S. Rama Rao Sahib and *A. Sundaram Aiyar* for Respondent.

The Court delivered the following

JUDGMENT.—In view of our decision in *Subbaramier* v. *Venkatachalapathi Aiyar*[1] that a simple mortgagee of agricultural land has a saleable interest therein sufficient to satisfy S. 3 (*ii*) (*a*) of Madras Act IV of 1938, it would seem to follow that the holder of a vendor's lien in agricultural land is equally qualified to be an agriculturist. But the trial Court has not gone fully into the question whether in fact the lien subsists. The transferee did not admit his liability to pay to his transferor, as the learned Judge seems to think, but to the plaintiff the holder of the incumbrance over the right transferred. Whether or not the vendor's lien subsists will in our opinion depend largely on the circumstances of the transfer—for instance, if the transferee has the right to hold the unpaid money for the protection of his own interest against the incumbrances, there can hardly be a debt due to the transferor in respect of which the lien may be said to subsist. But this question can best be investigated by the trial Court in disposing of the pending application under S. 19. With these observations the petition is dismissed with costs.

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* C. R. P. No. 656 of 1939. 19th August, 1940.

1. (1940) 2 M.L.J. 515.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Nanjunda Chetty ... *Appellant** (*Appellant-1st Respondent-1st Defendant*)

v.

Y. P. R. L. M. L. Lakshmanan Chettiar and others ... *Respondents* (*Respondent—Petitioner-Assignee decree-holder*).

Nanjunda Chetty v. Lakshmanan Chettiar.

Execution—Application in accordance with law—Decree awarding relief against properties—Application for arrest of judgment-debtor—Effect—Civil Procedure Code (V of 1908), S. 52 (2).

The granting of a decree against the assets in a judgment-debtor's hands does not necessarily preclude execution against him personally. In certain circumstances which are set out in S. 52 (2), Civil Procedure Code, such a mode of execution is permitted. Where the prayer in the execution application was for the arrest of the defendant although the decree was only against the family properties in his hands and not against him personally.

Held, that the execution application was in accordance with law.

Ramachandra Naidu v. *Tirupathi Naidu*, (1916) 35 I.C. 614 followed.

Ramakrishna Kadirveluswami v. *Eastern Development Corporation, Ltd.*, (1917) 43 I C. 537 (Mad) and *Pandarinath Bapuji* v. *Lilachand Hatibhai*, (1888) I.L.R. 13 Bom. 237 considered.

Appeals against the orders of the District Court of Coimbatore respectively dated 28th October, 1939 and 27th October, 1939 and made in C. A. Nos. 255 and 252 of 1939 (E. P. R. No. 160 of 1938 in O. S. No. 233 of 1927, and E. A. No. 396 of 1938 in O. S. No. 234 of 1927 Sub-Court, Coimbatore) respectively.

K. S. Desikan and *C. D. Venkataramanan* for Appellant.

A. C. Sampathi Aiyangar for Respondent.

The Court delivered the following

JUDGMENT:—The question at issue in these two appeals is whether two applications for execution filed by the decree-holder on 17th February 1936 were or were not in accordance with law. The prayer in each application was for the arrest of defendant 1. The decrees as they then stood amended did not in either case make defendant 1 personally liable, but were only against the family properties in his hands. Both Courts

*A. A. A. O. Nos. 21 and 22 of 1940. 8th August, 1940.

below have held that these applications were in accordance with law.

Nanjunda Chetty v. Lakshmanan Chettiar.

In appeal it is argued that the applications were not in accordance with law as the relief asked for was one which the decree did not permit of being granted. If this premise is correct, I think the conclusion must follow. *Ramakrishna Kadirveluswami* v. *Eastern Development Corporation Ltd.*[1], and *Pandarinath Bapuji* v. *Lilachand Hatibhai*,[2] are instances in which this legal principle has been applied. But I am bound by a Bench decision of this Court to hold that the premise is not correct. That decision is *Ramachandra Naidu* v. *Tirupathi Naidu*[3], and it deals with precisely similar facts. It is there held in effect that the granting of a decree against assets in a judgment-debtor's hands does not necessarily preclude execution against him personally. In certain circumstances which are provided for by S. 52 (2) of the Code of Civil Procedure such a mode of execution may be permitted. It is also pointed out that the judgment-debtor in that case was not asked to explain whether such circumstances existed or not which is also true here. I find that in Rustomji's Commentary on the Limitation Act it is doubted whether this decision is good law—but as it has never been overruled in Madras or, so far as I am aware, dissented from in any reported decision, it is binding upon me. The result is then that these appeals must fail and are dismissed with costs.

Leave refused.

B. V. V. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Gudipati Brahmanandam .. *Petitioner* (2nd Respondent)*

v.

Gudipati Sarveswara Rao and others .. *Respondents (Petitioner and Respondents 1 and 3).*

Brahmanandam v. Sarveswara Rao.

Civil Rules of Practice (Madras), r. 183—Sale of attached debt—Validity—Setting aside—Limitation Act, Art. 166.

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1. (1917) 43 I.C. 537 (Mad.). 2. (1888) I.L.R. 13 Bom. 237.
3. (1916) 35 I.C. 614.

* C. R. P. No. 1543 of 1937. 9th August, 1940.

Brahmanandam v. Sarveswara Rao.

There is nothing in r. 183 of the Civil Rules of Practice which would justify the conclusion that a sale of a debt which was attached in execution is void, merely because the Court would have been better advised to have realised it by the appointment of a receiver having regard to the terms of r. 183. It can be set aside only by an application and Art. 166 of the Limitation Act will apply.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order dated 17th July, 1937 and made in C. M. P. No. 2295 of 1936 in S. C. S. No. 868 of 1934 on the file of the Court of the District Munsif of Gudivada.

P. Satyanarayana Rao for Petitioner.

K. Venkatarama Raju for Respondents.

The Court delivered the following

JUDGMENT.—The present petitioner was the purchaser in Court auction of a mortgage-debt due to one Krishnayya who was the judgment-debtor in a money suit. The decree-holder, having attached this mortgage-debt, brought it to sale and it was purchased by the present petitioner on 14th October, 1935. More than a year later, the son of the mortgagee, who by this time is dead, filed an application which recites O. 21, r. 90, Ss. 47 and 151 of the Code of Civil Procedure and S. 18 of the Limitation Act, praying the Court to set aside the sale and direct the mortgagor, who was made a party, to deposit the amount due on the mortgage, out of which the decree debt was to be satisfied and the balance paid to the applicant. The lower Court has dealt with this application in a somewhat summary manner. The learned District Munsif recites r. 183 of the Civil Rules of Practice as laying it down that a debt attached in execution of a decree should be realised by appointment of receiver and not by sale, unless the attached debt is very insignificant. He then states, wrongly, that the decree debt was not over Rs. 100 whereas in fact it was three times this figure and that the sale fetched less than Rs. 100, whereas the price was Rs. 251 and, without going into the question of limitation at all, the learned District Munsif sets aside the sale and directs the decree-holder to take steps under r. 183 of the Civil Rules of Practice.

It seems to me that this order cannot be upheld. Granted that r. 183 directs the Court to realise an attached debt by the appointment of a receiver and not by sale, unless this is undesirable from the smallness of the amount of the debt or otherwise, there is nothing in r. 183 which would justify

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the conclusion that a sale of the debt in execution is void, merely because the Court would have been better advised to have realised it by the appointment of a receiver having regard to the terms of r. 183. If once it is conceded that the sale in question—however ill-advised it may be—cannot be regarded as void, it must be set aside in some manner known to law. There must be an application and presumably the law of limitation governing that application will be Art. 166. If for any reason, the applicant can bring himself within time in respect of an application which is *prima facie* time-barred, by calling in aid the provisions of S. 18 of the Limitation Act, the grounds upon which limitation is saved must be proved and definitely found before the Court can go into the question of the validity of the sale. Here, there is a sale which may or may not have been well-advised and which may possibly be attacked on other grounds. But the sale is certainly not *ab initio* void and there must be an application to get it declared invalid. The application filed by the son of the judgment-debtor is apparently time-barred. Before the Court can adjudicate on the validity of the sale, it must necessarily give a finding regarding the limitation of the application. I say nothing about the merits of the application, having regard to the other contentions raised by the parties. But I do hold that the order of the lower Court setting aside the sale without giving a finding on the question of limitation cannot be sustained.

The Civil Revision Petition is therefore allowed with costs; the order of the lower Court is set aside. The lower Court is directed to deal with the contentions of the parties and dispose of the application afresh in the light of this judgment.

K. S. —— *Petition allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD THANKERTON, LORD ROMER, SIR GEORGE RANKIN, LORD JUSTICE LUXMOORE AND MR. M. R. JAYAKAR.

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Hem Chandra Roy Chaudhury v. Suradhani Debya Chaudhurani.

Hem Chandra Roy Chaudhury .. *Appellant**

v.

Suradhani Debya Chaudhurani and others .. *Respondents.*

Mortgage—Invalidity as against purdanashin *mortgagor—Enforcibility against the other mortgagor who is competent*—Purdanashin—*Transactions with—Tests of validity*

* P. C. Appeal No. 80 of 1938. 23rd May, 1940.
Bengal Appeal No. 15 of 1937.

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Though a mortgage is found to be not binding on one of the mortgagors a *purdanashin* on the ground that the deed was not explained to her, the other mortgagor who was competent to mortgage his interest is bound by the mortgage.

Tests for determining the validity transactions with *purdanashins* reviewed.

Appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal.

The appellant, Hem Chandra Roy Chaudhury, was the first defendant in a suit brought by the first respondent in the Court of the Subordinate Judge at Mymensingh to enforce a mortgage. The suit was filed on the 6th March, 1931, and the mortgage deed (exhibit 1) was dated 18th August, 1918. The property mortgaged thereby was a taluk (Gangaram Rai) numbered 237 in the books of the Mymensingh Collectorate and comprising ten mouzas; also another taluk (Sambhu Chandra Roy) numbered 239 in the same Collectorate and comprising seven mouzas. The mortgage deed had been executed in favour of the plaintiff by two persons as mortgagors—the appellant and his paternal grandmother, an old lady whose name was Sm. Nabin Kishore Chaudhurani.

The appellant had inherited the mortgaged properties, together with other properties, from his father at some date before 1914 while he was yet a minor. The father's will, made in 1891, states that Nabin Kishore, the testator's adoptive mother, had managed and administered his zemindari and other properties during his minority and was efficient in doing all business relating thereto. The appellant in 1913, on attaining majority, executed a trust deed (3rd Falgoon 1320 B.S.) vesting all his properties in her so that she might continue to manage them. Between 1914 and 1917 they had jointly borrowed considerable sums from the Maharaja of Mymensingh on four mortgage deeds. The first of these mortgages dated in 1914 was paid off by money raised from one Ananth Bandhu Guha by means of a mortgage (exhibit S) entered into on 18th March, 1918, a few months before the mortgage in suit. The other three mortgages were paid off by means of the mortgage in suit which was for the sum of Rs. 1,20,000—Rs. 1,00,423-4-6 due on the three mortgages already mentioned, Rs. 4,000 due on a note of hand to the plaintiff (respondent No. 1) and Rs. 15,576-11-6 cash advanced. The appellant and his grandmother in 1920 and 1923 had borrowed further sums from Ananth Bandhu Guha under two mortgage deeds exhibits R and T.

The properties comprised in the respective mortgages to Ananth Bandhu Guha were as follows. His prior mortgage of 18th March, 1918 (exhibit S) comprised four out of the seventeen mouzas mortgaged to the plaintiff. His subsequent mortgage of 1920 (exhibit R) comprised the same seventeen mouzas and his last mortgage of 1923

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(exhibit T) comprised in addition to these seventeen mouzas a house and lands known as Bailor House.

Ananth had died before suit and the present respondents 2 to 5 were impleaded as his representatives. They were defendants 3 to 6 and may be referred to as the Guha defendants.

Nabin Kishore was impleaded as the second defendant in the suit. She died on 8th September, 1932, before the trial and the appellant was substituted in her place on 13th September, 1932. The time originally allowed by the Subordinate Judge to the defendants for filing written statements was extended by him until 4th June, 1931, on which day the Guha defendants put in a written statement. The appellant was given further time until the 25th. On that day he asked for still more time. The Subordinate Judge gave him two days only, remarking that he had had two and a half months already; also that he had no right to look into the Guha defendants' written statement before filing his own. (This may have meant no more than that he should file his own written statement independently in the first instance.) On the 29th June, Nabin Kishore filed her written statement and on the 6th of July the Guha defendants filed an amended pleading in which for the first time they sought to have their prior and subsequent mortgages enforced in the plaintiff's suit. On the 18th July issues were framed, including an issue as to the sums due on the respective mortgages in favour of the plaintiff and of the Guha defendants. On 29th August an issue, not now of importance, was amended at the instance of Nabin Kishore. After her death in September, 1932, the appellant, who had filed no written statement on his own account, asked leave on 1st November, 1932, to file a new written statement as her representative. He was given leave, but as he applied late, leave was only given on the terms that he could take no fresh ground of defence apart from those already raised by her previous written statement. He filed a written statement on 14th November, 1932, of which paragraphs 5 to 7 setting up an interest of third parties in the mortgaged property was struck out by order of 19th November.

S. P. Khambatta for Appellant.

C. Bagram for Respondents.

23rd May, 1940. Their Lordships' judgment was delivered by

Sir George Rankin.

SIR GEORGE RANKIN.—[After setting out the facts as above.]

The first and main contention of the appellant throughout has been that Nabin Kishore was a purdanashin lady, that the mortgage deed sued upon was not explained to her, and that for this reason the mortgage is invalid even against him. Both Courts in India held on very convincing evidence that though an

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old lady, Nabin Kishore had considerable capacity for business; that the deed was read over to her, though it was not explained; that she understood its effect except that she did not understand that she was making herself personally liable to repay the money borrowed from the plaintiff. Neither Court in India appears to have appreciated that if for want of explanation the lady did not understand an important feature of the transaction, it cannot be held that her mind and free consent went with her act in executing the deed. A purdanashin woman is not required to understand every technical detail of a bargain. In the judgment of the Board delivered by Lord Buckmaster in *Sunitabala Debi* v. *Dhara Sundari Debi Chowdhurani*[1], this is pointed out and the "proper and necessary test" was held to have been applied by the Subordinate Judge who had found "that the lady had sufficient intelligence to understand the relevant and important matters, that she did understand them as they were explained to her, that nothing was concealed and that there was no undue influence or misrepresentation." And in *Farid-un-nissa* v. *Mukhtar Ahmad*[2], the Board stated the requirement as being "that the disposition made must be substantially understood and must really be the mental act as its execution is the physical act of the person who makes it." Though there may not be "a clear understanding of each detail of a matter which may be greatly involved in technicalities"—to use Lord Buckmaster's words—there may still be an intelligent comprehension of the bargain on the part of the lady. In such a case the bargain is good and is good as a whole. But if a feature of the transaction affecting in a high degree the expediency of her entering into it is not understood by the lady the bargain cannot be divided into parts or otherwise reformed by the Courts so as to uphold certain portions of it while rejecting others. Her answer to a suit upon the deed is not that she has an equitable defence to the enforcement of a certain stipulation but that it is not her deed. The protection extended to a person in her situation is protection against being held bound by a transaction which never had her free and intelligent consent.

Their Lordships must accept the concurrent finding of the Indian Courts that the lady did not understand that she was incurring personal liability for the loan and on this view must dispose of the case on the footing that the mortgage deed did

1. (1919) 37 M.L.J. 483: L.R. 46 I.A. 272, 278: I.L.R. 47 Cal. 175 (P.C.).
2. (1925) 49 M.L.J. 758: L.R. 52 I.A. 342, 350: I.L.R. 47 All. 703 (P.C.).

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not bind her at all. What defence is that to the appellant? That he had the beneficial interest in the property is agreed, though the trust deed of 1913 is not before the Board. He was competent to mortgage his interest. No doctrine of the law of India has been indicated to their Lordships which prevents a beneficiary under a trust from dealing with his interest by way of mortgage, though it is true enough that in India such an interest is not technically regarded as an equitable estate. If Nabin Kishore had a life interest in one of the villages, as she would appear from her son's will to have had under her husband's permission to adopt, that in no way affects the present suit. The life interest has come to an end. The mortgage is not being enforced against it, but is good and enforceable against the appellant's interest in the village—an interest which came to him as his father's heir, though subject, it may be, to certain life interests outstanding in his father's mother and widows. The plaintiffs mortgage is plainly enforceable against the appellant, whose defence is neither honest nor substantial.

The only other question raised by the appeal has reference to the relief granted to the Guha defendants in respect of their subsequent mortgages of 1920 and 1923 (exhibits R and T). No relief whatever was given to them in respect of their prior mortgage of 18th March, 1918 (exhibit S) and no personal decree was given to them in respect of either of the subsequent mortgages. Under O. 34, r. 4, cl. 4 of the Civil Procedure Code, they were at least entitled to redeem the plaintiff or to receive their own mortgage money under exhibits R and T out of the surplus sale proceeds remaining after satisfaction of the plaintiff's mortgage. If they pay off the plaintiff they become entitled to apply for a final decree for sale in the plaintiff's stead. They have been given this relief and nothing more. The appellant claims to have a grievance that some objection to the validity of these subsequent mortgages was taken by him, but has not been tried. But their Lordships have not succeeded in ascertaining the nature of the objection which requires still to be tried. The execution of the deeds is not disputed, there is no ground for objecting to the rate of interest, the sums due upon the deeds have been enquired into and ascertained. The trial Judge rightly refused to allow the appellant to set up the interest of his father's widows and the decree will not bind them. The appellant has not shown to their Lordships any

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ground for dissatisfaction with the orders of the trial Judge upon his belated written statement of November, 1932—orders which have been already detailed in this judgment. On this part of the case also the appeal must fail.

Their Lordships will humbly advise His Majesty that this appeal be dismissed. The appellant will pay the costs of respondent No. 1.

Solicitors for Appellant: *T. L. Wilson & Co.*
Solicitors for Respondents: *W. W. Box & Co.*
K. S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

Tiruchendur Sri Subramaniaswami Temple, through its Dharmakartha A. C. S. Kandaswami Reddiar .. *Appellant** (*Plaintiff*)

v.

P. Ramasamia Pillai (insane) through his wife and guardian R. Muthammal and others .. *Respondents* (*Defendants 2, 9, 12, 14, 15 and 23*).

Tiruchendur Sri Subramaniaswami Temple v. Ramasamia Pillai.

Will—Bequest to son of all properties—Subsequent clause directing "If son or his son has no child, the said properties shall pass to Subramaniaswami at Tiruchendur"—Construction.

A will provided ". . . . . . I have bequeathed to my son the right to all my properties and moneys, etc., and he shall alone enjoy them. If he or his son has no child, the said properties shall pass to Subramaniaswami at Tiruchendur".

Held, the will conveyed an absolute estate on the son and the subsequent clause did not impose any condition affecting the character of the bequest in favour of the son.

Appeal against the decree of the Court of the Subordinate Judge of Tuticorin dated 23rd February, 1937 and made in O. S. No. 57 of 1932.

K. V. Sesha Aiyangar for Appellant.

K. R. Rama Aiyar for Respondents.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—The main point argued in this appeal is that the finding of the Court below on a question of construction of a will is wrong. The will is one about which there is no dispute so far as its execution and validity are concerned. The testator was a retired Deputy Collector, Minakshisundaram Pillai, who was lying very ill in hospital at the time he made the will and died the very next day. The will is very short,

* Appeal No. 360 of 1937. 1st May, 1940.

Tiruchendur Sri Subramaniaswami Temple v. Ramaswamia Pillai.

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being in fact, a model of brevity and it runs as follows:

"I am now an in-patient in the hospital at Madura, having undergone an operation for carbuncle. As I have suspicions about my surviving, I have bequeathed to my son Pichai Pillai the right to all my properties and moneys, etc., and he shall alone enjoy them. If he or his son has no child, the said properties shall pass to Subramaniaswami at Tiruchendur."

This was executed on the 20th May, 1919. The next day a codicil was added to the effect that with the money due to the testator his elder brothers should purchase immovable properties such as lands, etc., in the name of his son. The testator died on the same day soon after the codicil was executed. The question is whether there is an executory devise in favour of Subramaniaswami under the will. If it can be regarded as containing an executory devise in favour of the deity, it is obvious from *Soorjeemony's case*[1] and the subsequent cases which are all referred to in a recent judgment of their Lordships of the Judicial Committee in *Gadadher Mullick* v. *Official Trustee of Bengal*[2], that there is nothing in the Hindu Law which makes such a devise void or invalid. The real point therefore for our determination is whether on a proper construction of the will it can be regarded as containing only a conditional bequest in favour of the son or, in other words, whether there is an executory devise in favour of the deity. The words used in the will are very simple and there is no dispute about the correctness of the translation of the will which is in Tamil. The two sentences are not connected with each other except that one follows the other. In other words there is no connecting conjunction and there is nothing to show that the last sentence was intended to operate as a condition affecting the character of the bequest made in the previous sentence in favour of the son. The bequest to the son in the earlier sentence is unconditional and appears to convey an absolute estate to him. There is nothing improper or unreasonable in this construction, because the bequest is one made by the testator on his death-bed to his only son, a minor, the testator's wife having predeceased him and there being no other child. There is thus no reason to suppose that it was intended to give only a limited estate to the son who, it must be remembered, would have taken an absolute estate of inheritance if there had been no will at all. The question therefore would arise whether,

1. (1862) 9 M.I.A. 123.
2. (1940) 1 M.L.J. 834: L.R. 67 I.A. 129: I.L.R. (1940) 1 Cal. 415 (P.C.).

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Pandrang Row, J.

in spite of these considerations, the last sentence in the will must be read as if it imposed a condition affecting the character of the bequest in favour of the son. After careful consideration we see no reason to take this view which has been pressed before us on behalf of the appellant. It seems to us as if the testator merely as an after-thought wanted to determine the devolution of the property in case his son died without issue and not in any way to limit either the character of the estate that was given by the earlier bequest in favour of the son or to make it conditional and liable to be divested at his death without issue. In this view of the case which, though supported by other reasons, is the view which has commended itself to the Court below, it is not necessary to consider whether, if the bequest in favour of the son is to be regarded as conditional or if it should be assumed that there is an executory devise in favour of the deity, the conditions which the law imposes on such devises have been satisfied in the present case. We may, however, add that we are not satisfied that any such condition has been violated in this case. In view of the construction which we find it impossible to avoid, it follows that the principal ground of appeal must fail.

It is, however, sought to be argued that, even though the appeal has to fail on this ground, nevertheless the lower Court ought to have given a decree for actual partition in respect of these shares of the plaint property which are covered by the compromises between some of the defendants and the plaintiff-appellant. There might have been a good deal to be said in support of this contention if these defendants who had compromised and whose shares are now sought to be partitioned and handed over to the plaintiff-appellant had been made parties to this appeal. The plaintiff-appellant, however, deliberately refrained from making them parties because the case had been compromised so far as they were concerned. Such being the case, it is not now open to the plaintiff-appellant to ask that any decree should be made for the purpose of actual partition when these defendants are not parties to the appeal. And we may as well add that a belated oral application made after this defect was pointed out is certainly not deserving of serious attention. The result is the appeal fails and it is dismissed with costs.

K. S. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Periaswami Chettiar and another .. *Petitioners** (*Respondents-Plaintiffs*)

v.

S. A. Ramaswami Goundan .. *Respondent* (*Petitioner*).

Periaswami Chettiar *v.* Ramaswami Goundan.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 3 (ii) (a), 7 and 19—Simple mortgagee—If 'agriculturist'—Puisne mortgagee—If entitled to have debt due to first mortgagee decree-holder scaled down—Trial Court—Power to scale down decree passed by appellate Court.

A simple mortgagee has such a saleable interest in agriculturist land as to qualify him for the benefits of the Act.

Subburama Aiyar v. *Venkatachalapathi Aiyar*, (1940) 2 M.L.J. 516, followed.

A puisne mortgagee against whom a decree has been passed in a suit by the first mortgagee, is a person who is liable to pay the debt and entitled to have the debt scaled down.

Narayanachari v. *Annamalai Chettiar* (1939) 2 M.L.J. 225 overruled.

Periannna v. *Sellappa*, (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218, applied.

Askaram Sowcar v. *Venkataswami Naidu*, (1920) 40 M.L.J. 218: I.L.R. 44 Mad. 544 and *Thinnappa Chettiar* v. *Krishna Rao*, (1939) 51 L.W. 453 at 460, referred to.

The trial Court has power to scale down a decree passed by the appellate Court. *Rantala Ganga Raju* v. *Bikkina Bulli Ramayya*, (1939) 1 M.L.J. 329: I.L.R. (1939) Mad. 520, followed.

Petition under Ss. 115 of Act V of 1908 and 224 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Coimbatore dated 14th February, 1939 and made in I. A. No. 1588 of 1938 in O. S. No. 247 of 1933.

K. S. Sankara Aiyar for Petitioners.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Respondent.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This petition arises out of an application under S. 19 of Madras Act IV of 1938 to scale down a mortgage decree.

The applicant (respondent here) was an assignee from the fourth defendant who was a third mortgagee. The petitioners before us represent the plaintiffs who were the first mortgagees. The mortgagor was the first defendant. The plaintiffs got a

*C.R.P. No. 653 of 1939. 19th August, 1940.

Periaswami Chettiar v. Ramaswami Goundan.

Wadsworth, J.

decree in 1935 which they executed and realised the full amount by the sale of the hypotheca. Plaintiffs also filed an appeal claiming an additional sum by way of interest and on 17th March, 1938, the appellate Court gave a decree for this additional sum. The plaintiffs then applied for payment of the amount of this decree out of the balance in Court deposit, and it was this application which gave rise to the application by the representative of the fourth defendant who had been brought on record in execution to scale down the decree.

In revision a number of points have been taken. The first was whether the applicant by virtue of his mortgage can be said to have a saleable interest in agricultural land which would qualify him for the benefits of the Act having regard to the definition in S. 3 (ii). This point is covered by our decision in *Subburama Aiyar* v. *Venkatachalapathi Aiyar*[1], in which we have held that a simple mortgagee has such a saleable interest as to qualify him for the benefits of the Act.

The second point taken relates to the power of the trial Court under S. 19 to scale down a decree passed by the appellate Court. This question is covered by the decision of a Bench of this Court in *Rantala Ganga Raju* v. *Bikkina Bulli Ramayya*[2], with which we are in respectful agreement.

A more substantial question is whether a puisne mortgagee impleaded in a suit by the earlier mortgagee can be deemed to be a 'debtor' entitled to the benefits of the Act; that is to say, is he a person who is liable to pay the amount of the debt due to the first mortgagee. There is a decision of Newsam, J., in *Narayanachari* v. *Annamalai Chettiar*[3], to the effect that a puisne mortgagee is not a debtor of the first mortgagee decree-holder, the reason being that he is a person in whose favour the privilege of redeeming the first mortgage debt has been recognised but not one who is under an obligation to pay. This judgment, which is very short, makes no reference to the earlier case, *Perianna* v. *Sellappa*[4], in which the Bench had to consider the position of the purchaser of the equity of redemption impleaded in a mortgage suit and they held that the purchaser had such a liability as would fall within the definition of 'debt' under S. 3 (*iii*) of the Act and that

1. (1940) 2 M.L.J. 516.
2. (1939) 1 M.L.J. 329: I.L.R. (1939) Mad. 520.
3. (1939) 2 M.L.J. 225.
4. (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218.

Periaswami Chettiar v. Ramaswami Goundan. — Wadsworth, J.

certainly it was not the intention of the Legislature to limit the relief under the Act to cases where a judgment-debtor was personally liable. An attempt has been made to distinguish this decision on the ground that it emphasized the possessory interest which the purchaser had to protect by discharging the mortgage-debt, whereas in the case of the puisne mortgagee, it is possible for the latter to await the result of the sale and collect his dues from the proceeds thereof, if sufficient balance remains. We are unable to accept this distinction as valid. Under the mortgage decree, the debt is made payable by the judgment-debtor who is a puisne mortgagee. It is true that he need not pay it, if he is prepared to risk the loss of his interest in the hypotheca or if he is confident that the sale will produce sufficient to satisfy his mortgage as well as that of the first mortgagee. Surely the purchaser of the equity of redemption impleaded in a mortgage suit is in a very similar position. He need not pay the debt if he is prepared to risk the loss of his property, or if he is confident that the sale will realise sufficient to pay him a fair compensation for the money he has spent in acquiring the equity of redemption. In each case, there is in fact a liability to pay the debt of the first mortgagee. It is not a personal liability, but it is nonetheless a liability. The fact that a puisne mortgagee is a person under a liability to pay the debt of the first mortgagee has been recognised in other decisions apart from those under this Act—vide *Askaram Sowkar* v. *Venkataswami Naidu*[1] and *Thinnappa Chettiar* v. *Krishna Rao*[2]. We have no doubt that the principle governing the decision in *Perianna* v. *Sellappa*[3], must also govern the decision of the present case and we must hold that the puisne mortgagee against whom a decree has been passed in a suit by the first mortgagee is a person liable to pay the debt of the plaintiff.

In the result therefore the petition is dismissed with costs of the contesting respondent.

K.S. *Petition dismissed.*

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1. (1920) 40 M L J. 218: I.L.R. 44 Mad. 544.
2. (1939) 51 L.W. 453 at 460.
3. (1938) 2 M.L.J. 1068: I L.R. (1939) Mad. 218.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Subburamier .. *Petitioner* (Petitioner-2nd Defendant).*

v.

Venkatachalapathi Aiyar and others .. *Respondents (Respondents-Plaintiffs).*

Subburamier v. Venkatachalapathi Aiyar.

Madras Agriculturists' Relief Act (IV of 1938). S. 3 (ii) (a)—Simple mortgagee of agricultural land—If an 'agriculturist'.

A simple mortgagee is a person having a saleable interest in land and so an 'agriculturist' within the meaning of the Act.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the order of the Court of the Subordinate Judge of Madura dated 6th October, 1938 and made in I. A. No. 213 of 1938 in S. C. S. No. 154 of 1936.

O. V. Balaswamy for Petitioner.

K. Vydhianathan for Respondents.

The Court delivered the following

Wadsworth, J.

JUDGMENTS. *Wadsworth, J.*—The question in this revision petition is whether a simple mortgagee of agricultural land has a saleable interest therein, so as to bring him within the definition of the term, 'agriculturist', in S. 3 (*ii*) (*a*) of Madras Act IV of 1938.

A mortgage is certainly an interest in immovable property and it is certainly saleable, so that, on the plain language of the section, it would seem to follow that a simple mortgagee of agricultural land is an agriculturist. The contention which has found favour with the lower Court and which is urged before us is, that the words, "has a saleable interest in land", mean, has a right to sell the land, and it is argued that it could not have been the intention of the legislature to give to a money-lender the rights and benefits of an agriculturist debtor. With reference to this argument, it need only be said that possibly the definition of the word 'agriculturist' has been framed too widely so as to bring within the benefits of the Act those whom the legislature did not intend to benefit, but if so, the remedy is to amend the Act and not to qualify its words by putting in words we do not find in the section. As the definition is drafted, we take it to include a simple mortgagee. The Civil Revision

* C. R. P. No. 513 of 1939. 19th August, 1940.

Petition is therefore allowed with costs and the application is remitted to the trial Court for disposal.

Patanjali Sastri, J.—I agree with my learned brother, and only wish to add that I was first inclined to think that the opening words of the section, "unless there is anything repugnant in the subject or context," might serve to exclude the petitioner in this case from the scope of the definition, as it does seem somewhat repugnant to the natural sense of the word, 'agriculturist' to hold that it includes a simple mortgagee who is only a creditor holding immovable property as security for his debt; but, having regard to the various classes of persons who cannot be said to be agriculturists in the strict sense of the term, but who are clearly intended to be benefited by the Act, I hesitate to base any conclusion on the repugnancy clause.

Subbu-ramier v. Venkata-chalapathi Aiyar. — Patanjali Sastri, J.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Neelappa Reddiar .. *Petitioner* (Respondent-Plaintiff)*

v.

Solaimuthu Udayan and another .. *Respondents (Petitioners-Defendants).*

Neelappa Reddiar v. Solaimuthu Udayan.

Madras Agriculturists' Relief Act (IV of 1938), S. 8, Explanation—Debt due by A *discharged on substitution of debt due by* B *to the same creditor* —B's *debt, if one in "renewal or inclusion of* A's *debt".*

A promissory note of 1918 by *A* was discharged and in lieu of it on the same day (3rd October, 1924) a fresh promissory note was executed by *B* (a distant relative of the original debtor) who renewed it by a series of documents terminating in the suit promissory note.

Held, that the debt under the promissory note of 3rd October, 1924, was not in renewal or inclusion of the promissory note of 1918.

Barber v. *Mackrell*, 68 L.T. 29 and In re *Ramaswami Chettiar*, (1939) 2 M.L.J. 609, followed.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif of Ariyalur dated 29th August, 1938 and made in I. A. No. 198 of 1938 in S. C. S. No. 918 of 1937.

K. Aravamuda Aiyangar for Petitioner.

Y. Venkatasubramanyan for Respondents.

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* C. R. P. No. 113 of 1939. 21st August, 1940.

Neelappa Reddiar v. Solaimuthu Udayan.

Wadsworth, J.

The judgment of the Court was delivered by

Wadsworth, J.—This revision petition raises the question of the meaning of the explanation to S. 8 of Madras Act IV of 1938. Does the term "renewed or included in a fresh document" cover the case in which a debt due by *A* is discharged on a debt due by *B* to the same creditor being substituted for it?

The facts are that one Arunachala was indebted to the plaintiff under a promissory note Ex. E of the year 1918. That promissory note was discharged and in lieu of it on the same day (3rd October, 1934) a promissory note Ex. D was executed by the defendant who is a distant relative of Arunachala. This has been renewed by a series of documents terminating in the suit promissory note by defendant to the plaintiff dated 19th August, 1936. There is a missing link in 1925, but the lower Court has found that the evidence is sufficient to prove that the missing promissory note of 1925 was part of the chain of renewals. It follows therefore that in scaling down the debt the defendant is at least entitled to go back to Ex. D of 1924. The lower Court has found that he is also entitled to go back to Ex. E of 1918 executed by his relative Arunachala and the plaintiff seeks to revise this order.

It was held by Somayya, J., in In re *Ramaswami Chettiar*[1], that when *B* takes over a debt due by *A*, the new document is not a renewal of *A's* debt nor is it an inclusion in a fresh document so as to bring in the explanation to S. 8. There is a very brief judgment of Stodart, J., in C.R.P. No. 1962 of 1939 where our learned brother held that in the case of a debt by *A* renewed by his legal representative *B*, the explanation to S. 8 applies and that *B's* debt was a renewal of that of *A*. It is possible that different considerations may govern the case of two debts, one incurred by the legal representative of the debtor under the earlier debt. We are not, however, concerned with such a case here. The defendant was not the legal representative of Arunachala. The fact seems to be that by some private arrangement the debt due by the defendant was substituted for the debt due by his relative Arunachala. Can it be said in such circumstances that the defendant's debt is a renewal of the debt of Arunachala? We have no doubt that in ordinary parlance,

1. (1939) 2 M L.J. 609.

Neelappa Reddiar v. Solaimuthu Udayan.

Wadsworth, J.

when we speak of a renewal of a debt, we ordinarily mean the substitution of a fresh contract between the same parties for the same amount or the same amount plus accrued interest. That is the view taken by the Court of Appeal in the case of *Barber* v. *Mackrell*[1]. Lord Justice Lindley says:

"A bill is renewed when another bill is taken in its place, the parties to the bill and the amount of it being the same, though perhaps in some cases the interest due on the one bill is added."

It seems to us clear that this is the sense in which the word 'renewed' is employed by the Legislature in the explanation to S. 8.

It has been contended that though the defendant's debt may not be a renewal of the debt of Arunachala, it may be said to be an inclusion in a fresh document of Arunachala's debt and that the explanation can therefore be applied. We consider that this interpretation of the explanation to S. 8 involves violence to the language. Reading that explanation as a whole, we have no doubt that it was intended to cover the case of a debt by *A* in favour of *X* renewed by another debt by *A* in favour of *X* or included in a fresh document executed by *A* in favour of *X* for the original advance plus some further sum. This view is confirmed by reference to the later words of the explanation regarding the principal originally advanced with such sums, if any, as have been subsequently advanced and especially by reference to the final words 'principal sum repayable by the agriculturist'. Obviously, the Legislature was dealing with the same debtor throughout. We say nothing on the question whether when *A* dies and *B* inherits his liability and executes a new promissory note in substitution for that executed by *A*, the explanation would or would not apply.

In the result therefore we hold that the defendant will be entitled in scaling down the debt to go back only to the promissory note Ex. D dated 3rd October, 1924.

There is one other point with respect to which the lower Court's order appears to be defective. No provision is made in the lower Court's order for the costs in the suit. This is not a case to which S. 18 (1) applies as the suit appears to have been filed before 1st October, 1937. The omission to provide for the costs in the suit seems to have been due to inadvertance. This will be remedied by the trial Court if the petitioner's statement

1. 68 L.T. 29.

Neelappa Reddiar v. Sholaimuthu Udayan. — Wadsworth, J.

that the suit was filed before 1st October, 1937, is found to be correct. The Civil Revision Petition is therefore allowed with costs and the application is remitted to the trial Court for disposal in the light of this judgment.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Madipalli Venkatachellam .. *Appellant* (1st Defendant)*

v.

Madipalli Suryanarayanamurty and others .. *Respondents (Plaintiff and Defendants 2 and 3).*

Venkatachellam v. Suryanarayanamurty.

Civil Procedure Code (V of 1908), Sch. II, Para 20 (2)—Applications under—Applicability of procedure prescribed for suits—Jurisdiction—Property situate within two courts in British India—Applicability of principle of S. 17, Civil Procedure Code—Reference to arbitration—Death of one party joining in reference—Continuance of proceeding—Permissibility.

The intention of para. 20 (2) of Schedule II of the Code of Civil Procedure is that applications coming thereunder should in every way be treated as suits and the procedure applying to suits should apply to them. And S. 17 of the Code is one of the sections which the Court may take into account for deciding the question of jurisdiction in a case under para. 20 (2). Consequently, where an application under para. 20 (2) relates to property within the jurisdiction of two courts in British India it is open to the Court within the jurisdiction of which part of the property is situate to entertain the application.

Gangappa v. *Kapinappa*, (1869) 5 M.H.C.R. 128; *Ratnamalai Servai* v. *Ramaswami Servai*, (1919) 10 L.W. 57; *Ramabhadra Raju Bahadur* v. *Maharaja of Jaipur*, (1919) 37 M.L.J. 11: 46 I.A. 151; I.L.R. 42 Mad. 813 (P.C.); and *Krishna Aiyar* v. *Subbarama Aiyar*, (1932) 62 M.L.J. 550; I.L.R. 55 Mad. 689, considered.

Where certain family disputes are referred to arbitration and the parties intend to proceed with the arbitration to a decision the death of one of the parties to the reference will not bring the arbitration to an end.

Satyanarayana v. *Venkata Rangayya*, (1903) 13 M.L.J. 311: I.L.R. 27 Mad. 112, relied on.

Appeal against the decree of the District Court of East Godavari at Rajahmundry in O. S. No. 34 of 1926, etc.

V. V. Srinivasa Aiyangar, Ch. Raghava Rao and *T. Satyanarayana* for Appellant in Appeal No. 52 of 1936 and Respondent in C. R. P. No. 921 of 1936.

* Appeal No. 52 of 1936 and C. R. P. No. 921 of 1936. — 16th August, 1939.

Venkatachellam v. Suryanarayanamurty.

P. V. Vallabhacharyulu and *K. Bhimasankaran* for Respondents in Appeal No. 52 of 1936 and Petitioner in C. R. P. No. 921 of 1936.

The Court delivered the following

JUDGMENTS. *Mockett, J.*—The first defendant is the appellant. He is the son of one Chelamiah who died on the 15th October, 1925, at a great age. The second defendant is the brother of the first defendant and the plaintiff is the third brother. The following facts were stated from the bar and were accepted. In April or October, 1917—at this stage it is not necessary to be more precise about the date—the family became divided in status. In 1920, the second defendant filed, but subsequently withdrew, a suit for partition, but on May 22nd, 1921, there was a *muchilika* entered into between the parties with a view to dividing the property. On that there was a reference to arbitration by the plaintiff and the defendants and it is on that reference that this matter comes before this Court, having been first of all decided by the District Judge of East Godavari. That is all that is necessary at present with regard to the facts, because what is now being dealt with may be called a preliminary point. It can be shortly stated. Mr. V. V. Srinivasa Aiyangar for the first defendant has raised a point which was referred to but not decided by the Judicial Committee of the Privy Council in *Ramlal Hargopal* v. *Kishanchand*[1]. The point in question is dealt with by Lord Phillimore at page 372. His Lordship said:

> "It was contended on behalf of the appellant that if an award relates to more than one subject-matter and only one is within the jurisdiction of the Court, it cannot be filed in that Court; in fact, that it can be filed in no Court, because no one Court would have jurisdiction over the whole subject-matter. Their Lordships deem it unnecessary to rest their judgment on any such general proposition."

Lord Phillimore went on to point out why it was unnecessary to decide that point. His reason was this, namely, that it was evident to their Lordships that the property concerned in the case before them was property wholly outside British India and that in the words of their Lordships there was no dispute concerning the ownership and management of properties within the jurisdiction. It must, therefore, be emphasised in that case that what was before the lower Court was an application under S. 20 of the Second Schedule of the Code of Civil Procedure

1. (1923) 46 M.L.J. 628: L.R. 51 I.A. 72: I.L.R. 51 Cal. 361 (P.C.).

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Mockett, J.

relating to property wholly outside the jurisdiction of the Courts of British India. What is the procedure set out in the second schedule? Clause 20 is headed "Arbitration without the intervention of a Court" and it says:

"Where any matter has been referred to arbitration without the intervention of a Court, and an award has been made thereon, any person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award that the award be filed in Court."

And in the case to which I have just referred there was an application to the Court to file an award with regard to property wholly outside British India. In this case it is not necessary to say more than this, that admittedly this award dealt with property and part of it was immovable property within the jurisdiction of the District Judge of East Godavari and part of it outside his jurisdiction, as that term is ordinarily understood. Mr. Srinivasa Aiyangar has argued before us exactly the point that was referred to by Lord Phillimore. His argument is that clause 20 of the second schedule to the Code states that the person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award and that means "to a Court having jurisdiction over the whole of the subject-matter of the award" and that, as admittedly part of the subject-matter of this award is situated outside East Godavari judicial District, the District Judge had no jurisdiction. And Mr. Srinivasa Aiyangar has also not recoiled from the position that no judge had any jurisdiction to make an order under clause 20 in regard to this matter, because once it is conceded that the subject-matter is in more than one jurisdiction, it must follow that no Judge in any one jurisdiction can have jurisdiction over it. That seems to me to be a startling proposition and it is difficult to suppose that the legislature can have contemplated the results it would produce in numerous cases—for it naturally and frequently happens—especially on the borders of districts that family lands are partly in one district and partly in another. But authorities have been cited to us which, according to the learned Counsel for the appellant, are said to support the proposition. It is as well to state that no authority has been cited to us covering facts similar to the facts now under consideration. There is no authority which has been brought to our notice in which it has been decided that, when an application under cl. 20 relates to property in two jurisdictions in British India, no Court has jurisdiction to hear the appli-

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cation. But there is clear authority that, when part of the subject-matter is in British India and part of the subject-matter is in a foreign state which naturally in this country usually means "in a native state", the Court in British India cannot exercise jurisdiction over the award. I respectfully agree that that must necessarily be so, because, once it is conceded, and especially in the case of immovable property, that the property in question is wholly outside the jurisdiction of the British Courts, it must follow that a British Court cannot deal with an award because the award could not be enforced in a foreign state and moreover very curious results must follow, if the award was divided. The following result would follow; that is to say, *A* has awarded to him lands in British India and *B* lands in a foreign state. A partial enforcement of that award would mean that *A* would get something and *B* would get nothing. It is obvious that, in order to make an award effective, the whole of it must be enforced except possibly in such cases in which it appears that the award may be equitably divisible and that is a topic on which I desire to express no opinion. This particular topic—severability—has been discussed in one or two cases but does not in this case require any decision from us. Mr. Srinivasa Aiyangar relies very strongly on a decision of this High Court which is reported in *Krishna Aiyar* v. *Subbarama Aiyar*[1]. The learned Judges in that case, Reilly and Anantakrishna Aiyar, JJ., held that the expression "the subject-matter of the award" in para. 20 of Sch. II of the Civil Procedure Code means "the whole" and not "the whole or portion of the subject-matter of the award" and a Court within whose jurisdiction a portion of the immovable properties forming the subject-matter of an award is situated has therefore no jurisdiction to entertain an application to file the award made under that paragraph. That is a very general proposition and, if accepted by us, undoubtedly covers this case and is a clear authority in favour of Mr. Srinivasa Aiyangar's argument. But it is most important to emphasise that in that case the properties over which the Subordinate Judge of Palghat in this province purported to exercise jurisdiction were partly within the Madras Presidency and partly in Travancore, a state under the rule of His Highness the Maharaja of Travancore. There was some discussion with regard to certain property situate in Bangalore. It is not

1. (1932) 62 M.L.J. 550: I.L.R. 55 Mad. 689.

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necessary to go into that as it is sufficient if part of the property concerned lay within Travancore. That judgment therefore deals with the position which I have previously indicated, namely, where it is obvious that the Court in British India can have no jurisdiction to make any order it is to be emphasised that there were immovable properties in Travancore State. It does not seem that in that case any argument was addressed to the Court with regard to the position before us now, namely, where the whole of the properties are in British India. At page 694 Anantakrishna Aiyar, J., who gave the leading judgment of the Court says:

> "*Prima facie* the expression 'over the subject-matter of the award' would seem to imply over the *whole* of the subject-matter of the award. The words 'whole' or 'in part' occur in para. 11 of the second schedule, and in S. 17 of the Code, the words 'any portion of the property' occur. If therefore, the intention of the legislature was that the words 'subject-matter of the award' should mean the whole or a portion of the subject-matter of the award, then it is reasonable to expect that it would have said so expressly."

As to this, there seem to me to be little relation between S. 11 and S. 20 which deal with very different topics and with respect I am not able to agree that they can be usefully compared.

The learned Judges relied on two decisions, both of this High Court. The first was a decision of Scotland, C.J., and Collett, J., reported in *Gangappa* v. *Kapinappa*[1] and secondly reference is made to certain observations of Kumaraswami Sastri, J., referred to in *Ratnamalai Servai* v. *Ramaswami Servai*[2]. Reference is also made to a decision in Rangoon reported in *S. A. Nathan* v. *S. R. Samson*[3]. But in that latter case also the subject-matter was immovable properties within the jurisdiction of British Courts and immovable properties in the French territory of Pondicherry. In the case reported in the Madras High Court Reports the Court observed as follows:

> "The application must be made to a Court having jurisdiction in the matter to which the award relates . . . . . . From this it appears quite clear that the Court applied to must be one having jurisdiction in respect of the *whole* matter."

We have had the advantage of seeing the original documents in that case. It was a reference by the Judge of the Small Cause Court, Chittoor and it is clear from that reference that what the arbitrators had done was to adjudicate on debts

1. (1869) 5 M.H.C.R. 128. 2. (1919) 10 L.W. 57.
3. (1931) I.L.R. 9 Rang. 480 (F.B.).

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payable between the parties, the aggregate thereof being beyond the jurisdiction of the Small Cause Court but the amount of one of them within the jurisdiction. In other words, what was raised in that reference was, could a Court of Small Causes deal with an award which dealt with matters beyond its pecuniary jurisdiction? And the learned Judges took the view that the Court applied to must be one having jurisdiction in respect of the whole matter. That seems to me to mean "having jurisdiction in the sense that it is understood, the measure of pecuniary jurisdiction" and that, if the award dealt with a matter that was beyond that jurisdiction, it was a clear case when the award as a whole could not be enforced by that Court. The judgment of Kumaraswami Sastri, J., does not seem to me to touch the question which we have to decide, because his observations are very general. What had happened in that case was that an arbitrator had joined in an award an order for dissolution of marriage and also for the payment of money. What Kumaraswami Sastri, J., held was that the jurisdiction of the Court would depend upon the reliefs awarded by the award and that it was not open to the parties to confer jurisdiction on the Subordinate Judge to deal with matters over which he had no jurisdiction at all. It should in this appeal be remembered that the District Court of East Godavari has unlimited jurisdiction. It is well to mention that the decision to which we have just referred in *Krishna Aiyar* v. *Subbarama Aiyar*[1] has been considered by a Bench, Broomfield and Sen, JJ., of the Bombay High Court in *Gangadhar* v. *Dattatraya*[2] and their Lordships at page 212 express the view that:

"If the decision in *Krishna Aiyar* v. *Subbarama Aiyar*[1] is correct, it could mean that in many cases private arbitrations could never be made effective in the manner contemplated by the legislature, since there would be no Court to which the application could be made. With all deference to the learned Judges who decided this case I am not satisfied that this is the law".

In my view the learned Judges in Bombay have not noticed what seems to me the key to the whole position, namely, that, however general the words in that decision, the decision itself actually only deals with references in which property in British India and property in a foreign jurisdiction is concerned. If the decision of the Court was intended to go further than the

1. (1932) 62 M.L.J. 550: I.L.R. 55 Mad. 689.
2. I.L.R. (1937) Bom. 338: A.I R. 1937 Bom. 211.

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actual facts before it, I personally should be disposed to share the doubt expressed by the Bombay High Court. But I take the view that that decision extends no further than the actual facts and that it is only due to the generality of the observations of the Court while dealing with those particular facts that it has been possible to attempt to extend the decision so as to bring about the deadlock which the appellant seeks to establish in this case in applications under cl. 20 of Sch. II. In my view there is a complete answer to the argument which has been put before us by Mr. Srinivasa Aiyangar. It must be observed in cl. 20 that any person interested in the award may apply to any Court having jurisdiction over the subject-matter of the award. How is the Court to determine whether it has or has not jurisdiction? What procedure is laid down? In the case of an ordinary Court, in an ordinary suit, the Civil Procedure Code, Ss. 15 to 25 give guidance to the Courts as to how they should decide whether they have jurisdiction or not and it seems to me that it is by reference to S. 16 that the appellant contends that the Court has no jurisdiction. But it is argued that these sections do not apply to proceedings under cl. 20. The nature of those proceedings is dealt with in sub-cl. 2. It is stated that the application should be in writing and shall be numbered and registered as a suit between the applicant as the plaintiff and the other parties as defendants. A reference to the record in this case shows that the pleadings are described as in an ordinary suit. It is numbered as such. There is the document headed a "plaint." There are three written statements and additional written statements and there were issues. From where is all that procedure derived? It has not been possible for me to understand how, if the Civil Procedure Code does not apply, it is possible for the Court to which application is made under cl. 20 to decide any matters at all. Once again how can it decide whether it has jurisdiction? It seems to me that the curious position referred to by Lord Phillimore and argued before us to-day is met by the answer that the intention of sub-cl. 2 of cl. 20 is that these applications should be in every way treated as suits and that the procedure applying to suits should apply to them; and I am fortified in that view by the position which at the risk of repetition I will again state that, if it is not so, then apparently there is no procedure and no methods whatever provided by which the Court can deal with those matters. If that is so,

S. 17 of the Code provides that where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate. If S. 17 applies, it is obviously open to the plaintiff as they are described in the pleadings in this case to file their plaint in East Godavari and the East Godavari Court would have jurisdiction to hear that case not only with regard to the property immediately within its jurisdiction but with regard to any other property, the subject of that suit; and the result would be that by the application of S. 17 the East Godavari Court would have jurisdiction over the whole of the subject-matter when the trial starts. If that is so, much of the argument in this case will have been unnecessary. I hold that for the reasons I have given, the District Judge had jurisdiction to deal with the whole of the subject-matter which is situate in the first place outside his jurisdiction but by the filing of the suit included the other matters in the plaint over the whole of the subject-matter. The arguments which I just referred to were directed from another aspect of the case altogether. It was contended by the learned Counsel for the respondent that it was not open to Mr. Srinivasa Aiyangar to raise this objection at all. It had never been argued in the Court below that the Court had no jurisdiction and therefore, says the learned Counsel for the respondent, S. 21 of the Civil Procedure Code is in the appellant's way. It has never been raised as a ground of appeal and therefore, again says the respondent, O. 41, r. 2, prevents the appellant from raising it. As the argument was originally put to us by Mr. Srinivasa Aiyangar, I inclined to the view that he was not prevented from raising the point for the same reason that the appellant was not prevented from raising the point in the case before the Judicial Committee to which I have referred, because what he was arguing was that this was a case of no jurisdiction whatever. But in view of what I have held above I think technically this is a matter relating to the place of suing which should have been raised in the lower Court and that therefore both the provisions of the Civil Procedure Code stand in Mr. Srinivasa Aiyangar's way and, speaking for myself, I should not be disposed to grant him any indulgence here to allow him to raise it. All this, however, is purely academic, because, in

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order to arrive at a decision with regard to the whole matter, it has been necessary for us to hear it argued in full and I therefore only record my above view for the sake of completeness. For the reasons I have given I consider that the objection by the appellant that the lower Court had no jurisdiction to hear this application under cl. 20 of the second schedule of the Civil Procedure Code must fail.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I agree. It is unnecessary for me to refer to the facts which have been sufficiently set out in the judgment of my learned brother just now delivered. In the memorandum of appeal before us the appellant has taken a number of points. We are not now dealing with any of those points but with a question of jurisdiction not raised in the Court below and not mentioned in the grounds of appeal before us. O. 41, r. 2 leaves a discretion in the Court as to whether an appellant may be allowed to urge in support of his appeal a ground of objection not set forth in the memorandum of appeal. I may also mention that, beyond giving the respondent notice that the objection was going to be taken, the appellant has not chosen to follow the procedure indicated by r. 42 of the Appellate Side Rules for obtaining leave to raise an additional ground of appeal. Ordinarily speaking, we should not object to a new ground of appeal being raised and argued if the respondent is not likely to suffer any prejudice thereby. But it seems to me that the facts of this case render it extremely difficult for us to exercise our discretion in favour of the appellant. The application for filing the award was made in the Court below in September, 1926, and it was heard and disposed of on the 30th October, 1935. The application therefore appears to have been pending for a period of nearly nine years in the Court below and the hearing itself before the learned Judge seems to have occupied a period of twelve days. The appeal to this Court was filed about 3½ years back and, after all this long lapse of time and after all the expense which must have been incurred, one feels naturally reluctant to allow a point to be raised which had never been taken before. But, in view of the large stakes involved and the possibility of the case proceeding further, it is perhaps proper that we should deal with the merits of the objection.

The objection is that the Court below had no jurisdiction to entertain the application because the whole of the property

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which formed the subject-matter of the award did not lie within the local limits of its territorial jurisdiction. It is not disputed that except for a house in Innespet, Rajahmundry and a share in a rice factory in the same place the rest of the large properties, mostly immovable, dealt with by the award were outside the Court's jurisdiction. Mr. Srinivasa Aiyangar, the learned Counsel for the appellant, has contended that the Court having jurisdiction over an application to file an award under para. 20 of the second schedule of the Code of Civil Procedure is the Court having jurisdiction over the whole of the subject-matter of the award and, inasmuch as admittedly in this case a portion only of that subject-matter was within the jurisdiction of the Court below, it had no jurisdiction to entertain the application. In other words, a Court having territorial jurisdiction over a part only of the subject-matter is wholly incompetent to deal with an application filed under the paragraph. If the award should be sought to be enforced in a suit it is not disputed that the suit could be entertained by a Court having jurisdiction over part only of the subject-matter of the award. The contention, however, is that an application coming under para. 20 is not governed in matters of jurisdiction by the rules in the Code which determine the venue for the purpose of a suit. There are two objections to this contention. In the first place, though para. 20 speaks of a Court having jurisdiction over the subject-matter of the award, neither it nor the second schedule contains any rules for determining the Court invested with jurisdiction in matters within the second schedule. We would be left entirely without any guidance on the point unless we can refer to the provisions of Ss. 15 to 25 in the Code as providing the necessary machinery. S. 89 of the Code is not to be regarded as implying a prohibition to this course. That section provides that:

"Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the second schedule."

There is nothing in the language of the section to warrant our holding that the sections of the Code or the rules in the First Schedule do not apply to matters arising under the second schedule. For instance, the question whether the procedure of O. 23, r. 3 could be made applicable to matters arising under the second schedule was considered in *Subbaraju* v. *Venkat-*

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ramaraju[1] and it was ruled that the Code was applicable to the second schedule which is really a part of it and that there was no justification to regard it as a self-contained chapter in itself. So it seems to me that it is not only permissible but obligatory upon the Court to take note of the provisions of Ss. 15 to 20 and with their aid to ascertain which Court is the proper Court to entertain an application under para. 20. Among those sections is S. 17 which furnishes a valuable guidance for the determination of the point raised. It enables a party to institute a suit relating to immovable property if a portion at least, though not the whole of the property is situate within the limits of the Court to which he resorts. Where the property is situate within the jurisdictions of different Courts, the plaintiff has the option of choosing any one of those Courts, and when he has once chosen it, he is entitled to bring before it not only so much of the dispute as relates to the property within its jurisdiction but the entire dispute covering that property, and other property in other jurisdictions as well. In other words, where, by reason of S. 17, a Court is given jurisdiction by reason of part alone of the property being within its local limits that jurisdiction extends over the entire subject-matter of the suit. I am quite unable to accede to the argument that S. 17 does not govern the consideration of the question as to which Court is to be held for the purpose of para. 20 of the second schedule to have jurisdiction in a given case. If this construction is not to be accepted, it would lead, as my learned brother has observed, to startling results; it would really result in denying altogether to a litigant an easy and inexpensive remedy by way of application in every case where the subject-matter of the award lies in more jurisdictions than one. In fact, if such were the case no Court whatever would have jurisdiction to deal with an application under the paragraph. If this was the intention of the Legislature, one would expect to find more explicit language to have been used. In my opinion it is a forced construction that is sought to be placed upon the word subject-matter in para. 20. It is not to be forgotten that the primary object of the Legislature is to place in the hands of litigants an easy, speedy and inexpensive remedy by resort to a domestic tribunal of their own choice without the necessity of having to institute a suit with all the delay,

1. (1928) 55 M.L.J. 429: I.L.R. 51 Mad. 800 (F.B.).

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expenses, worry and trouble it might entail. Para. 20 appears to my mind to be conceived with the object of promoting such a beneficient purpose and I am of opinion that if I accede to the contention of the appellant, it would result, in an appreciably large number of cases, in the frustration of the very object behind the paragraph. Beyond stating that such was the law and the plain construction of the language the appellant's learned Counsel was unable to point to any intelligible or rational basis for the distinction that he drew between a suit and an application for enforcing an award. And I find it difficult for my part, more especially when the language is not plain, to give my assent to a construction which, far from advancing justice, has the effect of hindering it.

It is true that para. 20 speaks of any Court having jurisdiction, jurisdiction may be territorial, or pecuniary and may also depend on the nature of the dispute brought up for settlement before the Court. Whether or not an objection to jurisdiction which is based upon the limits of pecuniary jurisdiction or has reference to the nature of the disputed matter can be waived, it seems to me that an objection having reference to the local or territorial jurisdiction of the Court is capable of being waived. This furnishes the second ground for repelling the contention. S. 21 of the Code of Civil Procedure enacts that no objection as to the place of suing shall be allowed by any appellate or revisional Court unless such objection was taken in the Court of first instance at the earliest possible opportunity. Some argument—I confess it was a little too subtle for me—was advanced on behalf of the appellant to the effect that there was a distinction recognised by the Code between what was called 'the place of suing' which is the heading under which Ss. 15 to 25 appear, and the jurisdiction of the Court to take cognizance of a matter although that jurisdiction may turn on its local or territorial limits. To my mind the determination of the place of suing is the same thing as the determination of the local or territorial jurisdiction of the Court. If, either by reason of S. 17 of the Code or by reason of the omission of the party to take the objection to the territorial jurisdiction of the Court at the proper time, the Court entertains or deals with a litigation it seems to me that it is a case where there was either no initial defect of jurisdiction, or if there was such a defect it is one that must be deemed to

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have been waived. As my learned brother has pointed out, para. 20, cl. 2 makes it fairly clear that the procedure applicable to the determination of applications coming within it is the procedure relating to suits, and, if I understood the appellant's learned Counsel aright, he seemed to concede this proposition. The considerations adverted to above incline me to the opinion that the District Court of East Godavari which had admittedly jurisdiction over a part of the subject-matter of the award had ample jurisdiction over the whole, and was therefore competent to make the order it has made.

It has been contended that there are judicial pronouncements in this Court and in the Privy Council which make it obligatory on us to hold that where the whole of the subject-matter is not within the jurisdiction of a Court but only a part of it that Court has no power to entertain the application. Before referring to the cases relied upon for the appellant it is perhaps well to remember that in S. 16 of the Code which lays down the essential test for fixing the venue there is an important explanation added, namely, that 'property' in the section means 'property situate in British India'. S. 16 is the most important section of the group of sections relating to the place of suing. S. 17 and the later sections in the group proceed to widen and enlarge the scope of S. 16 by enacting other and more liberal rules. However that may be it is not permissible in view of the explanation to S. 16 to extend the jurisdiction of the Court beyond British India or even to any place within it to which the Code of Civil Procedure does not extend. In *Ramabhadra Raju Bahadur* v. *Maharaja of Jaipur*[1], the question was whether a mortgage decree for the sale passed by the Subordinate Judge of Vizagapatam comprising properties not only within his jurisdiction but also in the Agency tract governed by the Scheduled Districts Act could be held to be valid. The Civil Procedure Code did not extend to the Agency and the Subordinate Judge who was only exercising jurisdiction under the Code had no power whatever to deal with, or pass any decree relating to property in the Agency. That being so, the objection to the jurisdiction of the Court was held to be one which went to the very root of the matter and the decree was held to be null and void so far as that property was concerned. For the term

1. (1919) 37 M.L.J. 11: L.R. 46 I.A. 151: I.L.R. 42 Mad. 813 (P. C.).

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'Courts' in S. 17 of the Civil Procedure Code, as their Lordships point put, could have reference only to Courts to which the Code applies and where the Code did not apply, it was no use referring to S. 21 or any other provision in it for validating an invalid order. The importance of this decision lies in this, that a distinction must be made between cases where the property lies within British India though in different jurisdiction to which the Code applies and a case where some portion of the property is within British India and some portion out of it, in a Native state or in any other place to which the Code as such is not, and could not be made applicable.

It is on the decision in *Krishna Aiyar* v. *Subbarama Aiyar*[1] that the appellant relied almost exclusively for the argument that the Court below not having jurisdiction over the whole of the subject-matter had no jurisdiction at all to deal with the application. A reference to the facts of the case makes it clear that the award in that case comprised property partly situate in British India and partly in Travancore. The Court held that the application could not be entertained as the word subject-matter in para. 20 of Sch. II, Civil Procedure Code, meant the whole matter dealt with and decreed by the award and not any particular portion of it only and that the Court being incompetent to pass a decree in respect of the whole of the award property, could not split it up and deal with only those portions of it that were within its jurisdiction. The learned Judges were concerned as pointed out by Anantakrishna Aiyar, J., at page 696 with the question whether the Court in British India had jurisdiction to pass a decree in accordance with the award when that award dealt with property outside British India. The actual decision was thus circumscribed by reason of the inapplicability of the Code to part of the award property and the consequential incompetency of the Court to deal with it. It is thus clear that S. 17 can be displaced only in a case where part of the property is situate outside British India and not in a case where as here the whole of it is in British India though in different jurisdictions and therefore governed by the Code. In fact neither side has been able to point to any precedent governing a case like the one before us. There are however observations in the judgment which tend to support the appel-

1. (1932) 62 M.L.J. 550: I.L.R. 55 Mad. 689.

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lant though the actual decision as I understand it, does not. We have examined the facts in all the cases referred to by the learned Judges who decided *Krishna Aiyar* v. *Subbarama Aiyar*[1] and we find that there is none among them which can be said to furnish a parallel to the present case. It will be found on examination that either they are cases where the question did not turn upon territorial jurisdiction at all as for example, *Gangappa* v. *Kapinappa*[2] and *Ratnamalai Servai* v. *Ramaswami Servai*[3], or where a single inseparable award had dealt with property situate partly in British India and partly outside. Anantakrishna Aiyar, J., has also expressed the opinion that para. 20 provides a special procedure and confers an extra and special statutory right under special conditions imposed by that paragraph. He thinks that there is no hardship in construing S. 20 in the way he does as there is an alternative remedy available to the party by a regular suit which he can by virtue of S. 17 institute in any one of the several Courts within whose jurisdiction the property or any part of it is situate. I regret that with great respect I am unable to agree that this aspect of the question affords a true guidance to the construction of para. 20 which, as I have indicated, must receive a liberal rather than a restricted construction. The Bombay High Court has expressed a view contrary to the one which has found support in *Krishna Aiyar* v. *Subbarama Aiyar*[1]. The latest case in Bombay brought to our notice is that reported in *Gangadhar* v. *Dattatraya*[4], to which I shall not refer as it has been already dealt with in detail by my learned brother.

Reference was made to the decision of the Privy Council reported in *Ramlal Hargopal* v. *Kishanchand*[5]. In that case an award relating to the management of three Hindu temples for the support of which three villages had been endowed two of which were in Berar, was sought to be filed in the District Court of East Berar. Two of the temples were in the Dominions of the Nizam, and the third in British India but not in Berar. The objection to the jurisdiction taken before the District Judge himself in the first instance though not pressed afterwards was allowed to prevail in the Privy Council. The

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1. (1932) 62 M.L.J. 550: I.L.R. 55 Mad. 689.
2. (1869) 5 M.H.C.R. 128.
3. (1919) 10 L.W. 57.
4. I.L.R. (1937) Bom. 338.
5. (1923) 46 M.L.J. 628: L.R. 51 I.A. 72: I.L.R. 51 Cal. 361 (P.C.).

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ground of the decision was that all the temples were outside Berar and although two of the endowed villages were within the jurisdiction there was no dispute concerning their ownership or management or the application of their revenues to the upkeep of the temples. In other words, the award did not in fact deal with properties outside the jurisdiction, or as the Board pointed out, there was no substantial question decided by the award which affected property within the jurisdiction of the Berar Court. It was no doubt contended that if an award relates to more than one subject-matter and only one is within the jurisdiction of the Court, it cannot be filed in that Court; in fact that it can be filed in no Court, because no one Court would have jurisdiction over the whole subject-matter. But their Lordships did not find it necessary to pronounce on any such general proposition. I am unable to treat this decision as containing any support for the appellant's contention. The point is merely mentioned and not decided, and the relevant provisions of the Code were not noticed.

For the reasons which I have endeavoured to explain I am unable to see any substance in the objection to jurisdiction raised on behalf of the appellant and agree that it must be overruled.

Their Lordships delivered the following judgments on the merits of the appeal:—

Mockett, J.

Mockett, J.—I will now deal with the objections to this award as stated by Mr. V. V. Srinivasa Aiyangar, who appears on behalf of the first defendant Venkatachalam. (1) Chelamiah having died in 1925 was not thereafter a party to the reference which was thereby revoked. (2) If the reference was not thereby revoked, Chelamiah's legal representative should have been added. (3) Matters referred were not decided. (4) Matters not referred were decided. (5) The arbitrators misconducted themselves. (6) The award is bad in part on the face of it.

As far as it is possible, I will deal with the arguments addressed separately on these points although many arguments overlapped.

[His Lordship proceeded to consider the evidence and concluded.]

In my opinion these charges of misconduct are wholly unfounded and are a pure after-thought on the part of a

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disgruntled party to the reference. I think a reasonable latitude should be allowed in examining awards such as these having regard to the people concerned and the circumstances. More especially would I be unwilling to assist a party who, with full knowledge of the circumstances, allows an arbitration to proceed and takes part in it and then seeks to evade it later on by raising a number of objections which have never occurred to him before. The observations of their Lordships of the Judicial Committee on this topic in *Chowdhri Murtaza Hossein* v. *Mussumat Bibi Bechunnissa*[1] can clearly be called in aid by the respondent. This applies not only to that part of the case which I have dealt with but also with regard to what follows.

The appellant has argued that in importing the terms of Ex. C into the award the arbitrators have gone outside the scope of the reference. Ex. C is dated 2nd October, 1917. The reference of muchilika is dated 22nd May, 1921. Ex. A is a curiously worded document. It does not say that the property should be divided equally among Chelamiah and his 3 sons. It says:

> "You should effect a partition as you think fit according to your pleasure and give a decision, that you should give some property you think fit to Chelamiah of us—out of the properties mentioned above and make proper arrangements therefor as you please, that you should divide and give the remaining property to Venkatachellam, Suryanarayanamurty and Ammiraju."

I do not think it has really been doubted in this case that the intention was, Chelamiah being over 90—so we are told—to make reasonable provision during his life and partition between the brothers. The history leading up to Ex. A is unfortunately not clarified in the evidence, I think this has been one of those cases where knowledge of all the circumstances seems to have been assumed by those in charge of the case in the lower Court and so not proved. According to Ex. III-B Chelamiah gave a notice to Venkatachellam calling on him to divide the property into four equal shares. That is dated 3rd July, 1918, some 9 months after Ex. C. What happened I do not know but it seems to me that Ex. A replaced Ex. C. The arbitrators considered Ex. C very fully and they said regarding it:

> "Considering the position and circumstances, status, etc, of this family we are of opinion that the above arrangements subject to the alterations

1. (1876) L.R. 3 I.A. 209 at 220 (P.C.).

specified hereunder are very proper. All the parties accepted the above terms and have given effect to them till now. The said terms are hereby confirmed subject to the alterations hereunder and it is decided that the same should be given effect to. The properties proposed to be given to the various individuals in pursuance of the above terms should be determined and the necessary alterations should be specified according to the partition which we are now effecting."

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It seems to me that what the arbitrators did was to take as the frame work of their award a previous agreement which had been entered into between the parties but made certain adjustments which were necessary, for instance, Chelamiah had died and so provision had to be made naturally for his wife, the mother of the plaintiff and the male defendants. It must again be remembered that long before then the immovable properties had been divided by consent. I do not think it was outside the terms of the reference in a Hindu family for the arbitrators to make provision for charity and for the women members. In fact, that such a criticism could be directed to a family division of property caused me some surprise which was, I understand, shared perhaps even in a greater degree by my learned brother. But any difficulty over this disappears if the evidence of the arbitrator P. W. 2 is accepted, because he stated at the conclusion of his evidence that the allotment of the land to the sisters and to the choultry was agreed to by the parties. This witness's evidence has been accepted throughout by the learned Judge and in my view rightly. In Ex. L dated 23rd April, 1926, Venkatachellam is writing with reference to the registration of the land for the choultry and for the sisters. No objection was taken to these matters in Ex. XV, the notice sent to the arbitrator. I think it is perfectly evident that this ground also is an after-thought. Apart from the affirmative evidence of the arbitrator the whole of the probabilities in this case point to members of the family assenting to the arrangement being made for pious purposes and for the ladies of their family.

Considerable arguments have been addressed to us on the following topic. It has been contended for the appellant that Chelamiah was one of the referring parties, that as he died on the 15th October, 1925, the award of the 25th August, 1926, is bad in law on the ground that the reference was wholly revoked by the death of Chelamiah, a referring party. The Indian Arbitration Act of 1899 applies only to Presidency towns and arguments have therefore been based on the commom law.

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Mr. Srinivasa Aiyangar has argued that he is entitled to go back to the position as it was in England before legislation affecting arbitrations and reference is made to the case of *Orphan Board* v. *Van Reenen*[1]. We have been referred to the judgment of Lord Wynford in the course of which the following observation is made:

> "If men who submit to arbitration in the instrument of submission bind their representatives in a case where the action would survive to or against their representatives although one or both of the parties should die before the award be made, the arbitrators may proceed with the reference. They have provided for the event of death, and agreed, that those who take their property should take it, subject to the decision of the arbitrators appointed. But if the representatives are not included in the reference, and one of the parties dies, that reference is determined."

Mr. Srinivasa Aiyangar contends that in the absence of legislation the whole position turns on the relationship of principal and agent between the referring parties and the arbitrator, that as the death of the principal in this case one of the referring parties, determines the authority of the agent, so the arbitrator's authority is withdrawn by the death of a referring party. In fact he relies on the general law as he claims it was and still is.

It has been contended before us that an agreement to refer cannot be specifically enforced under the Specific Relief Act. This no doubt is so, but an arbitration, the subject of the second schedule to the Code of Civil Procedure can be enforced by the provisions of paras. 17 and 19. If this is a matter to be judged by a consideration of the relationship of principal and agent, it would seem that if the death of the principal revokes his authority, it is equally open to the principal during his lifetime to revoke it himself. But that view is negatived by a decision of this Court in *Nagaswamy Naik* v. *Rangaswamy Naik*[2], in which a bench of this High Court held that in India an agreement to refer an existing dispute to arbitration was as binding and capable of enforcement as any other lawful contract and a submission cannot be revoked without just and sufficient cause. The Court took the view that the English rule was not in consonance with the law of India and referred to the provisions of the then Code of Civil Procedure which are to-day reproduced in the present Code. The learned Judges pointed out that the

1. (1829) 1 Knapp 83 : 12 E.R. 252.
2. (1875) 8 M.H.C.R. 46.

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dislike of private forums which prevailed in the early days in English Courts have never found favour in the Courts of British India where the policy of the Legislature was rather to promote references to arbitration than to discourage them. That case was decided in 1875. In 1868, the Judicial Committee in *Pestonjee Nusserwanjee* v. *D. Manockjee & Co.*[1] had held that the appellant cannot at his own will and pleasure revoke the authority of an arbitrator in whose appointment he has concurred. Their Lordships took the view that an agreement to refer was by the Indian Legislature put on the same footing as any other lawful agreement. In 1903, in *Satyanarayana* v. *Venkata Rangayya*[2], a Bench of this High Court again dealt with the subject more directly now under discussion. The learned Judges made the following observation:—

> "It follows therefore that contracts to refer to arbitration should not, in this country, be treated as standing upon the peculiar footing that such contracts are revocable at the mere will of a party so as to warrant the view that every such contract is essentially of a personal nature, as the District Judge seems to have thought, and the question whether a legal representative of a deceased party is or is not entitled to enforce the contract to refer is a question which would depend upon whether the right dealt with in the reference is of a merely personal nature or is one which survives to the legal representative."

In *Dutta* v. *Khedu*[3], Kuramat Husain and Chamier, JJ., accepted the Madras view and stated:

> "It seems clear, however, that the authority of an arbitrator is not necessarily revoked by the death of one of the parties to a proposed arbitration. In the present case the right to sue survived, and therefore after substitution of the representative of the deceased party the case should have been referred to the arbitration as prayed."

In the case reported in *Satyanarayana* v. *Venkata Rangayya*[2], the reference to arbitration had been filed in Court.

In *Manindra* v. *Mahananda*[4], Mookerjee and Carnduff, JJ., had before them a case such as the present, namely, where there had been a private submission to arbitration and counsel in that case sought to distinguish between a reference filed in Court and a private submission. The learned Judges observe:—

> "But, clearly there is no substantial difference in principle between the cases mentioned and the case before us; as pointed out by the learned Judges

1. (1868) 12 M.I.A. 112.
2. (1903) 13 M.L.J. 311: I.L.R. 27 Mad. 112.
3. (1911) I.L.R. 33 All. 645.
4. (1911) 15 C.L.J. 360.

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of the Madras High Court in *Satyanarayana* v. *Venkata Rangayya*[1], the rule of the English Common Law that a submission to arbitration stands revoked by the death of one of the parties, is not applicable to this country. The test to be applied here is, what is the true nature of the submission? Were the matters in difference personal questions in respect whereof it was not intended that the successors in interest of the parties should be affected by the decision of the arbitrators? If the intention of the parties was that not merely themselves but their representatives in interest should be bound by the decision of the arbitrators, the reference plainly does not stand revoked merely by the death of one of the parties."

The learned Judges go on to say:

"If the hearing had not been completed, it would have been necessary to bring the representatives of the deceased party on the record and to make them parties to the submission. Here, however, the hearing had terminated and nothing remained for the arbitrators to do but to deliver their award."

I cannot see in the case of a private submission to arbitration how the legal representatives of a referring party can be brought on the record, there being no record in the ordinary sense. The only question that arises is whether the result would bind their personal representatives.

In *Binayakdas* v. *Sashi Bhushan*[2], Woodroffe and Ghose, JJ., observed:—

"It is true as a general principle that a person who is not a party to, or properly represented in, any proceedings should not be bound by those proceedings. But proceedings before arbitrators are not intended to be carried on according to the rules of procedure contained in the Civil Procedure Code. If there is a binding reference to arbitration all that is necessary to be seen is that there is a substantial representation of the different interests before the arbitrators. The question whether the award would be binding or not must depend upon the circumstances of each case."

Tegha v. *Ram Singh*[3] is a case of death of a party to a reference. "It is true," says Sagar, J.:

"That if, before the death of a party, the hearing of the case has been completed and nothing remains to be done except the delivery of the award, and it is also shown that the intention of the parties was that not merely themselves but the legal representatives should also be bound by the decision of the arbitrator, the award delivered after the death of the party would be binding upon his representatives in interest."

It is important to note that the objection here is not taken by the executor under the will of Chelamiah but by one of his sons and it is not suggested there are any merits in this objection. It is frankly conceded to be purely technical. Personally I have very little doubt that by this *muchilika* Chelamiah

1. (1903) 13 M.L.J. 311: I.L.R. 27 Mad. 112.
2. A.I.R. 1922 Cal. 226.
3. A.I.R. 1924 Lah. 725.

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intended that there should be a division of the property among his sons and provision for him during his few remaining years as he was then a nonagenarian must necessarily have been in his view. But taking all the circumstances into consideration and the absence of any serious objection by the legal representatives or the executor, I think that the underlying intention of this reference was a final division of the properties and the probable early death of Chelamiah must have been in contemplation. That being so, I do not think it can lie in the mouth of one of the sons to argue that there was no intention that his legal representatives should be bound. Para. 11 of the judgment deals apparently with this topic which has been so fully developed here. I doubt very much whether it was argued in its present form before the lower Court. The objection, the learned Judge says, is that provision was not made for Chelamiah. This is a curious objection coming from the first defendant. On the date of Ex. L, Chelamiah had been dead six months. Nobody took any objection to the continuance of the reference. The conclusion I have arrived at with regard to this objection is that it is now clearly established that in India there is no rule that the death of a referring party of itself recalls the reference to arbitration, that is, brings it to an end. Whether it must continue must depend upon the special circumstances of each case. I am satisfied in the circumstances of this case that it was the intention of Chelamiah and of all concerned that it should go on and that was fully understood by the first defendant. So far as the will is concerned, I think it was no doubt completely lost sight of in the two partition proceedings, Exs. A and C. It has not even been printed in this appeal and I have not heard what its terms are. The first defendant at no time relied on its provisions. For the reasons which I have given, I think the learned Judge arrived at the right conclusion and that he rightly disbelieved the evidence of Venkatachellam on questions of fact which conflicted with that on the other side—and rightly held that the arbitrators acted in good faith throughout—and that they did nothing without the knowledge and consent of all concerned.

Personally I should be very reluctant to interfere with these arbitrations relating to the adjustment of family disputes unless some real injustice or substantial divergence from the law can be proved. When, as in this case, the matter has gone

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on without objection by anybody until after the result, it would be most undesirable to interfere especially in matters of procedure unless the Court felt itself constrained to do so in the interests of justice.

In the result this appeal must be dismissed with costs. We consider that we should exercise our powers under r. 46 of the Appellate Side Rules in fixing the fee for this case which we fix at Rs. 1,000. Our reason is this. In whatever form the case has been brought before us, it has in fact been in substance and has been argued as a first appeal. It has occupied six days of the time of this Court, it has involved investigation of a nice question of law and we think that it is a proper case for such an order to be made.

The Civil Revision Petition and the memorandum of objections which have not been argued are also dismissed but as to these matters I would make no order as to costs.

It is right that I should add that although objections 3 and 4 set out in the first paragraph of this judgment are under para. 14 of the Second Schedule, Civil Procedure Code, grounds for remitting the award, not for setting it aside, this case has been argued before us throughout on the basis that the award should be set aside and no application to remit it was made. Indeed it seemed to me that headings 3 and 4 were really included as charges of misconduct rather than under para. 14 of the Second Schedule.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I agree that there is no substance in this appeal, but I would however like to add a word or two on some of the matters on which stress was laid in the course of the arguments of the learned counsel for the appellant. I may at once say that there is no ground for thinking that there is any error of law apparent on the face of the award so far as I can see, nor can I see any ground for attributing corruption or misconduct either in fact or in law to any of the arbitrators. I am satisfied that the arbitrators did not decide any matter not referred to them or omitted to decide any matter referred to them. The objection under this head is that a share should have been allotted to the father, which was not done and that no property should have been set apart for the choultry or for the sisters, which is charged as an act outside the reference. The arbitrators were in this case appointed to effect a partition of what was originally a joint family estate between the three

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brothers, namely, the appellant and respondents 1 and 2. The father Chelamiah was alive at the time of the reference and was in fact himself a party to it though he was very, very old. Looking at the language employed in the muchilika, Ex. A, there is clear indication that he did not want a share to be allotted for himself but that he only desired that some property should in the discretion of the arbitrators be given to him apparently for the purpose of maintaining himself during the brief period during which he expected to live. The age of the father and the nature of the provisions to which he had himself agreed in the *Samakhya deed*, Ex. C, suggest, that such must have been his intention. Nor is there much substance in the contention that the arbitrators exceeded their powers in making certain other minor provisions which are usually made at the time when partitions in a joint family take place. A reasonable provision for charity or by way of portions to sisters, more especially when the family estate is large, is so common a feature of partitions in general that it is a rare thing to see parties raising a controversy about it at the time or later. Even in the present case the appellant does not object to the provisions themselves as being either improper or extravagant His learned Counsel has been quite frank when he said that he has a legal right to take advantage of any handy weapon that may be available to him in order that he might get rid of what, according to him, is a hateful award. In the special circumstances of this case and in view of the very large discretion vested in the arbitrators by the words "you should effect a partition as you think fit according to your pleasure and give a decision." I am unable to agree that in setting apart some property for the sisters of the appellant and some for the choultry the arbitrators travelled outside the reference. In fact it would seem that in this matter they had the consent, express or implied, of all the parties including the appellant who only thought of raising this objection in the appeal before us.

It was strenuously urged that the death of Chelamiah during the pendency of the proceedings before the arbitrators brought about a complete termination of the arbitrators' power to proceed further with the reference. The death of Chelamiah, it was contended, operated in law as a revocation of their authority. The principle relied on is the familiar one of an agent's authority coming to an end on the death of the principal.

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Whether an arbitrator fills the position merely of an agent whose agency is revocable by the happening of those events which have the effect of determining an ordinary agency is a question not altogether free from difficulty at the first look. The theory of agency had apparently some support in the old common law of England, but it must be remembered that it had reference to the authority of the arbitrator rather than to the agreement to refer between the parties. The former was deemed revocable by the exercise of a legal power supposed to be implicit in the submission itself. The latter was irrevocable, being in the nature of a contract which could not be broken without giving rise to a claim for damages. Even in England the integrity of the common law seems to have been materially interfered with by the enactment of Statutes. In this country we are governed by the statutory provisions on the subject and it seems to me that it is scarcely permissible to go in search of an ancient principle of the common law, when we find that it has been definitely abrogated even in the country of its origin by S. 1 of Statute 24 and 25, George V, c. 14, which enacts that:

"An agreement shall not be discharged by the death of any party thereto either as respects the deceased or any other party but shall in such an event be enforceable by or against the personal representative of the deceased."

The idea that the appointment of an arbitrator contemplated in every case the exercise of personal judgment by the party which appears to be the foundation on which the doctrine of revocability by death rested, would thus seem to have been definitely given up in England. We here are not bound by any rule of the common or statutory law of that country except in so far as it furnishes a standard of justice, equity and good conscience to be applied to the decision of questions arising for consideration by the Courts of this country.

The question was considered by the Privy Council in *Pestonjee Nusserwanjee* v. *D. Manockjee & Co.*[1], with special reference to S. 326 of the Code of 1859 which was the predecessor of the present para. 17 of Sch. II. At pages 130 and 131 the following pertinent observations occur:

"Their Lordships are of opinion, that according to the proper construction of this Code, as previously explained, when persons have agreed to submit the matter in difference between them to the arbitration of one or

1. (1868) 12 M.I.A. 112.

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more certain specified persons, no party to such an agreement can revoke the submission to arbitration unless for good cause, and that a mere arbitrary revocation of the authority is not permitted. Their Lordships do not think it necessary to refer to the English law on this subject further than to point out, that the direction of recent legislation, both by English Acts and the Acts of the Indian Legislature, has been to put an end to the distinction between the agreement to refer, and the authority thereby conferred, which formerly enabled a person who was a party to a binding agreement to revoke the authority thereby conferred, and by so doing, to put an end to the agreement for submission to arbitration; and to put such agreement for arbitration on the same footing as all other lawful agreements by which the parties are bound to the terms of what they have agreed to, and from which they cannot retire unless the scope and object of the agreement cannot be executed, or unless it be shown that some manifest injustice will be the consequence of binding the parties to the contract. Their Lordships are, therefore, of opinion, that it was not in the power of the appellant simply, at his own mere will and pleasure, to revoke the authority of the arbitrators in whose appointment he had concurred."

The effect of this decision, as I understand it, was to get rid finally and for ever of the doctrine of revocability at will and the distinction supposed to exist between the agreement to refer and the authority of the arbitrators. It is in this sense that this important decision has been understood and acted upon in this Court. In *Nagaswamy Naik* v. *Rangaswamy Naik*[1], the learned Judges expressed themselves at page 55 as follows:

"The 'horror', which formerly prevailed in the English Courts of a *domestic forum* never found place in British India, where it has always been the policy of the Legislature to promote the reference of disputes to arbitration; and the framers of the Code in the chapter on Arbitration, embodied most of the existing law of the Company's Courts. Having regard, not only to the former law in force in this country, but to the provisions of the Indian Contract Act (S. 28) of 1872, we are incline to say that an agreement to refer an existing dispute to arbitration is as binding and capable of enforcement as any other lawful contract, and that a submission of such a dispute to arbitration once made is not, without just and sufficient cause, revocable."

When the Court was pressed with a previous contrary ruling in *Alla Aiyappa* v. *Nundula Peraiya*[2], to which Holloway, J., himself was a party he appears to have expressed himself in a somewhat pungent, and, if I may say so with respect, a refreshingly frank manner. He is reported to have observed at page 53 as follows:

"That decision is bad. It is one of the worst in the Reports. I then had the jargon of the English Common Law running in my head, and my attention was not called to the fact that the Civil Procedure Code had completely altered the law out here. I would not have thought that the point could be doubted or that it was open to argument had not my attention been drawn by

1. (1875) 8 M.H.C.R. 46. 2. (1866) 3 M.H.C.R. 82.

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Mr. Mayne in *Pestonjee Nussenwanjee* v. *D. Manackjee & Co.*[1], to the change in the law made by Act VIII of 1859."

After this pronouncement it is scarcely possible to accede to the contention that the common law of England should be taken as a guide for our decision. Further in *Satyanarayana* v. *Venkata Rangayya*[2], we have a modern decision of a strong Bench of this Court which has acted upon the principle recognised in the earlier case. In that case pending a reference by Court on an agreement filed under S. 523 of the Code of 1882 corresponding to the present para. 17, one of the parties died and the question was whether the authority of the arbitrator became *ipso facto* revoked and whether the legal representatives of the deceased could not continue the proceedings. The learned Judges adverted to the difference between the old English common law and the law as understood to be applicable in this country and ruled:

"That contracts to refer to arbitration should not, in this country, be treated as standing upon the peculiar footing that such contracts are revocable at the mere will of a party so as to warrant the view that every such contract is essentially of a personal nature . . . . and the question whether a legal representative of a deceased party is or is not entitled to enforce the contract to refer is a question which would depend upon whether the right dealt with in the reference is of a merely personal nature or is one which survives to the legal representative."

This view was expressed after the relevant cases both in England and in this Court had been considered. The decision was that a right to partition which formed the subject-matter of the submission in that case as it is here, being of such a nature that it would survive to the legal representative, the death of a party could not cause a revocation of the arbitration. In view of these decisions to which no exception seems to have been ever taken since, it serves no purpose to pursue the matter further. It only remains to say that the fact that the remedy by way of specific performance has been limited to the mode indicated in the Code, is no reason for holding that the contract can be put an end to at the will of one of the parties to it. It rather emphasizes its enforceability by the other, though not by suit but by the process of an application. The contention therefore that the death of Chelamiah put an end to the arbitration must be overruled.

1. (1868) 12 M.I.A. 112. 2. (1903) 13 M.L.J. 311: I.L.R. 27 Mad. 112.

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It is however urged that Chelamiah had left a will dated 1st February, 1919, by which he had made a disposition of his property appointing his widow, the third respondent here, as executrix. The argument was that an award passed without notice to, and in the absence of, the executrix is bad and cannot be sustained. It is not necessary to deal with this contention at any length as in my opinion it is enough to say that the only party who could be said to have had a grievance was the executrix herself who has not however chosen to challenge the judgment of the Court below. It seems to me that the appellant who never thought of this objection and never put it forward before the arbitrators cannot now be permitted to take advantage of a ground which might have been available to some party other than himself. Further the objection loses all its force when it is remembered that the fight all along was between the brothers and the mother seems never to have taken no real part in it at all. I also entirely agree in the view of my learned brother that, so long as a dispute is pending before arbitrators on a private reference, the proceedings before them are not governed by the provisions of O. 22 of the Civil Procedure Code and there can be no question therefore of the legal representative of the deceased Chelamiah being brought on the record. Finally I may add that almost all the objections which have been pressed before us were objections that could well have been taken before the arbitrators themselves, had the appellant chosen to do so. It is now too late to entertain any of them.

B. V. V. *Appeal and Memo. of objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Itikala Suryanarayanamurthy .. *Petitioner* (Petitioner-Defendant)*

v.

Redi Viranna .. *Respondent (Respondent-Plaintiff).*

Suryanarayanamurthy v. Viranna.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 8 (1) and 19—Payments after 1st October, 1937, towards decree on debt incurred before 1st

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* C. R. P. No 1602 of 1938. 20th August, 1940.

Surya-narayana-murthy v. Viranna.

October, 1932, appropriated towards interest and costs—If to be reopened and readjusted under S. 8 (1)—Reappropriation if barred as "refund" within meaning of S. 8 (4).

Appropriations made after 1st October, 1937 and before the Act came into force towards interest due before that date can be reopened and re-adjusted first towards the costs then interest due from 1st October, 1937 and next towards the principal. The word 'refund' in S. 8 (4) means only repayments in cash and it is no bar to readjustment of the debt according to S. 8 (1) of the Act.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Rajahmundry dated 18th August, 1938 and made in I. A. No. 214 of 1938 in O. S. No. 3 of 1936.

K. Bhimasankaran for Petitioner.

Ch. Raghava Rao for Respondent.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This Civil Revision Petition raises the question of the way in which S. 8 of Madras Act IV of 1938 should be interpreted in a case in which there have been payments made and appropriated after the 1st October, 1937 and before the Act came into force. The essential facts are that there was a debt anterior to the 1st October, 1932, which resulted in a decree dated the 30th September, 1936. The decree was for a sum of Rs. 1,761-8-0 with interest at 6 per cent. and for costs amounting to Rs. 437-6-3 with interest thereon. After the decree had been passed there were three payments: (1) Rs. 500 on 25th January, 1938; (2) Rs. 200 on 23rd February, 1938; and (3) Rs. 300 on 2nd March, 1938. It is found by the Court below that these payments were all appropriated towards costs and interest. The question is whether these appropriations are liable to be undone with reference to Ss. 8 and 19 of the Act.

The petitioner contends that the plain way of working out the provisions of the Act in a case of this kind is as follows. Firstly, you appropriate payments under S.19 to costs as originally decreed, that is to say excluding interest on costs. Then you look to the state of affairs as on 1st October, 1937, and you cancel so much of the debt as represents interest payable on that date, disregarding the fact that some of that interest is embodied in the decree for a fixed sum. Next you take the principal and work out the interest at the rate of the decree, six per cent., which is less than the maximum prescribed in S. 12 and

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appropriate the payments as on the date on which they were made, firstly, to the amount due for costs already mentioned; secondly, to the amount due for interest after 1st October, 1937. Any balance will be credited towards the principal. This interpretation of the Act gives full force to the provisions of the first clause of S. 8. It is, however, contended for the respondent that the interpretation ignores the provisions of S. 7 and the fourth clause of S. 8 The argument is that under S. 7 all that can be scaled down is the debt payable at the commencement of the Act and therefore to the extent to which there have been appropriations before the commencement of the Act there is no debt payable and the process contemplated in the first clause of S. 8 cannot be applied. It seems to us that this is placing upon S. 7 an interpretation which is inconsistent with the provisions of S. 8 and the proviso to S. 19. The proviso to S. 19 quite clearly contemplates a re-appropriation and re-adjustment in respect of payments actually made either before or after the commencement of the Act. That is to say the debt to be scaled down is not the debt less payments made before the Act, but the debt having regard to the payments made before the Act which have to be readjusted in accordance with its provisions. Similarly the first clause of S. 8 does not say interest outstanding on the 1st October, 1937, less any amounts appropriated thereto before the commencement of the Act. The section seems to contemplate the cancellation of all the interest as it stood on the 1st October, 1937, without regard to the subsequent appropriations.

A further contention is that the fourth clause of S. 8 protects the creditor from re-appropriation of any amount appropriated already. This seems to us to be an interpretation which is not in accordance with the plain meaning of this clause. The fourth clause appears to us to contemplate cases in which the literal application of the scaling down provisions would result in an obligation by the creditor to pay back in cash to his debtor something which the latter has voluntarily paid towards the debt. This, according to the clause, need not be done. If the debtor has paid something over and above that which would be due from him after the application of the Act the creditor keeps the excess. There is nothing in this clause which to our mind justifies the interpretation of it as giving sanctity to appropriations made after 1st October, 1937 and

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before 22nd March, 1938. In our view therefore the debt has to be scaled down in the manner for which the petitioner here contends that is to say by cancelling the interest payable on the 1st October, 1937, adjusting the payments made firstly to costs as decreed; secondly to the amount outstanding towards interest as on the dates of payments after cancelling the interest outstanding on the 1st October, 1937; and thirdly adjusting any balance towards the principal debt.

The revision petition is therefore allowed and the application is remitted to the trial Court which will dispose of the matter in the light of this judgment. The respondent will pay the petitioner's costs.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Anantharamakrishna Aiyar .. *Petitioner* (Respondent-Plaintiff)*

v.

V. Sundaram Aiyar .. *Respondent (Petitioner-Defendant).*

Anantha-rama-krishna Aiyar v. Sundaram Aiyar.

Madras Agriculturists' Relief Act (IV of 1938), S. 8 (1)—Appropriation of payments towards interest—When can be reopened and readjusted under S. 8 (1).

Appropriations towards interest made before 1st October, 1937, cannot be reopened and readjusted under S. 8 (1) of Madras Act IV of 1938. Appropriations made after 1st October, 1937, will be available for readjustment towards the principal first under S. 8 (1).

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the Subordinate Judge of Tinnevelly dated 14th October, 1938 and made in I. A. No. 186 of 1938 in S. C. S. No. 46 of 1934.

R. Ramasubbu and *K. Venkateswaran* for Petitioner.

N. G. Krishna Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The question whether the payment of Rs. 643-12-0, dated 29th December, 1934, was appropriated before 1st October, 1937, is a question of fact which does not

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* C.R.P. No. 711 of 1939. 20th August, 1940.

appear to have been decided by the Court below. If from the materials available, it can be shown that there was an appropriation towards interest made before 1st October, 1937, to the extent of that appropriation there cannot be any cancellation of interest and the appropriation will stand. Any appropriation made after 1st October, 1937, and before the commencement of the Act must be deemed to be available for readjustment in accordance with the provisions of the Act, *vide* our decision in C. R. P. No. 1602 of 1938. (*Satyanarayanamurthy* v. *Virannd*[1].)

Anantharamakrishna Aiyar v. Sundaram Aiyar.

The petition is allowed and the application is remitted to the trial Court for disposal in the light of this judgment.

Costs in revision will abide by the result.

K. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE MOCKETT.

Thalappil Thithachumma .. *Prisoner** (*Accused-Appellant*).

Thithachumma, *In re.*

Penal Code (XLV of 1860), S. 302—Offence under—Accused being woman with young baby—Sentence.

Where the accused, a woman, is guilty of child murder and the crime is shown to have been committed after deliberation and in a brutal manner she is liable to be sentenced to death and the existence of an extremely young baby born to the accused since the murder might perhaps be taken into consideration by the Provincial Government when the accused prefers an application for clemency but that would not be a ground for passing the lesser sentence.

Trial referred by the Court of Session of the South Malabar Division for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 9 of 1940 on 4th April, 1940 and appeal by the said prisoner against the said sentence, passed upon her in the said case.

P. Basi Reddi for Prisoner.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The judgment of the Court was delivered by

Burn, J.—This is one of the many cases of murder of a child for the sake of jewels worn upon the person. An unusual feature of the case is that the murder in this case was committed by a young woman aged about 20.

Burn, J.

There is no possible doubt about the facts. On the 2nd January, 1940, the appellant decoyed a child named Katheesa

1. (1940) 2 M.L.J. 547.

* Referred Trial No. 69 of 1940. (Criminal Appeal No. 318 of 1940). 17th July, 1940.

Thithachumma, *In re.*

Burn, J.

aged twelve to her house, strangled her by putting a cloth round her neck and pulling it tight, took her silver jewels worth about Rs. 5 off and then threw the body into a well in the compound. With the jewels she went straightaway to a silver smith (P.W. 14) and requested him to make them over for her. The silver smith deducted one rupee weight of silver for his own wages and turned the rest of the jewels into chitters which were recovered from the appellant by the police very shortly afterwards. There was no eye-witness of this crime and the evidence against the appellant consist almost entirely of confessions made by herself. When she was questioned on the 3rd January by a member of the local Vigilance Committee (P.W. 11) it is alleged that she admitted the murder. She was sent immediately to the Village Munsif (P.W. 3) and to him also she admitted her guilt and she made a statement which the Village Munsif reduced to writing (Ex. E). She was sent to the Sub-Magistrate and on the 6th February, the police asked the Sub-Magistrate to record her confession. The Sub-Magistrate having given the woman time for reflection till the 11th January recorded her confession which is Ex. B and finally when the preliminary investigation was being made the appellant said to the Magistrate, "It is true that I killed Katheesa and took the jewels. I committed a folly. I have nothing else to state." In the Sessions Court she retracted the confession before the Sub-Magistrate and she alleged that she had not made any confessions out of Court.

Her story was confirmed by the evidence of the younger sister of the deceased (P.W. 6) who said that on the morning of the 2nd January the appellant came and asked her sister Katheesa to go with her to pick tamarind. Katheesa never returned. The evidence of the silver smith (P.W. 14) also confirms her story. He produced the bits of silver (Material Objects 3, 3-*a*, 4, 4-*a* and 5) which he had kept for his own remuneration and he spoke to M. Os. 6 to 26 which he said he had made for the appellant out of the silver jewels brought to him on the 2nd January.

The appellant was advanced in pregnancy and has given birth to a child since this murder. This was apparently made a ground for urging before the learned Sessions Judge that the extreme sentence should not be passed; but the learned Sessions Judge, we think, has dealt with this matter in the proper

manner. He has pointed out that the crime was obviously committed after deliberation and in a brutal manner. There was no suggestion that the appellant was in any way unbalanced in mind or that she was unaware of the nature of her act or the consequences of it. There was no suggestion made at the trial that the appellant might not have been in full control of her faculties. The learned Sessions Judge has therefore said quite rightly that the existence of an extremely young baby born to the appellant since the murder might perhaps be taken into consideration by the Provincial Government when the appellant prefers an application for clemency but would not be a ground for passing the lesser sentence.

We agree with the learned Sessions Judge that the offence was clearly established. We confirm the conviction for murder and the sentence of death and dismiss this appeal.

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Sanampudi Kodandaramayya .. *Appellant* (Plaintiff)*

v.

Gurrala Venkatareddi .. *Respondent (Defendant).*

Madras Agriculturists Relief Act (IV of 1938), Ss. 3 (v) and 8—'Creditor'—If includes successive assignees of original creditor.

The renewal of a debt to the assignee of the original creditor is a renewal to the 'same' creditor within the meaning of the explanation to S. 8 of Madras Act IV of 1938. This definition of 'creditor' extends not only to a first assignee but to any subsequent assignee also. The ultimate assignee has, in respect of the debt succeeded to, the legal rights of the original creditor in exactly the same sense as the first assignee has.

Appeal against the order of the District Court of Guntur dated 20th day of March, 1939 and made in A. S. No. 493 of 1938 (O. S. No. 229 of 1938, District Munsif's Court, Guntur).

K. Kotayya for Appellant.

P. Satyanarayana Rao for Respondent.

The Court delivered the following

JUDGMENT.—As I have already held in C. M. A. No. 207 of 1939 the definition of the word 'creditor' in the Act is conclusive in showing that a renewal of a debt to the assignee of the original creditor is a renewal to the 'same' creditor

* C. M. A. No. 306 of 1939. 13th August, 1940.

Kodanda-ramayya v. Venkata-reddi.

within the meaning of the explanation to S. 8 of the Madras Act IV of 1938. I am now, however, asked to hold that the definition of the word 'creditor' in S. 3 (*v*) though it may extend to a first assignee cannot be extended to any subsequent assignee. The number of links in the chain of succession makes, in my opinion, no difference. The point is simply this that the ultimate assignee has, in respect of the debt, succeeded to the legal right of the original creditor in exactly the same sense as the first assignee has. The appeal is dismissed with costs.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Boppana Rukminamma and another .. *Petitioners** (*Defendants 2 and 3*)

v.

Maganti Venkata Ramadas .. *Respondent* (*Plaintiff*).

Rukminamma v. Venkata Ramadas.

Madras Agriculturists Relief Act (IV of 1938), S. 4 (e)—Applicability—Registered society formed under Societies Registration Act—If "corporation" excluded from operation of Act IV of 1938.

A registered society formed under the Societies Registration Act is a corporation and a debt due to such a society cannot be scaled down.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of Masulipatam in S. C. S. No. 29 of 1938.

This is a suit on a promissory note brought by a society formed under the Societies Registration Act (XXI of 1860) as transferee from the payee, the third defendant. The promissory note was executed by the second defendant, who signed her name above the words as "guardian of the first defendant."

The suit promissory note was in renewal of a promissory note dated the 10th June, 1933, executed by the mother (second defendant) in the same way. That promissory note was in renewal of a promissory note executed by the father of the first defendant on 10th June, 1930.

Three points have been raised in this petition. The first is that the person really liable under the promissory note was the first defendant, who has now become a major, and not the second defendant, who executed the suit promissory note and the promissory note of 1933 as the guardian of the first defendant. The lower

* C. R. P. No. 1673 of 1938. 16th August, 1940.

Court came to the conclusion from the terms of the promissory note that it was the mother and not the son who was liable. In this revision petition the mother has not chosen to make her son party, although it is clear that either the mother or the son would be liable. She has therefore sought to avoid liability altogether by the family by omitting to make the son a party. Even if it be true that the legal liability is against the son and not against the mother, I am not willing to interfere in revision to do an inequity.

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The second point is that the third defendant is not liable because the plaintiff did not give him any notice of the dishonouring of the promissory note by the first defendant when it was presented to him by the plaintiff for payment. As to these, there is evidence by P. W. 2 that oral notice was given to the third defendant. That evidence has not been controverted, the third defendant not having gone into the box.

D. Suryaprakasa Rao for Petitioners.

A. Lakshmayya for Respondent.

The Court delivered the following

JUDGMENT.—[After dealing with the other points on facts as set out above proceeds.]

The third point relates to the application of Act IV of 1938. The lower Court found that as the plaintiff was really a registered society formed under the Societies Registration Act, the debt could not be scaled down. It is contended that this society is not a corporation; but I am unable to see why. A perusal of the Societies Registration Act makes it clear that a society formed under that Act is a corporation and that it has a separate existence apart from its members and can sue and be sued in its corporate capacity. On all the points therefore this petition fails and is dismissed with the costs of the plaintiff.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Mayandi Venkatesa Mudali and another .. *Petitioners** (*Respondents*)

v.

Konne Desappa Mudali .. *Respondent* (*Petitioner*).

Provincial Insolvency Act (V of 1920), S. 6 (e)—Sale of properties of debtor for arrears of rent under Madras Estates Land Act—If act of insolvency.

Venkatesa Mudali v. Desappa Mudali.

* C. R. P. No. 550 of 1937. 22nd July, 1940.

Venkatesa Mudali *v.* Desappa Mudali.

A decree for rent is a decree for the payment of money notwithstanding the fact that the rent is charged on the holding. A sale of the debtor's property for arrears of rent under Madras Estates Land Act operates as an act of insolvency.

Petition under S. 75 of the Provincial Insolvency Act, praying the High Court to revise the order of the District Court of Chittoor dated 4th December, 1936, in C. M. A. No. 42 of 1936 preferred against the order of the Court of the Subordinate Judge of Chittoor dated 4th April, 1936 and made in I. P. No. 69 of 1935.

V. V. Srinivasa Aiyangar and *S. Ramanujachariar* for Petitioners.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondent.

The Court delivered the following

JUDGMENT.—The question is whether the sale of the appellant's property for arrears of rent under the Madras Estates Land Act operates as an act of insolvency under S. 6 (*e*) of the Provincial Insolvency Act. It seems to me clear that the decree for rent is a decree for the payment of money, notwithstanding the fact that the rent is charged on the holding. The decree in question was passed before the appointment of the *ad-interim* receiver in the previous insolvency. At the time of the sale, the receiver was apparently not in possession though he had been appointed. The property therefore not only vested in the debtor but was in his physical possession and there was nothing, except his poverty, to prevent him from paying the rent. The property was certainly "his property" within the terms of S. 6 (*e*) of the Provincial Insolvency Act. The case reported in *Lachmi Chand* v. *Bipin Behari*[1] has no application, for in that case, there had been an adjudication and the property no longer vested in the debtor. The view taken by the Courts below is correct and the petition is dismissed with costs.

K. S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Messrs. Bapalal & Co. .. *Appellants** (*Defendants*)

v.

A. R. Krishnaswami Aiyar .. *Respondent* (*Plaintiff*).

Bapalal & Co. *v.* Krishnaswami Aiyar.

Defamation—Letter to Police Inspector charging criminal breach of trust against plaintiff—If absolutely privileged as sent to protect defendant's interest,

1. A.I.R. 1928 Cal. 644.

*C. C. C. A. No. 52 of 1939. 2nd August, 1940.

Bapalal & Co. *v.* Krishnaswami Aiyar.

The plaintiff took some diamonds on approval in April, 1936. The defendant presented an invoice for its cost on 25th May and when by 27th September the diamonds had not been paid for, the defendant sent a letter to the Inspector of Police and the plaintiff claimed the letter to be defamatory as being equivalent to a charge against him of criminal breach of trust. Defendant claimed privilege.

Held, a complaint to a Police Officer from its very nature as a statement which the complainant is prepared later, if called upon to do so, to substantiate upon oath, is absolutely privileged. Case-law discussed.

Appeal against the decree of the City Civil Court, Madras, in O. S. No. 787 of 1937.

V. C. Gopalaratnam for Appellants.

N. Panchapagesa Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit filed by respondent against the appellants for damages for defamation. The facts may be stated very briefly. Respondent, a Medical Practitioner in Madras took some diamonds from the appellants, a firm of jewellers, on approval in April, 1936. On 25th May appellants presented him with an invoice for their cost. By 27th September, the diamonds had not been paid for. On that day the appellants sent a letter to the Inspector of Police, Flower Bazaar Police Station, which is claimed by respondent to be defamatory, as being equivalent to a charge against him of criminal breach of trust. In their written statement appellants contended that this communication was privileged, having been sent *bona fide* with the sole purpose of protecting their own interests. The learned City Civil Judge held that the *occasion* was privileged and if the letter were in fact *bona fide* the suit must be dismissed, but he held further that the letter did not state the true facts; that there was an outright sale on 25th May; and that the appellants were maliciously referring to the Police for investigation what they knew could be only the subject-matter of a civil claim. He accordingly decreed the suit.

In appeal an entirely new point has been taken with reference to the law of privilege. It is now contended that the letter in question was privileged absolutely, that is to say, that a Civil Court is precluded from adjudicating upon the question whether it was sent maliciously or not. On a careful consideration of the authorities I think this contention must prevail.

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The principal authorities to which I have been referred to in the course of the arguments are *Sanjivi Reddi* v. *Koneri Reddi*[1], *Golap Jan* v. *Bholanath Khettry*[2], *Madhab Chandra Ghose* v. *Nirod Chandra Ghose*[3] and *Majju* v. *Lachman Prasad*[4]. All these authorities are unanimous in holding that the common law of England which grants an absolute privilege to all statements made in the witness-box should be applied in India. That privilege extends in England to the preliminary examination of witnesses, *e.g.*, by a solicitor to find out what they can prove (see *Watson* v. *M'Ewan*[5]). The question then is how far this principle derived from *Watson* v. *M'Ewan*[5] should be extended. *Sanjivi Reddi* v. *Koneri Reddi*[1] dealt with a complaint to a Magistrate requesting him to take action under S. 107, Criminal Procedure Code, and to statements made by the complainant to a Police Officer investigating that complaint. Both were held to be absolutely privileged. No actual *evidence* was given in this case, as the Magistrate eventually refused to take any action under S. 107. In *Golap Jan* v. *Bholanath Khettry*[2], a complaint laid before a Magistrate for criminal breach of trust which led to no trial but was dismissed under S. 203, Criminal Procedure Code, was held to be absolutely privileged. In *Madhab Chandra Ghose* v. *Nirod Chandra Ghose*[3], it was held that both a report to the police alleging the commission of a crime, and evidence given in Court in support of the accusation were absolutely privileged. In *Majju* v. *Lachman Prasad*[4], a distinction was drawn between a complaint to the police which in fact led to judicial proceedings, and one which did not. A complaint in the latter case was held not to be privileged.

Now there is nothing in the three other decisions referred to above to suggest that this particular ground of distinction would find favour with the Madras or Calcutta High Courts. In *Sanjivi Reddi* v. *Koneri Reddi*[1] and *Golap Jan* v. *Bholanath Khettry*[2], complaints to a Magistrate were held absolutely privileged, even though the Magistrate dismissed them. In *Madhab Chandra Ghose* v. *Nirod Chandra Ghose*[3], the complaint to the police was no doubt followed by an actual trial, but there is nothing in the judgment to suggest that that

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1. (1925) 50 M.L.J. 460: I.L.R. 49 Mad. 315.
2. (1911) I.L.R. 38 Cal. 880.
3. I.L.R. (1939) 1 Cal. 574.
4. (1924) I.L.R. 46 All. 671 (F.B.).
5. (1905) A. C. 480.

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fact influenced the learned Judges in coming to their decision. Both Judges apply the principle of *Watson* v. *M'Ewan*[1], to a complaint to the police and Ghose, J., points out on page 580 that the reason for the privilege is stronger in the case of a complaint to the police than in the case of statements to a solicitor for the question whether a prosecution shall follow upon the complaint is taken out of complainant's hands by his own action.

I am accordingly of opinion that the weight of authority is in favour of the view that a complaint to a Police Officer from its very nature as a statement which the complainant is prepared later, if called upon to do so, to substantiate upon oath is absolutely privileged. I must accordingly allow this appeal, and dismiss respondent's suit. As the main ground in the appeal was never pleaded in the Court of first instance I make no order as to costs.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HORWILL.

The Nayar Modern Bank, Ltd., Palghat, by its Managing Director M. Madhavan Nair .. *Appellant** (*Applicant*)

v.

Messrs. James Voce Pirrie, Cyril Gill and John Stanley Goodwin, the Official Liquidators of the Travancore National and Quilon Bank, Ltd. (in liquidation) .. *Respondents* (*Respondents*).

Nayar Modern Bank, Ltd., Palghat *v.* Official Liquidators of the Travancore National & Quilon Bank, Ltd.

Banker and customer—Customer (another bank) depositing employees' cash security as required by S. 282-B (1) of Indian Companies Act—Liquidation of banker company—Customer if entitled to priority.

As the result of the statutory obligation under S. 282-B (1) of the Indian Companies Act imposed upon the appellant (a bank) the employees' cash security, was deposited in a scheduled bank which subsequently went into liquidation. The depositor bank claimed priority on the ground that the money had been deposited for a specific purpose.

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1. (1905) A.C. 480.

* O. S. A. No. 35 of 1939. 21st August, 1940.

Nayar Modern Bank, Ltd., Palghat v. Official Liquidators of the Travancore National & Quilon Bank, Ltd.

Held, though the appellant held the moneys for a special purpose, the relationship with the bank in which the money is deposited is that between a bank and an ordinary customer, namely, that of debtor and creditor. The only obligation of the bank having notice of the trust, was not to participate in a breach of trust by the trustee.

On appeal from the order of the Hon'ble Mr. Justice Venkataramana Rao dated 21st April, 1939 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 2874 of 1938 in O. P. No. 158 of 1938.

K. Kuttikrishna Menon for Appellant.

C. Krishnaswami Aiyar instructed by *King and Partridge* for Respondents.

The judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—The appellant is a company registered under the Indian Companies Act and carries on a banking business at Palghat in Malabar. The appellant requires certain employees to deposit sums of money with it as security for the due fulfilment of their duties. S. 282-B (1) of the Indian Companies Act states that all moneys or securities deposited with a company by its employees in pursuance of their contracts of service with the company shall be deposited by it in a special account to be opened for the purpose in a scheduled bank as defined in clause (*e*) of S. 2 of the Reserve Bank of India Act, 1934, and that no portion of the money shall be utilised by the Company except for the purposes agreed to in the contract of service. The Travancore National and Quilon Bank, Limited (I will refer to it for brevity as 'the Bank') was a scheduled bank as defined in the Reserve Bank of India Act, but it is now in liquidation as the result of an order for compulsory winding up passed by this Court on the 4th September, 1938. On the 30th July, 1937, the appellant deposited with the Bank a sum of Rs. 1,000 received as security from an employee. On the 15th of January, 1938, and on the 21st of February, 1938, it deposited with the Bank Rs. 5,000 and Rs. 500 respectively, these sums also representing security received from employees. These moneys were credited to the appellant in an account headed "employees' cash security". They were, of course, deposited with the bank as the result of the statutory obligation imposed upon the appellant by S. 282-B (1) of the Indian Companies Act. The question involved in this appeal is whether the appellant is entitled to rank in the liquidation of

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the Bank in priority to the ordinary creditors. The question was decided against the appellant by Venkataramana Rao, J., and this appeal is from his order.

The learned counsel for the appellant frankly and rightly concedes that the Bank did not hold the moneys as a trustee for the employees of the appellant, but he says that his client is entitled to prior payment because it is recognised that property which has been delivered to a bankrupt for a specific purpose does not pass to his trustee in bankruptcy, and quotes a passage from Halsbury's Laws of England where it is stated that property of this nature is clothed with a species of trust and is subject to the same principle as trust property. (Vol. 2, p. 228, Hailsham edn.) The learned Judge rejected this contention. He recognised that in such a case as the present one the depositor is the trustee and the money deposited is trust money, but he held that this does not affect the relation which the law creates between a bank and an ordinary customer, namely, the relation of debtor and creditor. The learned Judge pointed out that the legal effect of the notice to the Bank that the moneys deposited were trust moneys was only to cast a duty on the bank not to participate in a breach of trust by the trustee.

We agree with the opinion of the learned Judge. The appellant would be entitled to succeed only if the Bank was in the position of a trustee or if the money had been deposited for a specific purpose. The appellant has conceded that the Bank was not a trustee; and we think it is equally clear that these moneys were not deposited with it for a special purpose so far as the Bank was concerned. The appellant held the moneys for a special purpose and was required by statute to deposit them in a Bank, but the section makes no difference in the position of the Bank. Its position was still that of a banker keeping an account for a customer. The Bank, having notice of the trust, could not be a party to a breach of trust but that does not help the appellant. There has been no breach of trust.

The appeal fails and will be dismissed with costs.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Raju Mudali *alias* Vinayaka Mudaliar .. *Appellant** (*Petitioner*)

v.

Chinnaraju Naidu and others .. *Respondents* (*Respondents 2 to 6*).

Raju Mudali *v.* Chinnaraju Naidu.

Civil Procedure Code (V of 1908) O. 43, r. 1, cl. (k)—Word 'suit' if includes 'appeals'.

In an appeal under O. 43, r. 1, cl. (*k*) against an order of the lower appellate Court, refusing to set aside the abatement of an appeal on the death of the appellant, a preliminary objection was raised that no appeal lies under O. 43, r. 1, cl. (*k*) on the ground that the word 'suit' in the rule necessarily must exclude the word 'appeal'.

Held, the word 'suit' includes 'appeals' (*vide* O. 22, r. 9 as interpreted by r. 11).

Akkas Mia v. *Abdul Aziz Bepari*, A.I.R. 1929 Cal. 532, not followed.

View of the Patna High Court preferred. [Vide *Mir Wajid Ali* v. *Fagoo Mandal*, (1938) I.L.R. 17 Pat. 84: A.I.R. 1938 Pat. 125 and *Hari Saran Singh* v. *Syed Md. Eradat Hussain*, A.I.R. 1925 Pat. 162.]

Appeal against the order of the District Court of North Arcot dated 12th September, 1938 and made in I. A. No. 627 of 1937 in A. S. No. 214 of 1936.

A. C. Sampath Aiyangar for Appellant.

Ch. Raghava Rao for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal filed under O. 43, r. 1, cl. (*k*) of the Code of Civil Procedure against an order of the learned District Judge of North Arcot refusing to set aside the abatement of A. S. No. 214 of 1936. The appellant is the legal representative of the appellant who was on record in A. S. No. 214 of 1936. He applied to be impleaded and to be allowed to continue the appeal at a time when more than 90 days had elapsed since the death of his predecessor-in-interest. The reasons for his application were that he was a sepoy undergoing service at Jubbulpore, that he attempted to obtain leave from his Commanding Officer for the purpose of coming to Vellore and attending to this question of coming on record in the appeal, that the Commanding Officer refused to grant him leave and that when he eventually granted him leave on receipt of a letter from the Village Munsif, 90 days had expired. The

* C. M. A. No. 150 of 1939. 14th August. 1940.

Raju Mudali v. Chinnaraju Naidu.

learned District Judge refused to allow the petition on the ground that it was not necessary for the appellant to have obtained the attestation of his Commanding Officer in Jubbulpore to his affidavit and that he could easily have attended to this matter in the ordinary course of the post. There is no other material available, no affidavit from the Commanding Officer himself which in the circumstances of the case could hardly be expected, nor any affidavit from the Advocate who represented the appellant or the appellant's predecessor-in-interest.

The learned Advocate for the respondents takes the preliminary objection before me that no appeal lies under O. 43, r. 1 (*k*) and in support of that position cites the case reported in *Akkas Mia* v. *Abdul Asis Bepari*[1]. That authority certainly supports his view, but on the other hand there are cases in which the Patna High Court has interpreted the clause in O. 43 in a different way. It seems to me quite clear on an examination of both O. 22 and O. 43 that I should follow the view of the Patna High Court. O. 22, r. 9 in terms relates only to a suit. It begins:

> "Where a suit abates, ... no fresh suit shall be brought on the same cause of action."

But r. 11 of O. 22 runs as follows:

> "In the application of this order to appeals, so far as may be, the word 'plaintiff' shall be held to include an appellant, ... and the word 'suit' an appeal,"

And there is no dispute before me that an order that an appeal has abated can be set aside under O. 22, r. 9 as interpreted by r. 11. O. 43, r. 1 (*k*) reads as follows:

> "An appeal shall lie from an order under r. 9 of O. 22 refusing to set aside the abatement or dismissal of a suit."

It is argued in support of the preliminary objection that the use of the word "suit" in cl. (*k*) must necessarily exclude the word 'appeal'. I am unable to accept that argument. It seems to me that the expression "refusing to set aside the abatement or dismissal of a suit" is merely a compendious way of referring to the provisions of r. 9. As already stated, r. 11 of O. 22 makes r. 9 applicable to appeals. It would be contrary to all rules of logical interpretation, it seems to me, if the word 'suit' in cl. (*k*) of O. 43, r. 1 is to bear a different meaning to what

1. A.I.R. 1929 Cal. 532.

Raju Mudali v. Chinnaraju Naidu.

it bears in O. 22, r. 9. I accordingly overrule the preliminary objection and hold that this appeal does lie.

On the merits of the appeal I think the order of the learned District Judge was not one in which he has rightly exercised his discretion. It may well be that if the appellant had been more familiar with legal procedure or if it were shown that he had been in correspondence with his Advocate during this period, he might have taken other steps to bring himself on record in time. But what he states in his affidavit seems to me to show that he has conducted himself with reasonable diligence in this matter. He has done what one might normally have expected a soldier serving in a foreign province to do. He states that he has prepared an affidavit and that his Commanding Officer would not sign it. This matter of course has not actually been proved, but it seems to me that it would never have been stated if it were not true, and once the Commanding Officer had refused to sign the affidavit, one could hardly have expected the appellant to have sought out any other public official in a distant place like Jubbulpore. Although the appellant does not state explicitly that in his mind the only practicable way of bringing himself on record was to come to Vellore and there prepare the necessary affidavit and take the necessary steps, I think it is a reasonable inference from a perusal of the affidavit as a whole that that was the impression which existed in his mind, an impression which in my opinion is not in all the circumstances of this case an unreasonable one. I would therefore set aside the order of the learned District Judge and the abatement of the appeal and allow the appellant to be brought on record as the legal representative of the appellant in that appeal and order that the appeal be duly heard and disposed of according to law. In the circumstances of this case I think the fairest order in regard to costs is that each party should bear his own costs throughout.

K. S. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

K. Sannaya .. *Petitioner* (1st Accused).*

Sannaya, *In re.*

Government of India Act, 1935, S. 270 (1)—Postman charged with offence under Ss. 409, 467 and 471, Indian Penal Code, for misappropriating amount

* Cr. R. C. No. 551 of 1940. (Cr. R. P. No. 524 of 1940). 4th September, 1940.

of money order entrusted to him by forging thumb impression of payee—Postman—If person employed in connection with the affairs of the Government of India—Consent of Governor-General for prosecution—Necessity.

Sannaya, *In re.*

A postman misappropriated the amount of a money order entrusted to him by forging the thumb impression of the payee. He was charged with offences under Indian Penal Code, Ss. 409, 467 and 471.

Held, the forged document was used in the execution of the duty of the postman, a person employed in connection with the affairs of the Government of India. The consent of the Governor-General is therefore necessary for the prosecution for the offence under S. 471, Indian Penal Code, but there is no bar to the trial of the offence under Ss. 409 and 467, Indian Penal Code.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Stationary Sub-Magistrate, Coondapur, dated 11th July, 1940, in R. C. No. 2 of 1940.

K. S. Jayarama Aiyar and *G. Gopalaswami* for Petitioner.

The Public Prosecutor (*V. L. Ethiraj*) on behalf of the Crown.

The Court made the following

ORDER.—The petitioner is a Postman attached to the Coondapur Sub-Post Office and a charge sheet has been filed against him for offences under Ss. 409, 467 and 471 of the Indian Penal Code for misappropriating the amount of a money order entrusted to him by forging the thumb impression of the payee in the money order form and using the forged document by returning it to the post office in token of payment.

The offences were committed on 10th April, 1939, that is, before the relevant date as defined in S. 270, cl. 3 of the Government of India Act, which in relation to acts done by persons employed about the affairs of the Government of India is the date of the establishment of the Federation, and being a servant of the Crown in a department of the Central Government the petitioner would unquestionably be a person employed in connection with the affairs of the Government of India. S. 270 (1) provides that no proceedings civil or criminal shall be instituted against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown in India before the relevant date except with the consent in the case of a person who was employed in connection with the affairs of the Government of India, of the Governor-General in his discretion and the forged document was used in the execution of the duty of the petitioner as Postman of

Sannaya, In re.

returning the paid money order forms to the Post Office in token of having made the payment. The consent of the Governor-General is therefore necessary for the prosecution for the offence under S. 471 of the Indian Penal Code, but there is no bar to the trial of the offence under Ss. 409 and 467 of the Indian Penal Code, and the trial can proceed in respect of these charges.

K. S. *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HORWILL.

Travancore National Bank Subsidiary Company, Limited (in liquidation) by its Official Liquidator, Mr. R. Narasimhachariar .. *Appellant** (*Applicant*)

v.

The Travancore National and Quilon Bank, Limited (in liquidation) by its Official Liquidators, Messrs. C. Gill and J.S. Goodwin .. *Respondents.*

Travancore National Bank Subsidiary Co., Ltd. *v.* Travancore National & Quilon Bank, Ltd.

Indian Trusts Act (II of 1882), S 6—Liquidation of a Bank—Chit-fund controlled by the same Bank—Subscribers of chit-fund assigning the amounts to the company by letter—Trust whether created thereby—Preferential payment whether possible.

Where the appellant company was formed by the respondent Bank for the purpose of organising chit-funds, and the bank held almost all the shares in the company and controlled the company also, and the subscribers of the chit-fund under the terms of understanding between them could not withdraw any amount without furnishing security and therefore the company either retained the money or paid it into the bank where savings bank accounts were opened in the subscribers' names, and under certain conditions contained in the letters of assignment by subscribers to the appellant company, on the question whether on the liquidation of the bank the appellant company could claim preferential payment before the ordinary creditors of the Bank,

Held, that there was no trust in contemplation entitling the liquidator of the company to preferential payment from the Bank. Before there could be a trust of movable property the author of the trust must indicate with reasonable certainty by words his compliance with the provisions enumerated in S. 6 of the Trusts Act II of 1882.

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* O. S. A. No. 32 of 1939. 8th August, 1940.

Travancore National Bank Subsidiary Co., Ltd. v. Travancore National & Quilon Bank, Ltd.

On appeal from the judgment and order of Venkataramana Rao, J., dated 2nd May, 1939 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 437 of 1939 in O. P. No. 158 of 1938.

S. Parthasarathi and *V. K. Thiruvenkatachari* for Appellant.

C. Krishnaswami Aiyar instructed by *King and Partridge* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant and the respondent are limited liability companies and both of them are now in liquidation under orders for compulsory winding up. For the sake of brevity I will refer to the appellant as "the company" and the respondent as 'the bank'. The company was formed by the bank for the purpose of organising chit-funds, which was considered to be a profitable business. The bank held all the shares in the company, except two, and it is common ground that it controlled the company through one of its officers. The chit-funds which the company organised were for periods of 25 months with four classes of subscribers. The subscriber who was successful at the monthly auction could not withdraw the amount subscribed that month unless he furnished security to the company for its repayment. If he furnished security, of course, he was allowed to withdraw the money and dispose of it as he pleased. If security was not furnished, the company either retained the amount or paid it into the bank. In the latter event the subscriber was required to open a savings bank account with the bank and the money was paid into it. One of the conditions of the keeping of this account was that the amount deposited in it should not be available for withdrawal for purposes other than payment of the instalments for which the subscriber was liable in respect of the chit-fund until the subscriber had paid all his instalments. When he opened the account the subscriber was required to sign a letter addressed to the bank and couched in the following terms:

"I beg to inform you that I am holding . . . . . No. . . . . in your Chit Fund No. . . . . . which was prized at the auction conducted on the . . . . . for the . . . . . instalment.

I have acknowledged receipt of the bid amount for which I have given a separate receipt and I confirm my agreement that as security for the due payment of all the future subscriptions towards my above ticket . . . . in

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Chit No. . . . . you will hold as much amount as would cover up the future liability of this in chitty savings bank account with you.

I also confirm my agreement with you that you will appropriate towards future instalments as they fall due the necessary amount from my deposit in your chitty savings bank account."

This letter is not very appropriately worded as the chit-fund did not nominally belong to the bank, but there can be no doubt as to its effect. The bank was to hold what was deposited in the account as security for the due payment of what the subscriber owed to the company. The company and the bank carried on business in the same premises in Madras and the arrangement was completed by an officer of the bank acting on behalf of the company and the bank.

The Court is informed that the bank kept a considerable number of these accounts. The company and the bank having gone into liquidation, the question arose whether the company was entitled to have the amounts standing in these various savings bank accounts treated as moneys over which the liquidator of the company had a preferential claim. In order to have the question settled he took out a summons under S. 183 of the Indian Companies Act. The matter was heard by Venkataramana Rao, J., who held that the liquidator of the company was not entitled to any preferential payment from the liquidators of the bank, but that he was entitled to rank as an ordinary creditor in respect of these various amounts. The appeal is from this decision.

The claim for preferential payment was based on an allegation that the bank held these moneys as a trustee for the company. This claim was rejected by the learned Judge who held that the letter which the subscriber addressed to the bank on the opening of the savings bank account operated as an assignment to the company of the moneys standing to the credit of the account. The learned Advocate who appears on behalf of the appellant concedes that if there is no trust the learned Judge's decision cannot be challenged. He does not dispute that the letter signed by the subscriber on the opening of the account can be read as an assignment of the money to the bank for the benefit of the company. The learned advocate for the bank denies that there is any trust and accepts the learned Judge's decision as being correct.

We are in entire agreement with the learned Judge when he says that there is no basis on which the bank can be

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regarded as a trustee for the company. Before there can be a trust of movable property the author of the trust must indicate with reasonable certainty by words or acts (*a*) an intention on his part to create a trust, (*b*) the purpose of the trust, (*c*) the beneficiary, and (*d*) the trust property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfer the trust property to the trustee. These are the provisions of S. 6 of the Indian Trusts Act, 1882. In this case it is impossible in our opinion to say that there was an intention on the part of the subscriber to create a trust. What the subscriber agreed to do and did was to open a savings bank account with the bank which was to be kept on certain conditions. The payment into the account of the money by the company was a payment in on behalf of the subscriber and the intention was that this money should be used in discharging the subscriber's financial obligations to the company. It is accepted that the letter which the subscribers signed effected an assignment of the amount to the company, but there was no trust in contemplation. Moreover the whole arrangement was really brought about by the bank for its own benefit. It owned the company which it had formed for the purpose of making profit out of chit-funds and the conditions which it imposed upon the subscribers to the chit-funds were conditions which were merely intended to safeguard itself.

The learned advocate for the appellant has quoted to us *Farley* v. *Turner*[1], but the facts in that case are so far apart from the facts in this case that it has no application. From whatever point of view this matter is looked at, the argument cannot be accepted that there is here a trust which entitles the liquidator of the company to claim preferential payment from the bank. The liquidator must prove as an ordinary creditor in the bank's liquidation. In order that there may be no misunderstanding it may be added that the subscribers have not been made parties to this appeal and have not appeared.

The liquidators of the bank are entitled to the costs of the appeal. The liquidator of the company will obtain his costs out of the assets of the company.

K. C. *Appeal dismissed.*

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1. (1857) 26 L.J. Ch. 710.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Velayudham Subbayya Nadar .. *Petitioner** *(2nd Defendant)*

v.

Kalamsetti Anjaneyalu and others .. *Respondents (Plaintiff and Defendants 1 and 3).*

Subbayya Nadar *v.* Anjaneyalu.

Civil Procedure Code (V of 1908), O. 44, r. 1—Application for leave to appeal in forma pauperis*—If can be rejected without hearing the applicant or giving him an opportunity of being heard.*

An application for leave to appeal in *forma pauperis* cannot be rejected without hearing the applicant or giving him an opportunity of being heard. Case-law discussed.

The reference in O. 44, r. 1, to a 'perusal' by the Court of the documents specified is not sufficient to justify a departure from the ordinary *cursus curiae.*

Petitions under Ss. 115 of Act V of 1908 and 224 of the Government of India Act respectively praying the High Court to revise the orders of the District Court of Nellore dated 22nd June, 1937, and 25th March, 1937 and made in O. P. Nos. 37 and 23 of 1937.

K. Umamaheswaram for Petitioner.

K. Kuppuswamy for Respondents.

The Court delivered the following

JUDGMENT.—The short question for decision in these revision petitions is whether an application for leave to appeal in *forma pauperis* can be rejected without hearing the applicant or giving him an opportunity of being heard. In each case, the Court below rejected the application without hearing the petitioner and the legality of this procedure is challenged before me.

It is not disputed that an application under O. 44, r. 1, Civil Procedure Code, is a judicial proceeding and the order made therein should be based upon the exercise of a judicial discretion exercised on a proper consideration of the relevant material. A Full Bench of this Court has expressed the opinion, approving *Appasami Pillai* v. *Somasundara Mudaliar*[1], that an order rejecting an application for leave to appeal in *forma*

* C. R. Ps. Nos. 861 and 1184 of 1937. 30th August, 1940.

1. (1902) I.L.R. 26 Mad. 437.

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pauperis is an appealable 'judgment' under cl. 15 of the Letters Patent. (See *Tuljaram Rao* v. *Alagappa Chettiar*[1].) It is therefore difficult to see how such a proceeding can be disposed of except in conformity with the fundamental principle in all judicial procedure that no order should be made without notice to the parties who will be prejudicially affected by the order and without affording them a reasonable opportunity of being heard. It is satisfactory to note that the practice of the Courts in this Presidency in dealing with applications of this kind has been in conformity with this principle.

The respondent relies on a recent decision of Wadsworth, J., in *Kanthimathi Ammal* v. *Ganesa Aiyar*[2], following an earlier decision of Sadasiva Aiyar, J., in In re *Paramasivam Pillai*[3]. With all respect I am unable to agree with these decisions. In the latter case, the learned Judge understands 'perusal' in the proviso to O. 44, r. 1 to mean "perusal without being supplemented by argument on petitioner's side" and he quotes in support of his conclusion a passage from the judgment of Jenkins, C.J., in *Sakubai* v. *Ganpat*[4]:

> "It is to be noticed that the Court must come to its conclusion upon a perusal only of the application, the judgment and the decree. This proviso is apt to be overlooked," etc.

The point now under consideration did not arise in the Bombay case (*Sakubai* v. *Ganpat*[4]), where the learned Judge was merely pointing out the desirability of the Court recording briefly the reasons for granting leave, and it is by no means clear that "only" in the passage quoted was meant to exclude a hearing of the petitioner and not material other than the application, the judgment and the decree. In the other case *Kanthimathi Ammal* v. *Ganesa Aiyar*[2], the learned Judge notes the prevailing practice of hearing the applicant in such cases, but finds no warrant for it in O. 44, r. 1 observing that:

> "The proviso to that rule contains no indication that it is either necessary or desirable for the Judge to hear the party before passing orders of rejection."

The mere absence of an express provision for hearing the applicant is, in my view, no justification for refusing to hear him. Hearing the parties affected before passing adverse orders is such a well-established and cardinal rule governing the procedure of Courts that the Code must be taken to assume

1. (1910) 21 M.L.J. 1 : I.L.R. 35 Mad. 1 at 9 and 17 (F.B.).
2. (1935) 69 M.L.J. 781 : I.L.R. 59 Mad. 805.
3. (1915) 28 I.C. 957.
4. (1904) I.L.R. 28 Bom. 451.

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its observance in all cases a matter of course without any express provision in that behalf. There is no such provision, for instance, in S. 115 but it has never been suggested that a revision petition can be dismissed without giving the petitioner an opportunity of being heard. Nor is the reference in O. 44, r. 1 to a 'perusal' by the Court of the documents specified sufficient, to my mind, to justify a departure from the ordinary *cursus curiae*.

Learned Counsel for respondents also placed reliance on *Somasundaram Chettiar* v. *Arunachalam Chettiar*[1], as showing that the respondent to an application for leave to appeal in *forma pauperis* has no right to be heard, and argued that the petitioner could be in no better position. But the respondent would not be prejudiced by not being heard at the stage of the admission of the petition because he would be heard in support of the judgment and decree appealed from before the matter is finally disposed of. (*Cf.*, the procedure under O. 41, r. 11.) But the dismissal of a petition without hearing the petitioner is quite a different matter, as the judgment sought to be appealed from would become final without his having had an opportunity of showing that it was contrary to law, etc.

I therefore set aside the rejection of the application by the Court below in each case and remit it for disposal after giving the petitioner an opportunity of being heard. I make no order as to costs as the respondent was not responsible for the course adopted by that Court.

K. S. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Sri Rajah Yenumala Latchanna Dora Varu .. *Petitioner* (Respondent-1st Defendant)*

v.

Sri Rajah Yenumala Mallu Dora Varu .. *Respondent (Petitioner-1st Plaintiff).*

Latchanna Dora Varu v. Mallu Dora Varu.

Civil Procedure Code (V of 1908), S. 151—Suit for partition—Defence denying claim in all the properties except a few which belonged to joint family—Order for interim maintenance—Whether proper—Revision—Memorandum of cross objections—Maintainability.

1. (1932) 63 M.L.J. 28: I.L.R. 55 Mad. 982.

* C. R. P. No. 1622 of 1938. 1st May, 1940.

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Where a person sued his father and brother for a share in some properties of the joint family but the defence was that as most of the properties were self-acquired the plaintiff could not claim against all properties except a few mentioned in a particular schedule, but during the pendency of the suit the plaintiff applied for maintenance, and the lower Court awarded the maintenance though less than the amount applied for,

Held, that the plaintiff was not entitled to the order of the nature passed.

Maharaj Kumar Gopal Saran Narayan Singh v. *Sita Debi*, (1923) 77 I.C. 718, relied on.

The Court has no inherent power under S. 151, Civil Procedure Code, to pass an interim order of maintenance.

Judgment of Jackson, J., in C. R. P. No. 1312 of 1930, followed.

A memorandum of cross-objections cannot be filed in revision. The proper procedure will be to file a separate revision.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order dated the 5th October, 1938, of the District Court of West Godavari at Ellore in I. A. No. 179 of 1938 in O. S. No. 34 of 1937.

V. Viyyanna for Petitioner.

Ch. Raghava Rao for Respondent.

The Court delivered the following

JUDGMENT.—The plaintiff brought the present suit against his brother and his father for the B schedule properties which, he said, were allotted to him in accordance with an agreement. In the alternative, he prayed for partition. The defendant's case is that the property is for the most part his self-acquired property and that the only property to which the plaintiff is entitled is that in Sch. I. During the pendency of the suit the plaintiff made an application to the Court for an interim maintenance of Rs. 800 a month. The learned District Judge has awarded Rs. 250 a month.

The plaintiff is not entitled to an order of the nature passed. In *Maharaj Kumar Gopal Saran Narayan Singh* v. *Sita Debi*[1], a Divisional Bench of the Patna High Court held that a Court has no inherent power under S. 151 to pass such an order. That case was very like the present, in that the plaintiff sued on a maintenance agreement, and only differed from it in that the defendant there did not admit that the plaintiff was entitled to anything. Here, the defendant does admit that the plaintiff is entitled to something; but he does not admit that the plaintiff is entitled to any part of the land that he claims. Jackson, J., in C. R. P. No. 1312 of 1930, quotes *Maharaj Kumar Gopal Saran Narayan Singh* v. *Sita Debi*[1], as

1. (1923) 77 I.C. 718.

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an authority for the position that the Court has no inherent power under S. 151 to pass an interim order of maintenance and pertinently adds that:

"A Court cannot interfere with a private person's property merely because he happens to be a defendant on behalf of another person merely because he happens to be a plaintiff. There is no inherent power in a Court to act without findings, so that if a matter is asserted by the plaintiff and denied by the defendant, the Court cannot presume that the plaintiff's allegations are true and give some interim relief pending disposal of the suit."

In the face of the above decisions, I do not feel justified in taking into account the document in the plaintiff's favour, the validity of which is denied by the defendant. The defendant does however admit that the plaintiff is entitled to some property, but it would be inconvenient, I consider, during the pendency of this suit which. I hope, will not be very much longer, to compel the plaintiff to take possession of property which he does not claim and with regard to which he may have some difficulty in collecting rent. Some maintenance in proportion to the property admittedly belonging to the plaintiff can be given; and I think the fairest course would be to reduce the amount granted to the plaintiff by the lower Court to Rs. 50 a month from the date of the last payment. If it is subsequently found that Rs. 50 a month is in excess of the mesne profits from the land to which the Court finds the plaintiff is entitled, the excess will be charged on the land awarded to the plaintiff.

The petition is allowed to the extent indicated. There will be no order as to costs.

A memorandum of cross-objections has been filed asking for an enhancement of the allowance. This has to be dismissed, whether on the ground that the plaintiff cannot be given even as much as was granted by the lower Court or on the ground that a memorandum of cross-objections cannot be filed in a revision petition. It could no doubt be treated as a revision petition if it had been filed within three months from the date of the passing of the order. Apparently this was not done. The memorandum has not been argued and it is not necessary to pass any order as to costs. The trial Court should expedite the disposal of the suit.

K. C. *Petition allowed and Cross-objections dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

P. S. Poovanalingam Pillai .. *Petitioner* (1st Respondent-Plaintiff)*

v.

Nagaratnam Pillai .. *Respondent (Petitioner-2nd Defendant).*

Poovanalingam Pillai *v.* Nagaratnam Pillai.

Madras Agriculturists Relief Act (IV of 1938), Ss. 8, 9 and 19—Pronote of 23rd January, 1924, endorsed to plaintiff on 26th January, 1933—Liability of the endorser to plaintiff—If can be treated as debt incurred on original promissory note.

In a suit against the endorser as well as the maker of a promissory note of 23rd January, 1924, which was endorsed to the plaintiff on 26th January, 1933, a decree was passed against both. The endorser applied for scaling down.

Held, the liability of the endorser was a personal liability the basis of which was the endorsement though the quantum of liability was the original debt under the pre-existing promissory-note. The debt is one incurred after 1st October, 1932, and must be scaled down under S. 9 of the Act.

Perianna v. *Sellappa,* (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218, distinguished.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the order of the Court of the District Munsif of Manamadura dated 10th March, 1939 and made in I. A. No. 121 of 1938 in S. C. S. No. 113 of 1936.

V. Ramaswami Aiyar for Petitioner.

K. V. Srinivasa Aiyar for Respondent.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This revision petition arises out of an application under Ss. 8 and 19 of Madras Act IV of 1938, to scale down the debt on a decree dated 29th August, 1936, in a promissory note suit. The present petitioner is the decree-holder. The original promissory note was executed on 23rd January, 1924, by the first defendant in favour of the second defendant. On 6th January, 1933, the second defendant endorsed the promissory note to the plaintiff, who sued upon it and got a decree both against the original promisor and the endorser. It was the second defendant (the endorser) who filed the application to scale down the decree.

* C. R. P. No. 1733 of 1939. 28th August, 1940.

Poovanalingam Pillai v. Nagaratnam Pillai.

Wadsworth, J.

The only question raised in revision is whether the debt, so far as the endorser is concerned, was incurred on 23rd January, 1924, the date of the original promissory note in his favour, or on 26th January, 1933, the date of his endorsement to the plaintiff. It is contended on behalf of the applicant (respondent here) that the principle of the decision in *Perianna* v. *Sellappa*[1] must govern the case. That was a case in which a purchaser of the hypotheca was made a defendant in a suit on the mortgage and the learned judges decided that he was a person having a liability towards the mortgagee by reason of his purchase of the land, that the purchase was not the basis of any new liability and that the liability then sought to be enforced was the liability arising out of the mortgage itself. It seems to us that the reasoning of that decision is not applicable to the facts of the present case. We are not here concerned with a liability charged on land, which becomes the liability of the purchaser of that land. Here, there is an original promissory note under which the applicant had no liability whatever. His liability was first incurred by reason of his endorsement of that promissory note and the date on which he incurred that liability is the date of his endorsement. It is true that the extent of his liability is measured by the extent of the liability of the original promisor. But, so far as the applicant is concerned, he incurred a liability for the first time on 26th January, 1933. That liability was a personal liability, the basis of which was his endorsement of the pre-existing promissory note. It is therefore a debt incurred after 1st October, 1932, and has to be scaled down under S. 9 of Madras Act IV of 1938.

The revision petition is therefore allowed and the application is remitted to the lower Court for fresh disposal in the light of this judgment. In the circumstances of the case, we make no order as to costs.

K. S. *Petition allowed.*

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1. (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD NORMAND (Lord President of the Court of Session), SIR GEORGE RANKIN AND LORD JUSTICE GODDARD.

The Commissioner of Income-tax, Bengal .. *Appellant**

v.

Messrs. Mahaliram Ramjidas .. *Respondents.*

P.C. — Commissioner of Income-tax, Bengal *v.* Mahaliram Ramjidas.

Indian Income-tax Act (XI of 1922), S. 34—Income-tax authorities having reason to suppose that return of income was false—Quasi judicial enquiry—If essential before ordering further return.

The respondent firm made a statutory return of income under S. 22 (2) which showed a loss and were accordingly assessed to income-tax at *nil* for the material year.

Subsequently allegations were made to the Income-tax Officer that the firm's return was false. *Ex parte* and informal enquiries having satisfied the officer that the firm had deliberately misled him and that *prima facie* chargeable income had escaped assessment he issued a notice to the firm under S. 34. The firm having contended that such a notice could not be validly served on them until they had had an opportunity of being heard, the matter was referred to the High Court on a case stated under S. 66 (1) of the Act. The High Court held in effect that the Income-tax Officer was not entitled to exercise his powers under S. 34 unless he had first held a quasi judicial enquiry to which assessee had been convened. On appeal,

Held, the Income-tax Officer is not required by the section to convene the assessee or to intimate to him the nature of the alleged escape from taxation, or to give him an opportunity to be heard before he decides to put into operation the powers which the section confers.

Decision of the High Court, A I.R. 1938 Cal. 557, reversed.

Appeal from the decision of the High Court, Fort William in Bengal dated 24th February, 1938 (Derbyshire, C. J. and Panckridge, J.†) on a reference under S. 66 (1) of the Indian Income-tax Act, 1922.

The facts and arguments appear from the judgment of the Board.

J. Millard Tucker, K.C. and *W. Wallach* for Appellant.

J. F. Parekh for Respondent firm.

Their Lordships' judgment was delivered by

Lord Normand.

LORD NORMAND.—This is an appeal by the Commissioner of Income-tax, Bengal, against a judgment of the High Court of Judicature at Fort William in Bengal delivered on a reference made under S. 66 (1) of the Indian Income-tax Act, 1922.

* P.C. Appeal No. 27 of 1939. 25th April, 1940.

† A.I.R. 1938 Cal. 557.

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The respondents are a registered partnership firm carrying on business in Calcutta.

The question in the appeal turns on the true construction of S. 34 of the Indian Income-tax Act, 1922. That section enacts:—

"34. If for any reason income, profits or gains chargeable to income-tax has escaped assessment in any year or has been assessed at too low a rate, the Income-tax Officer may, at any time within one year of the end of that year, serve on the person liable to pay tax on such income, profits or gains, or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-S. (2) of S. 22 and may proceed to assess or re-assess such income, profits or gains, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section:

Provided that the tax shall be charged at the rate at which it would have been charged had the income, profits or gains not escaped assessment, or full assessment, as the case may be."

The question at issue was formulated in the reference as follows:—

"Where the Income-tax Officer has, on such materials and informations as are available to him, reason to believe that income from any of the heads of income described under S. 6 of the Indian Income-tax Act—in the present instance, from 'business' and 'other sources', which should have been assessed in the year of assessment, has escaped assessment, and, as a result of such enquiries and investigations as are possible at that stage, has been satisfied as stated in paragraph 3 of the statement that a *prima facie* case has been made out against the assessee for assessment under S. 34 of the Act, whether, on a true construction of S. 34 of the Act, it is not open for the Income-tax Officer to initiate proceedings under S. 34, affording at the same time ample opportunities to the assessee to produce such evidence to the contrary as he likes, in the course of the proceedings thus initiated, or, on the other hand, does the section contemplate that the factum of such escapement should have been first proved and definitely found and determined by an independent enquiry, before the Income-tax Officer can assume jurisdiction to re-open the assessment under S. 34?"

The learned Judges of the High Court criticised this formulation, holding that is was not in proper form and that it was made up of several involved questions connected with each other. They therefore did not render a positive or negative answer to either of the alternative branches of the question, but the judgment of the Court delivered by the learned Chief Justice construes S. 34 as requiring the Income-tax Officer to indicate to the assessee the nature of the alleged escapement from assessment and to give the assessee an opportunity of being heard, before the Income-tax Officer decides that income has escaped assessment and before proceeding to exercise his

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powers under S. 34. To put the decision negatively, the Court held that the Income-tax Officer was not entitled to exercise his powers under the section unless he had first held a quasi-judicial enquiry to which the assessee had been convened. The question now is whether that decision is well founded in law.

Though the appeal is concerned with a general question of the construction of S. 34, it is necessary for a clear understanding of it that the facts which give rise to it should be briefly explained under reference to other material provisions of the Act which were in force in 1932-33, the year of assessment. These provisions are to be found in Ss. 22 and 23 of the Act. Under S. 22 (2) the Income-tax Officer must serve notice on any person, other than a company, whose total income is in the Income-tax Officer's opinion of such an amount as to render such person liable to income-tax, requiring him to furnish a return in the prescribed form of his total income during the previous year. Sub-S. (4) authorises the Income-tax Officer to serve on any person upon whom a notice has been served under sub-S. (2) a further notice requiring him to produce accounts and documents, subject to the limitation that he shall not require the production of any accounts relating to a period more than three years prior to the year previous to the year of assessment. S. 23 provides for the making of the assessment. Sub-S. (1) requires the Income-tax Officer, if he is satisfied that the return made under S. 22 is correct and complete, to assess the total income and to determine the sum payable. Under sub-S. (2) if the Income-tax Officer has reason to believe that the return is incorrect or incomplete he must serve on the person who made the return a notice requiring him either to attend at the Income-tax Officer's office or to produce any evidence relied on in support of the return. Sub-S. (3) provides that the Income-tax Officer, after hearing such evidence as the person who made the return may produce and such other evidence as the Income-tax Officer may require on specified points, shall by an order in writing assess the total income and determine the sum payable. Sub-S. (4) makes provision for an assessment by the Income-tax Officer to the best of his judgment if the assessee fails to make a return or to comply with the terms of the notices issued to him. This whole procedure, it may be recalled, not only applies on first assessment but is also prescribed by S. 34 if for any reason income, profits

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or gains have escaped assessment or have been assessed at too low a rate.

In the present case the procedure under S. 22 was put into operation by the Income-tax Officer and the respondents in reply to the notice issued under sub-S. (2) made a return in which they entered under the head "business, trade, commerce, etc." a loss of Rs. 8,54,385. The Income-tax Officer accepted the return as correct and complete and on the 23rd December, 1932, assessed the total income of the respondents at *nil* for the year 1932-33. But at the beginning of January, 1934, the Income-tax Officer received information that the account books of the assessees produced before the department had always been manipulated, that a comparison of the cash book with the bank pass books within recent years would show that they did not agree and that large sums of money which had been shown as received by the assessees in their bank pass books were not entered in the cash book. Specific instances of some of these discrepancies and inaccuracies were supplied by the informant. This naturally gave the Income-tax Officer food for thought, and after receipt of the information and before issuing notice under S. 34 he made such enquiries as were possible about the truth of the information. These enquiries were informal and *ex parte*. As a result of them the Income-tax Officer was satisfied (1) that the allegations of discrepancies between the assessees' books of accounts produced at the assessment and some of the entries in their bank pass books were not without foundation; (2) that the assessees had withheld or suppressed relevant facts and information and thereby deliberately misled the Income-tax Officer; and (3) that a *prima facie* case that some income chargeable to Income-tax had escaped assessment was made out. Accordingly on 5th February, 1934, the Income-tax Officer made an order directing notice to issue under S. 22 (2) read along with S. 34, and on 8th February, 1934, a notice was issued to the respondents in these terms:—

"Whereas I have reason to believe that your income from business and other sources which should have been assessed in the financial year ending the 31st March, 1933, has wholly escaped assessment and I therefore propose to assess the said income that has escaped assessment. I hereby require you to deliver to me, not later than the 9th March, 1934, or within 30 days of the receipt of this notice, a return in the attached form of your income from all sources which was assessable in the said year ending the 31st March, 1933."

On 22nd March, 1934, the respondents filed a new return showing the same loss as was shown in the original return.

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The Income-tax Officer on 21st May, 1934, issued further notices under Ss. 22 (4) and 23 (2) and thereafter further procedure followed, including applications by the respondents to the High Court for the purpose of preventing the Income-tax Officer from proceeding with a new assessment, on the ground, *inter alia*, that S. 34 had been put into operation without giving the respondents an opportunity of being heard. It is not, however, necessary to discuss these proceedings, because eventually the convenient and competent course was taken of staying proceedings under S. 34 till the question at issue should be settled on a case stated under S. 66 (1) of the Act

Learned Counsel for the respondents submitted an argument that the facts alleged did not bring the case within the scope of S. 34. This is an argument which is not open to the respondents on the terms of the reference, which assume a case that falls within the terms of S. 34 and on that assumption raise the general question, what on a sound construction of the section is the duty of the Income-tax authorities before issuing a notice under S. 22.

S. 34 is unhappily and even ungrammatically phrased. It is expressed impersonally, and it fails to state by whom and by what procedure it is to be established that income, profits or gains have escaped assessment or have been assessed at too low a rate. There is fortunately no dispute that the person who must make that decision is the Income-tax Officer, for, apart from the assessee, no one else is in a position to say whether income has been assessed or at what rate it has been assessed. The omission to prescribe expressly what the nature of the decision should be and by what procedure it must be reached is all the more surprising because in other sections of the Act the legislature has been careful to define what is necessary in these respects. This circumstance was founded on by the learned Counsel for the respondents, who pointed out that where some fact had to be established merely *prima facie* to the satisfaction of the Income-tax Officer in the *bona fide* exercise of his discretion, this was expressed by such phraseology as "When it appears to the Income-tax Officer", or "if the Income-tax Officer has reason to believe". On the other hand, when the statute requires that the Income-tax Officer shall make a decision, which is final so far as he is concerned, upon a matter of fact, the usual expression is "if he is satisfied". When that expression is used, however, express provision is also made whereby

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the interested parties may be heard either by the Income-tax Officer himself (S. 25-A and S. 28) or by the Assistant Commissioner (S. 3-A) before any definitive action is taken. In one place (S. 26) the formula is "where it is found", but in this instance the decision is made by the Income-tax Officer in the course of making an assessment and when an enquiry under S. 23 is open. Learned Counsel for the respondents maintained that in a taxing Act the construction more favourable to the assessee should be preferred and he suggested that S. 34 should be read as if it were introduced by the words "If the Income-tax Officer is satisfied" or the words "If it is found". But this suggestion is not in itself helpful to the respondents, since the words proposed to be implied do not carry with them by a further implication a direction to hold a quasi-judicial enquiry; and the real question is whether the section should be read subject to an implied *proviso* that the Income-tax Officer shall not apply the procedure prescribed by the section except after a decision taken in a quasi-judicial enquiry.

The section, although it is part of a taxing Act, imposes no charge on the subject, and deals merely with the machinery of assessment. In interpreting provisions of this kind the rule is that that construction should be preferred which makes the machinery workable, *ut res valeat potius quam pereat.* In the present instance two considerations are in their Lordships' opinion decisive. First, no powers are imposed by the section on the Income-tax Officer to convene the assessee, or to issue notices calling on him to produce documents, though these powers are essential if the Income-tax Officer is to conduct a quasi-judicial enquiry before deciding that profits have escaped assessment or have been assessed at too low a rate. In *Rex* v. *Kensington Income-tax Commissioners*[1], S. 52 of the Taxes Management Act, 1880 (now S. 125 of the Income-tax Act, 1918) came under consideration of the Divisional Court. It was contended on behalf of the subject taxpayer that the section imposed as a condition precedent to the operation of the section an obligation on the part of the surveyor to obtain legal evidence that the return was defective. The words to be construed were "if the surveyor discovers that any properties or

1. (1913) 3 K.B. 870.

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profits chargeable to tax have been omitted from the first assessment". Rejecting this contention Lush, J., said:

"It is certainly remarkable that the statute . . . . contains no machinery for enabling the surveyor to obtain the evidence which it is said he must obtain before his jurisdiction under the section arises. He is not a judicial officer; he has no power to compel witnesses to give evidence, or to administer an oath if they are willing to give evidence. He has no means of obtaining that evidence without which, according to the contention, the jurisdiction does not arise."

The decision of the Divisional Court in that case ultimately turned on a question not material to the present issue. It was reversed by the Court of Appeal (*Rex* v. *Kensington Income-tax Commissioners*[1]), but the Court of Appeal did not differ from the observations of Lush, J., cited above, as is made clear by the judgment of Pickford, L. J. (at p. 445). Caution is necessary in applying decisions on a British Income-tax Act to the Indian Income-tax Act, but the reasoning of Lush, J., is general and is not affected by specialties of the British Act. It is apposite to the respondents' contention in the present case. Their Lordships are of opinion, in accordance with that reasoning, that it cannot be a condition precedent to the operation of S. 34 that the Income-tax Officer should hold a quasi-judicial enquiry, because the powers necessary for such an enquiry are not conferred upon him. But there is a second consideration which is no less conclusive. The operative part of S. 34 empowers the Income-tax Officer to proceed *de novo* under sub-S. 2 of S. 22, and that in turn leads, if there should still be a question of the accuracy of the return, to an enquiry under S. 23 (2) and (3), and in that enquiry the assessee has a statutory right to appear and to produce evidence. Therefore a construction of S. 34 which requires a quasi-judicial enquiry to be held before the powers under the section can be operated would result in mere duplication of procedure and in two enquiries of the same kind, into the same matter, conducted by the same official, and without any advantage to the parties. A construction so unreasonable and unpractical ought not to be preferred when another construction is open. Accordingly their Lordships are of opinion that the Income-tax Officer is not required by the section to convene the assessee, or to intimate to him the nature of the alleged escapement, or to give him an opportunity of being heard, before he decides to operate the powers conferred

1. (1914) 3 K.B. 429.

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by the section. In the opinion of their Lordships the view which the learned judges of the High Court have taken of the section is too narrow, and the notice sent to the respondents on 8th February, 1934, is in form a competent preliminary to a new assessment.

The question in the reference is so framed that an answer to the first branch in the affirmative and to the second branch in the negative might be misleading and fail to give exact effect to the opinion of their Lordships. Their Lordships think that the proper answer to be given is that to enable the Income-tax Officer to initiate proceedings under S. 34 it is enough that the Income-tax Officer on the information which he has before him and in good faith considers that he has good ground for believing that the assessee's profits have for some reason escaped assessment or have been assessed at too low a rate. The result is that their Lordships will humbly advise His Majesty that the appeal should be allowed, and that the order of the High Court should be set aside. The respondents should pay the appellant's costs in the proceedings on the reference before the High Court and before the Board.

Solicitors for Appellant: *The Solicitor, India Office.*

Solicitors for Respondents: *Stanley Johnson & Allen.*

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K.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Kaza Suryanarayana .. *Petitioner* (Respondent-Decree-holder)*

v.

Sree Rajah Sobhanadri Appa Rao Bahadur Zamindar Garu of Talaprolu Estate at Nuzvid and others .. *Respondents (Petitioner and Auction-purchaser).*

Suryanarayana v. Sree Rajah Sobhanadri Appa Rao Bahadur.

Madras Estates Land Act (IX of 1908), Ss. 132 and 192—Arrears of rent—Revenue sale—Sale set aside as the land did not belong to the party claiming rent—Petition against order—No application under O. 21, r. 90, Civil Procedure Code—Whether Civil Procedure Code applies in entirety.

S. 192 of the Madras Estates Land Act makes O. 21, r. 92, not applicable to sales in execution of decrees for rent passed under the former Act.

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* C. R. P. No. 1044 of 1937. 9th August, 1940.

Jagannatha Pillai v. *Kathaperumal Pillai*, (1927) 53 M.L.J. 688: I.L.R. 51 Mad. 76, followed.

Where the petitioner contended that an order of the Deputy Collector setting aside a rent sale was wrong on the ground that O. 21, r. 90, Civil Procedure Code, was not applicable to sales in execution of decrees for rent passed under the Act,

Held, the petitioner was entitled to have his petition allowed.

The amendment to S. 192 of the Madras Estates Land Act by Act VII of 1934 does not make any substantial difference in the applicability of the Civil Procedure Code read subject to S. 132 of the Act, which provides a complete Code of Procedure applicable to the execution by a Revenue Cour of any decree for arrears of rent.

Gopalakrishnayya v. *Narasimha Rao*, (1939) 2 M.L.J. 120, referred to.

Petition under S. 115 of Act of 1908 praying the High Court to revise the order of the Court of the Deputy Collector of Nuzvid dated 14th April, 1937 and made in E. P. No. 311 of 1936 in S. S. No. 20 of 1934.

P. Somasundaram for Petitioner.

G. Ramakrishna Rao for Respondents.

The Court delivered the following

JUDGMENT.—This is a petition to revise the order of the Deputy Collector, Nuzvid Division, setting aside a rent sale held on 19th December, 1936. The petitioner who is the Agraharamdar of Singanagudam village obtained a decree for arrears of rent due by a tenant and brought his holding to sale in execution of the decree. The Revenue Inspector, Nuzvid, was appointed as the selling officer and he posted the sale to be held on 19th December, 1936. Meanwhile on 2nd December, 1936, the first respondent herein, the Zamindar of Talaprolu Estate, which adjoined the Agraharam addressed a letter to the Deputy Collector alleging that the holding which had been proclaimed for sale formed part of Ranganagudam village comprised in his estate and that the petitioner had no right to bring it to sale as part of his Singanagudam Agraharam. This letter was forwarded by the Deputy Collector to the selling officer, "for information and necessary action". No notice of this letter was given to the petitioner but on the date fixed for sale, the selling officer called upon the agent of the petitioner who had come there to attend the sale to answer the allegations in the letter sent by the first respondent. The agent filed a counter-statement alleging that the property sought to be sold was part of the petitioner's Agraharam, that it was in the

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possession and enjoyment of the judgment-debtor as a 'ryot' of the Agraharam village and that the claim of the first respondent was unfounded. The Officer took statements from the karnam and two ryots of Ranganagudem who supported the first respondent's claim, while the judgment-debtor and his brother filed statements supporting the petitioner's case. On these statements, the Revenue Inspector came to the conclusion that the land in question did not belong to the petitioner's village but formed part of the first respondent's Zamindari village Ranganagudam. In spite of this conclusion, he conducted the sale and knocked down the property to the second respondent who was the highest bidder, and submitted the sale records together with the record of his enquiry to the lower Court. That Court, however, set aside the sale on the ground that the selling officer having found that the land ordered to be sold was not part of the petitioner's village ought to have postponed the sale and submitted the records of his enquiry for orders of the Court and that the petitioner played a fraud on the Court by attempting to bring to sale a holding which was no part of his village. It accordingly directed the refund of the purchase money to the second respondent. In passing this order, the Court purported to act under O. 21, r. 90, Civil Procedure Code, read with S. 192 of the Madras Estates Land Act, though no application was made by the first respondent under that provision.

Learned counsel for the petitioner has challenged the validity of this order mainly on the ground that the Court has no power to set aside the sale under O. 21, r. 90, Civil Procedure Code, as that provision is not made applicable by S. 192 of the Madras Estates Land Act to sales in execution of decrees for rent passed under that Act. The respondent raised a preliminary objection to the maintainability of the revision petition. It was contended for him that O. 21, r. 90 as well as O. 43, r. 1 (*j*) applies to proceedings under the Estates Land Act and that therefore the petitioner's remedy was to appeal from the order now sought to be revised.

The question whether S. 192 of the Madras Estates Land Act makes O. 21, rr. 90 and 92 applicable to sales in execution of decrees for rent passed under the former Act was decided in the negative by a Bench of this Court in *Jagannatha Pillai* v.

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Kathaperumal Pillai[1] and that decision is binding on me. It was, however, pointed out by learned Counsel for the first respondent that that case was decided before S. 192 of the Act was amended by Act VII of 1934 and that the reasoning based on the specific exclusion of Chapter 43 of the Civil Procedure Code of 1882 corresponding to O. 43, r. 1 of the present Code from the provisions made applicable to proceedings under the Act could no longer apply. Jackson, J., observed at page 82:

> "Under the procedure, which, as now suggested, S. 192 is supposed to import, the sale is confirmed, and the aggrieved party has no appeal because S. 192 excludes Chapter (Order) XLIII, and no suit, because O. 21, r. 92 precludes a suit."

This anomaly, it is urged, cannot occur after the amendment of S. 192 as it does not now specifically exclude the application of O. 43 to proceedings under the Estates Land Act. I do not consider that this makes any difference. The substantial reasoning on which the decision in *Jagannatha Pillai* v. *Kathaperumal Pillai*[1] is based is that S. 132 by making the provisions of Chapter VI of the Estates Land Act applicable to the execution by a Revenue Court of any decree for arrears of rent, provides a complete Code of Procedure, and S. 192 which applies the provisions of the Code of Civil Procedure to proceedings under the Act must be read subject to S. 132. In fact, the decision was followed and applied even after the amendment of S. 192 in *Gopalakrishnayya* v. *Narasimha Rao*[2].

It follows that the preliminary objection should be overruled and the revision petition should be allowed. The petitioner will have his costs here and below to be paid by the first respondent.

K. C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Maragadhammal .. *Appellant**

v.

Yasodhammal .. *Respondent.*

Maragadh-ammal *v* Yasodh-ammal.

Court-fees—Nature and scope of probate proceedings—Judgment directing issue of probate declaring the will to be genuine—If 'final judgment'

1. (1927) 53 M.L.J. 688: I L.R. 51 Mad. 76.
2. (1939) 2 M.L.J. 120.

* S. R. No. 30252 of 1939. 12th April, 1940.

Maragadhammal v. Yasodhammal.

—*Appeal against—Court-fees payable—Madras High Court Original Side Fees Rules, Appendix II, No. 35.*

Question of title to property is not within the province of a Probate Court. The only question before it is whether a person died testate or intestate and who is entitled to the administration of the estate and if he died testate whether the executor is entitled to the grant of probate. A judgment directing the issue of probate after declaring the will genuine is a final judgment. The subject-matter of an appeal against such a judgment is incapable of valuation and the person preferring an appeal is entitled to put his own valuation upon it. The minimum fee of Rs. 225 under High Court Fees Rules, Appendix II, No. 35 is the proper court-fee payable for such appeal.

Reference under Court Fees Act, S. 5 in Original Side Appeal sought to be filed against the judgment of Somayya, J., in T. O. S. No. 11 of 1938 in Original Testamentary Jurisdiction of the High Court.

K. Narasimha Aiyar and *A. S. Nataraja Aiyar* for Appellant.

The Government Pleader (*B. Sitarama Rao*) instructed by *The Government Solicitor* on behalf of the Government.

The Court delivered the following

JUDGMENT.—The question for decision is, what is the Court-fee payable on the Memorandum of Appeal which was presented against the judgment of my learned brother Somayya, J., in T. O. S. No. 11 of 1938 by which he directed the issue of a probate after declaring the will propounded by the respondent to be genuine. The appellant paid a court-fee of Rs. 225. The learned Master is of the opinion that an *ad valorem* stamp duty is payable under No. 35 of the High Court Fees Rules. The office is of the opinion that under No. 35 the appellant has to pay a stamp duty on Rs. 7,615-12-5 at which the testamentary suit has been valued and the same must be deemed to be the valuation in the appeal. The appellant contends that the subject-matter is incapable of valuation, but he however values it at Rs. 2,000 and states that the stamp duty paid by him is correct. The question is, is the contention of the appellant sound?

The rule governing this matter is No. 35 of the Original Side Fees Rules which runs thus:

"Memorandum of appeal from a final judgment:

When the value of the subject-matter of the appeal does not exceed Rs. 2,500	.. Rs. 225
And for every Rs. 1,000 or part thereof in excess of Rs. 2,500	.. " 5."

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There can be no question that the appeal is from a final judgment (vide *Perumal Chetty* v. *Kandasamy Chetty*[1]). But the question that has to be decided is, what is the subject-matter of the appeal? In deciding this question the nature of the probate proceedings has to be considered. In a probate proceeding no question of title to property is adjudicated as it is not within the province of a Probate Court to go into it. The only question before it is whether a person died testate or intestate and who is entitled to the administration of the estate, and if he died testate whether the executor is entitled to the grant of probate. In *Pran Kumar Pal Chaudhury* v. *Darpahari Pal Chaudhury*[2], Sanderson, C.J., described the nature of a probate proceeding thus:

"I propose to consider what is the nature of the proceedings in connexion with an application for a grant of probate. There is no doubt that in such proceedings the question of title to property does not arise. The question is whether one or other of the parties to the proceedings is entitled to represent the estate. But, when the proceedings are contested, as in this case, the Court has to try an issue which arises between the parties and which involves the question whether the plaintiff is entitled to have a grant of probate or whether the person, who has entered a caveat and who has become a defendant, has substantiated and proved the defence which he has set up."

The learned Chief Justice then referred to the case of In the goods of *Colonel John Shelton, deceased*[3], where the nature of the proceedings is described thus:

"A contest for probate is a suit to try the question of testacy or intestacy, and that administration is a matter of civil right."

This is the view which has also been taken by a Bench of this Court in *Rodrigues* v. *Mathias*[4]. In that case the question was what is the stamp duty payable in the High Court on a memorandum of appeal presented against an order granting probate by a District Court? In dealing with that question Sankaran Nair and Munro, JJ., observed thus:

"We also think that on principle an *ad valorem* stamp should not be levied in such cases. The only title which the order appealed against gives to the petitioner is the right to administer the estate and if he has to sue to recover the estate he will have to pay stamp duty on its value. We do not think stamp duty on the value of the estate should be twice exacted."

Having regard to the nature of the right that is agitated in a probate proceeding, the subject-matter of the appeal in

1. (1922) 44 M.L.J. 146: I L R. 46 Mad. 592. 2. (1926) I.L R. 54 Cal. 126.
3. (1846) Montriou Reports, 167 at 173: Sanjeeva Rao's Indian Decisions, Old Series, Volume I, page 590.
4. (1911) 21 M L.J. 481.

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my opinion must be deemed to be incapable of valuation or the person who is preferring the appeal is entitled to put his own valuation upon it. In *Miss Eva Mountstephens* v. *Mr. Hunter Garnett Orme*[1], the view taken was that the subject-matter in dispute in an appeal against an order issuing probate was impossible to be estimated at a money value. There is no provision in the Original Side Rules as to payment of any fixed fee in regard to matters which are incapable of valuation as provided in the Court Fees Act. The only indication that can be gathered from the Fees Rules is a note to Rule No. 1 in regard to a plaint which is that the plaint shall contain a statement of the value of the subject-matter of the suit for purposes of calculating the court-fees payable thereon under this item. The plaintiff shall, in preparing the statement, follow as far as possible the provisions of S. 7 of the Court Fees Act, 1870, as amended by Madras Act V of 1922. S. 7 of the Court Fees Act does not provide for all cases. It seems to me that if the subject-matter of an appeal is viewed to be incapable of valuation which in my view is the correct basis, the minimum fee for the memorandum of appeal provided according to the High Court Fees Rules, namely, Rs. 225 is the proper fee leviable. But if the appellant is entitled to put his own valuation—and he has put his valuation here at Rs. 2,000—the fee that has been paid is the proper fee. I therefore decide that the appellant need not pay any further court-fee. The Government Solicitor will get his costs Rs. 35 from the Government.

K. S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

Chinniya Pillai and another .. *Petitioners** (*Petitioners*)

v.

Subbaratnam Pillai .. *Respondent* (*Respondent*).

Chinniya Pillai v. Subbaratnam Pillai.

Madras Local Boards Act (XIV of 1920), S. 55 (2) (b)—Person whose adjudication is annulled under Provincial Insolvency Act (V of 1920), S. 43—If 'undischarged insolvent' disqualified for election as member to a Local Board.

Annulment of adjudication on whatever ground it is based, must be taken to put an end to the legal character of an insolvent which adjudication under the Act confers upon a debtor and a person whose adjudication is annulled

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1. (1913) I.L.R. 35 All. 448.

* C. R. P. No. 581 of 1940. 31st July, 1940.

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under S. 43 cannot therefore be held to be an 'undischarged insolvent' disqualified for election to a Local Board under Madras Local Boards Act, S. 55 (2) (*b*). The meaning of 'undischarged insolvent' in S. 55 (2) (*b*) of the Local Boards Act cannot be controlled by anything contained in S. 73 of the Provincial Insolvency Act.

Petition under Ss. 115 of Act V of 1908 and 224 of the Government of India Act, praying the High Court to revise the order of the District Court of Trichinopoly dated 11th November, 1939, in O.P. No. 127 of 1938.

T. A. Ramasami Reddi for Petitioners.

A. V. Narayanaswami Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—The question that falls to be decided in this revision petition is whether a person whose adjudication is annulled under S. 43 of the Provincial Insolvency Act is disqualified for election as a member of a Local Board as an 'undischarged insolvent' under S. 55 (2) (*b*) of the Madras Local Boards Act. The respondent was adjudicated insolvent in 1928 and the adjudication was annulled in 1932 as he did not apply for discharge within the time prescribed. He was elected as a member of the Samayapuram-Kannanore Panchayat Board in June, 1938. Apparently no objection was raised on the ground of disqualification when he offered himself for election nor was any proceeding instituted to set aside his election after he was elected, but the petitioner who was also a member of the Board applied under S. 57 on 21st November, 1938, to the District Judge, Trichinopoly, in which the area of the Local Board is situated, to determine whether or not the respondent was disqualified under S. 55 of the Act. The learned District Judge held that the adjudication of the respondent having been annulled, he could not be said to be an 'undischarged insolvent' and accordingly rejected the application. This civil revision petition is directed against that order.

The petitioner's learned counsel contends that the expression 'undischarged insolvent' should be understood in a literal sense and that once a person was adjudicated insolvent he remained an 'undischarged insolvent' unless he obtained an order of discharge, though the adjudication itself was subsequently annulled. I have no hesitation in rejecting this contention, as its acceptance would lead to the obvious anomaly that a debtor who has obtained his discharge on a partial payment of his debts would be qualified for election to Local Boards, whereas a person whose adjudica-

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tion has been annulled under S. 35 of the Provincial Insolvency Act either on the ground that he ought not to have been adjudged insolvent or that his debts have been paid in full, would continue to be disqualified for such election as he would be an 'undischarged insolvent' in the sense contended for by the petitioner's counsel. This certainly could not have been the intention of the Legislature in enacting S. 55 (2) (*b*). The petitioner's learned Counsel recognising this *reductio ad absurdem* endeavoured to draw a distinction between an annulment of adjudication under S. 35 and an annulment under S. 43 of the Provincial Insolvency Act, on the ground that annulment under the latter provision does not remove the taint of insolvency but only emphasises the debtor's insolvent state, and he placed reliance on S. 73 of that Act as recognising the distinction. Apart from this section the bearing of which on the question in dispute I will presently consider, the Act makes no distinction between annulments of adjudication based on one ground or another so far as their legal effect is concerned. There are three sections in the Act which provide for annulment of adjudication, namely, Ss. 35, 39 and 43, and S. 37, which indicates what consequences are to follow on such annulment, is made applicable in each case. It seems to me therefore that annulment of adjudication on whatever ground it is based, must be taken to put an end to the legal character of an insolvent which adjudication under the Act confers upon a debtor. The extinction of such character due to annulment may operate to the advantage or to the prejudice of the person concerned according to the circumstances in which his adjudication is annulled, but it is clear that he can no longer be regarded in the eye of the law as an insolvent. It follows therefore that the respondent in this case cannot be held to be an 'undischarged insolvent'.

It remains to consider whether this conclusion is affected by anything contained in S. 73 of the Provincial Insolvency Act. That section relates to disqualification of insolvent debtors and so far as it is material here, runs thus:

"73. (1) Where a debtor is adjudged or readjudged insolvent under this Act, he shall, subject to the provisions of this section, be disqualified from—

* * * *

(*c*) being elected or sitting or voting as member of any local authority.

(2) The disqualifications which an insolvent is subject to under this section shall be removed and shall cease if—

(*a*) the order of adjudication is annulled under S. 35, or

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(*b*) he obtains from the Court an order of discharge, whether absolute or conditional, with a certificate that his insolvency was caused by misfortune without any misconduct on his part."

It is clear that under this provision, a person adjudged an insolvent continues to be disqualified for election as member of any local authority notwithstanding the annulment of his adjudication under S. 43 of the Act and in this respect the provision goes beyond S. 55 (2) (*b*) of the Local Boards Act. Petitioner's learned Counsel did not argue before me that S. 73 enacted by the Central Legislature ought to prevail against S. 55 of the Local Boards Act passed by the Provincial Legislature. Such a contention will obviously be of no assistance to the petitioner, as the application in this case was made to the lower Court under the special procedure provided by S. 57 of the Local Boards Act whereby jurisdiction is conferred upon the District Judge to decide questions of disqualification under certain specific provisions only, namely, Ss. 54, 55, 56 and 59 of that Act. All that was argued was that the expression 'undischarged insolvent' used in S. 55 (2) (*b*) must be understood in the light of the provisions of S. 73 of the Provincial Insolvency Act so as to avoid a discrepancy between the two provisions. I am unable to see how this can be done consistently with established principles governing construction of statutes. The two provisions, though relating to disqualification for election to Local Boards, so far as it arises out of insolvency, are worded altogether differently and the expression 'undischarged insolvent' does not occur in S. 73. Petitioner's counsel pointed out that the expression 'uncertificated bankrupt' in S. 55 (2) (*b*) of the Local Boards Act must refer to the certificate which is provided for in S. 73 (3) of the other Act and argued that the two sections must be read together. I fail to see how the meaning of the expression 'undischarged insolvent' in the former section can be controlled by anything contained in S. 73. It may be that the respondent is disqualified for membership of the Panchayat Board in question by virtue of the provisions of S. 73 and that, in an appropriate proceeding, he may be declared to be so disqualified. But that, in my opinion, cannot affect the question whether the respondent is disqualified under S. 55 (2) (*b*) of the Madras Local Boards Act. The Court below was concerned only with this question in the proceeding out of which this

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Civil Revision Petition arises, and agreeing with its conclusion I dismiss this petition with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HORWILL.

S. Gopalaswami Gounder .. *Appellant** (*Respondent*)

v.

K. Krishnaswami Gounder (Interim Liquidator of the Pollachi Vellala Union Mills Company, Limited, in liquidation) *Respondent* (*Applicant*).

Gopalaswami Gounder v. Krishnaswami Gounder.

Companies Act (VII of 1913), S. 235—Officer of company—If can be ordered to deliver books of the company in his possession to the liquidators.

Where books of a company, which must have some value to the company are found to be in the possession of the manager of the company the Court has power to order them to be delivered to the liquidator and it is not necessary to pass an order for payment of a specified amount in default of delivery of such property.

On appeal from the order of the Hon'ble Mr. Justice Gentle, dated 15th March, 1939 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 1499 of 1938 in O. P. No. 165 of 1937.

Dr. V. K. John for *P. N. Sundararajan* and *D. Noronha* for Appellant.

R. Venkataraman for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This is an appeal from an order passed by Gentle, J., on a misfeasance summons taken out by the liquidator of the Pollachi Vellala Union Mills Company, Limited. The liquidator alleged that the appellant, who had been the manager of the company, was liable under S. 235 of the Indian Companies Act to pay two sums of money, one of Rs. 3,448-10-6 and the other of Rs. 700-7-0. The liquidator also asked that an order be passed against the appellant, directing him to produce all books, papers, documents and correspondence relating to the company which were still in his possession

* O. S. A. No. 26 of 1939. 5th August, 1940.

Gopala-swami Gounder v. Krishna-swami Gounder.

Leach, C.J.

The learned Judge held that the appellant was not liable in the sum of Rs. 3,448-10-6 and the liquidator withdrew the summons so far as Rs. 700-7-0 was concerned. With regard to the books it was said that the appellant had wrongfully retained the following: (1) The inventory or stock book; (2) the directors' circulation book; (3) the shareholders' circulation book; and (4) the share transfer application register. The learned Judge found that the first two of these books were with the appellant, but that the remaining two were not with him. Accordingly he passed an order directing the appellant to deliver over to the liquidator the inventory book and the directors' circulation book. This order was not complied with and the learned Judge then called upon the appellant to show cause why he should not be committed for contempt of Court. In the meantime the appellant filed this appeal and as the result the contempt proceedings have been stayed.

Dr. John has contended that the learned Judge erred in law in confining his order to the delivery of the two books. He says that unless a loss has been suffered by the company there can be no order under S. 235 and that when an order is passed for the return of property it must also state the amount for which the person against whom it is passed is liable in the event of the non-delivery of the property. In this connection the learned Counsel has quoted the decisions of the Court of Appeal in In re *Canadian Land Reclaiming and Colonising Company: Coventry and Dixon's case*[1] and of the House of Lords in *Cavendish Bentinck* v. *Fenn*[2]. In the first of these cases the Court held that under S. 165 of the English Companies Act, 1862, in order to make a person liable under the section he must be shown to have been guilty of misconduct by which the company has suffered loss. The section was not for punishing a man who had been guilty of misfeasance, but for compensating the company for the loss suffered. In that case it had not been shown that there was any loss. This interpretation of the section was accepted by the House of Lords in the second case. There is, however, a great difference between S. 165 of the English Companies Act, 1862 and S. 235 of the Indian Companies Act, 1913, as amended

1. (1880) 14 Ch. D. 660. 2. (1887) 12 A.C. 652.

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by Act XXII of 1936. S. 165 of the English Act reads as follows:

"Where, in the course of the winding up of any company under this Act, it appears that any past or present director, manager, official, or other liquidator or any officer of such company, has misapplied or retained in his own hands or become liable or accountable for any moneys of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of any liquidator, or of any creditor or contributory of the company notwithstanding that the offence is one for which the offender is criminally responsible, examine into the conduct of such director, manager, or other officer, and compel him to repay any monies so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the Court thinks just, or to contribute such sums of money to assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust, as the Court thinks just."

S. 235 of the Indian Companies Act reads as follows:

"Where in the course of winding up of a company it appears that any person who has taken part in the formation or promotion of the company or any past or present director, manager, or liquidator, or any officer of the company has misapplied or retained or become liable or accountable for any money or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the Court may, on the application of the liquidator, or of any creditor or contributory (made within three years from that date of the first appointment of a liquidator in the winding up or of the misapplication, retainer, misfeasance or breach of trust, as the case may be, whichever is longer) examine into the conduct of the promoter, director, manager, liquidator or officer, and compel him to repay or restore the money or property or any part thereof respectively with interest at such rate as the Court thinks just, or to contribute such sum to the assets of the company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Court thinks just.

(2) This section shall apply notwithstanding that the offence is one for which the offender may be criminally responsible."

Under this section the Court may compel an officer of a company against whom a misfeasance summons has been taken out (1) to repay the money, or (2) to restore the property, or (3) to pay compensation. The difference between the two sections is that under S. 165 of the English Act the Court was not given the power to compel an officer of a company to restore property. He could only be compelled to make payment either by way of refund or compensation, and this was the position in England until the Companies (Winding up) Act, 1890, was passed. There power was given to the Court to order the restoration of property and the corresponding sections of the English Acts of 1908 and 1929 have been drafted on the same lines.

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The appellant is in possession of two books belonging to the company and therefore he is in possession of property of the company. It is true that S. 235 contemplates a loss to the company before an order can be passed under the section. This was pointed out by Maugham, J., as he then was, in In re *Etic, Limited*[1], where he stated:

"The conclusion at which I have arrived is that S. 215 (the corresponding section of the English Act to S. 235 of the Indian Act) is not applicable to all cases in which the company has a right of action against an officer of the company. It is limited to cases where there has been something in the nature of a breach of duty by an officer of the company as such which has caused pecuniary loss to the company. Breach of duty of course would include a misfeasance or a breach of trust in the stricter sense, and the section will apply to a true case of misapplication of money or property of the company, or a case where there has been retention of money or proproperty which the officer was bound to have paid or returned to the company."

The liquidator says that the retention of these two books by the appellant is likely to lead to considerable loss to the company. That has not been found, but obviously these books must have some value and their retention by the appellant means a loss to the company. There being a loss the learned Judge had the power to pass an order for the delivery of the books to the liquidator, and it was a proper order to pass.

The appeal must be dismissed with costs.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.)

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

In the matter of The 'Kareem Beedi' Factory, by its proprietor Khan Bahadur Abdul Kareem Sahib

and

In the matter of The Corporation of Madras.

Khan Bahadur Abdul Kareem Sahib .. *Applicant**

v.

The Commissioner, Corporation of Madras.. *Respondent.*

Abdul Kareem Sahib *v.* Commissioner, Corporation of Madras.

Madras City Municipal Act (IV of 1919), S. 287—Power of Commissioner of Corporation to refuse to renew a license to carry on a business of manufacturing beedis in a particular premises.

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1. (1928) 1 Ch. D. 861.

*Application No. 1900 of 1939. 8th December, 1939.

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In an application for the issue of a *writ of certiorari* against the refusal of the Commissioner to renew a license to carry on a business of manufacturing beedis in a particular premises,

Held, that S. 287 of the City Municipal Act must be construed according to the words used therein and the Commissioner has in a proper case power to refuse a renewal of a license.

Haji Ismail v. *Municipal Commissioner, Bombay*, (1903) I.L.R. 28 Bom. 253, relied on.

Application praying for the issue of a *writ of certiorari* to the Commissioner, Corporation of Madras, commanding him to send forthwith to and before this Court all and singular the orders of the said Commissioner in the matter of issuing license to the 'Kareem Beedi' Factory, with all things touching the same as fully and perfectly as they have been made by him and now remaining so that this Court may cause further to be done thereon, what of right and according to law this Court shall see fit to be done; for the issue of a writ of mandamus commanding the said Commissioner to issue a license to the applicant herein for the year 1939-40 in respect of the business carried on by him at Premises Nos. 41, 48, 57, 58 and 59, Sembudoss Street, George Town, Madras, for directing the taxed costs of this application to be paid by the respondent herein; and for consequential relief.

T. R. Venkatarama Sastri and *K. S. Rajagopala Aiyangar* for Applicant.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *A. Suryanarayanayya* for Respondent.

The Court delivered the following

Leach, C.J. JUDGMENTS. *The Chief Justice.*—The petitioner is a manufacturer of beedis and has been carrying on business in Madras for 25 years. As the result of his industry he has succeeded in building up a very substantial concern. The business is carried on in five buildings in Sembudoss Street, George Town, Madras. In No. 41, Sembudoss Street, he stores the tobacco required for the making of his beedis. He stores beedi leaves in No. 59 and uses Nos. 48, 57 and 58 for the handling and storage of the finished products. Sembudoss Street is in a residential part of Madras. It is a very narrow street and it is said that the growth of petitioner's business has resulted in a grave nuisance and a menace to health. On the 19th August, 1938, thirteen people living in the neighbourhood presented a petition to the Commissioner of Police, complaining of the

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nuisance and asking that action be taken. The Commissioner of Police had no jurisdiction to interfere, and the petition was forwarded to the Commissioner of the Corporation of Madras. The Commissioner inquired into the complaint and considered it to be well founded. As the result the Corporation refused the petitioner a license to carry on his business in the premises in Sembudoss Street from 1st April, 1939. S. 287 of the Madras City Municipal Act, as amended by Act X of 1936, requires a person to take out a license before he uses premises for the storage, packing, pressing, cleansing, preparing or manufacturing by any process whatever, tobacco, which the Act states shall include cigars, cigarettes and beedis. The petitioner asks this Court to direct, either by *certiorari* or mandamus, the Corporation to issue a license permitting him to carry on his business in these premises as heretofore. He alleges that the Corporation in refusing to grant him a license has acted arbitrarily and he says that inasmuch as a license was granted to him in respect of the previous year, the Corporation is not entitled in law to refuse to renew it. For the Corporation, it is said that the refusal to grant the petitioner a license is fully justified by the facts and that it cannot be compelled to renew the license.

On the evidence before the Court it must be held that the carrying on of the petitioner's business in Sembudoss Street does constitute a nuisance and a danger to health. The process of broiling to which the tobacco leaves are subjected creates an offensive smell, and the storage of large quantities of tobacco results in tobacco dust being carried by the wind to adjoining houses and causes the inhabitants to cough and sneeze. The business involves the attendance at the premises of large numbers of coolies and other people for whom there is no proper accommodation or sanitary arrangements. The noise also adds to the discomfort of the residents. The Commissioner of the Corporation in an affidavit states that he has been advised by the Health Officer of the Corporation that the continuance of the business in this locality will positively endanger the health of the residents. The Health Officer of the Corporation has sworn an affidavit in which he confirms the advice given to the Commissioner. In addition, Mr. B. W. Batchelor, a director of Messrs. Binny & Company and a member of the Standing Committee of the Corporation, took part in the inspection and has endorsed the opinion of the Commissioner

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in a separate affidavit. The petitioner denies that there is any nuisance, but his denial is only supported by his own affidavits, and they cannot be accepted in view of what the Commissioner, the Health Officer and Mr. Batchelor have said. It has not been suggested that these gentlemen are not speaking the truth. There is a suggestion that they have perhaps exaggerated the situation, but I am not prepared to accept it. In any event, there is ample evidence on the record to show that the Corporation in refusing to renew the petitioner's license has not acted arbitrarily, but in the interest of the health of the residents of the locality.

The question then resolves itself into this. Has the Corporation the power under the Act to refuse the license? Before the Act was amended in 1936, no license was required; but by reason of the amendment of S. 287 and Sch. VI, a license is now requisite. Sub-S. (1) of S. 287 says:

"No place within the limits of the City shall be used for any of the purposes mentioned in Sch. VI without a license obtained from the Commissioner and except in accordance with the conditions specified therein."

Sub-S. (3) says:

"The owner or occupier of every place for the use of which for any purpose a license is required shall apply to the Commissioner not less than thirty days before the place is used for such purposes."

Sub-S. (5) says:

"The Commissioner may grant a license subject to such restrictions and regulations as may be specified by him therein or he may refuse to grant the license."

Sub-S. (6) states that every license shall expire at the end of the year for which it is granted, or at such earlier date as the Commissioner may, for special reasons, specify in the license. By reason of sub-S. (7), an application for renewal of a license must be made not less than thirty days before the commencement of the year for which renewal is sought. Mr. Venkatarama Sastriar on behalf of the petitioner has conceded, as he must, that, when S. 287 was amended by Act X of 1936 the Commissioner had the power to refuse to issue a license, notwithstanding that the business had been carried on in the same premises for a quarter of a century. But he says that inasmuch as sub-S. (7) does not state that the Commissioner may, if he so chooses, refuse a license, it cannot be withdrawn once it has been issued, and must be renewed, although on renewal conditions may be imposed. Where there is a power to grant a license,

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there is power to refuse, and where an Act requires a person to apply for the renewal of a license at the expiry of the period for which it is granted, it must, in my opinion, necessarily imply a right to refuse to renew, unless there is indication to the contrary in the statute.

In *Haji Ismail* v. *Municipal Commissioner of Bombay, Ahmed Moosa* v. *The Municipal Commissioner of Bombay*[1], the Bombay High Court held that the power of the Municipal Commissioner of Bombay to grant a license under S. 394 of the City of Bombay Municipal Act (III of 1888) included the power to refuse it. It was also held that unless it was clear that the Commissioner had used his authority with some indirect motive and for a collateral purpose, not for the purpose for which the legislature had armed him with the power, the Court could not interfere with his discretion. There is nothing in S. 287 of the Madras Act which indicates an intention on the part of the legislature to withhold from the Commissioner the power of refusing to renew a license when the circumstances demand it. Mr. Venkatarama Sastriar has laid great stress on the provisions of S. 282 of the Act which requires the owner or occupier of a stable, veterinary infirmary, stand, shed, yard or other place in which quadrupeds are kept or taken in for purposes of profit, shall take out a license in the first month of every year. Sub-S. (2) of that section says that the Commissioner may, by an order and under such restrictions and regulations as he thinks fit, grant or refuse to grant the license. Mr. Venkatarama Sastriar argues that because there is no special power given under S. 287 to refuse renewal, it must in view of the terms of S. 282 be taken that the legislature intended a license for the carrying on of a business to be on a different basis. In this connection he has also drawn attention to the provision of S. 284 which states that if any stable, cattle-shed or cow-house is not constructed or maintained in the manner required by or under the Act, the Commissioner may by notice direct that it shall no longer be used as a stable, cattle-shed, or cow-house.

The argument here is really met by the provisions of S. 304. That section says that no person shall, without or otherwise than in conformity with an annual license granted by the Commissioner continue to keep open a private market.

1. (1903) I.L.R. 28 Bom. 253.

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Application for the renewal of the license shall be made not less than thirty days before the commencement of the year for which the license is sought. The Commissioner may by an order grant or refuse to grant or renew the license or withhold the license until the owner or occupier executes such works as may be specified in the order. Then follows the important proviso that the Commissioner shall not refuse or withhold the license for any cause other than the failure of the owner or occupier to comply with some provision of the Act or some regulation made under S. 308 or some by-law made under S. 349, or without the approval of the Standing Committee. The proviso indicates that where the legislature intended that there should be no power to refuse to renew, or intended to limit the exercise of such power, it has used appropriate language. The argument which S. 304 provides for the respondent Corporation is certainly as strong, if not a stronger one, than the argument which can be based for the petitioner on Ss. 282 and 284. In my judgment S. 287 must be construed according to the words used therein and when it is so construed, I consider that there is no room for reasonable doubt that the Commissioner has in a proper case the power to refuse a renewal. I say in a proper case, because if the refusal were arbitrary or prompted by some ulterior motive, the position would be different. That cannot be said to be the case here. There is no ground for suggesting that the Commissioner has acted in any way contrary to his duty. For the reasons indicated the petition will be dismissed with costs, and we fix the Advocate's fee at Rs. 250.

Krishnaswami Aiyangar, J.

Krishnaswami Aiyangar, J.—I am of the same opinion. I agree that a consideration of the language of not only S. 304 but also of S. 285-C, cl. (3) gives a clear indication that where the statute intends that the Commissioner is not to have the power of refusing a renewal, it has said so. The effect of the refusal is not to prohibit the petitioner from carrying on his business altogether but only to prohibit it in the premises in which it is now being carried on. There is nothing inherently wrong in the legislature placing a restriction upon the right of an individual in the interests of the residents in general of the locality.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

Patinhare Valappil Pokker .. *Appellant**

v.

Alakkal Kunheethutti and others .. *Respondents.*

Patinhare Valappil Pokker *v.* Alakkal Kunheethutti.

Malabar Tenancy Act (XIV of 1930), S. 26—Renewal in respect of part of original holding by intermediary in favour of the tenant in actual possession—Permissibility.

Where the renewal was in respect of a part of the original holding by an intermediary in favour of the tenant in actual possession of that part,

Held, that under S. 26 of the Act, the sub-tenants or sub-kanomdars derive a valid interest under such renewal obtained from the intermediary, though subject to certain conditions which are contained in that section, one of which is that the landlord is free to evict the tenant on the grounds specified in S. 20 other than the ground of non-payment of renewal fee

Appeal against the decree of the District Court of South Malabar in A. S. No. 400 of 1935 preferred against the decree of the Court of the District Munsif of Tirur in O. S. No. 104 of 1934.

P. Govinda Menon for Appellant.

N. R. Sesha Aiyar for Respondents.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—This appeal comes before us as a result of the order made by Burn, J., to the effect that an important question is raised in this appeal arising out of the Malabar Tenancy Act which frequently comes up for decision and on which there is no authority. This question is whether the renewal in respect of a part of the original holding by an intermediary in favour of the tenant in actual possession of that part is not permitted under the Malabar Tenancy Act, XIV of 1930. Before dealing with this question a few necessary facts have to be stated. The first plaintiff in the suit is the *jenmi* of the properties and the second plaintiff is an assignee of his in whose favour the plaintiff prays for a decree. Five items of properties were demised on *kanom* tenure by the first plaintiff in favour of the *tarwad* of defendants 1 to 20 under Ex. A of 11th September, 1911. One of these five items was set apart in favour of the third defendant whose assignee subsequently got a renewal from the

* S. A. No. 396 of 1937. 31st July, 1940.

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Pandrang Row, J.

jenmi in respect of that item. We are therefore not concerned with that item in this case. The 31st defendant purchased the *tarwad's* kanom right in the remaining four items in a Court sale. The twenty-seventh defendant is the *sub-kanomdar* of a part of one of these four items, namely, of item 3. The plaintiff filed a suit for redemption of Ex. A and while the suit was pending the twenty-seventh defendant put in an application purporting to be under Ss. 22 and 23 of the Act for a renewal in respect of the portion of item 3 in his possession and making the plaintiffs as well as the thirty-first defendant party respondents. This application after several adjournments came on for hearing on the 5th September, 1935, the very day on which the suit itself came on for hearing and was actually tried. It is clear from the order of the trial Court made on this date on the petition as well as from the statement contained in para. 19 of the judgment of the trial Court that the parties agreed to the following course being adopted, namely, the twenty-seventh defendant was content with getting a renewal only from the thirty-first defendant and the question whether such a renewal granted by the thirty-first defendant would be of any force as against the plaintiff, was left to be decided in the suit which was to proceed on the basis that the renewal had already been granted by the thirty-first defendant to the twenty-seventh defendant. Having regard to the course taken during the trial of the suit and the hearing of the petition based on the agreement of the parties, it is not possible in our opinion to allow either party now to resile from the position then agreed to, that is, on the 5th September, 1935, by the parties concerned. It is therefore not open in our opinion to the appellant, that is, the second plaintiff, to contend in this second appeal that the renewal as between the defendants 27 and 31 must be deemed to be regarded as invalid even as between the parties thereto, either because it was a renewal granted during the pendency of the suit, or on the ground that it was actually granted after the suit had been disposed of. No such objection is available to the appellant in view of his agreement at the trial to proceed on the basis that a renewal had been granted already by the thirty-first defendant to the twenty-seventh defendant. The only question therefore which remains is what has been mentioned at the outset, namely, whether the renewal of a portion of item 3 by

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the intermediary in favour of the tenant in actual possession is binding on the plaintiffs, that is, on the *jenmi*; in other words, whether S. 26 of the Malabar Tenancy Act of 1930 which expressly provides what effect renewal should have on the rights of the landlords, applies to cases where the renewal is of only a portion of the original holding and does not take in the entire original holding. In S. 26 itself there is nothing to show that the provisions thereof are limited to cases where the renewal granted by the intermediary in favour of the tenant in actual possession must be in respect of the entire original holding created by the *jenmi* in favour of the intermediary. The relevant words are: "and the tenant in actual possession of the holding". It is not disputed that the word 'tenant' found in this section would include a *sub-kanomdar* like the twenty-seventh defendant. If he is a tenant in actual possession of the holding, the holding can only refer to his holding, that is, the holding or parcel of land included in the engagement to which he was a party and cannot be taken to mean the holding created by the engagement entered into by his landlord with the superior landlord or *jenmi*. As the section also clearly provides—and indeed the section seems to have been enacted expressly for the purpose—for cases where the grantor intermediary for his own part does not obtain a renewal for any reason; in other words, the section is an exception to the general rule that a person cannot grant what he does not possess himself; and it was intended to guard or protect the interests of sub-tenants or *sub-kanomdars* who get a renewal only from their immediate landlord and not from the ultimate *jenmi*. It is clear from S. 26 that such sub-tenants or *sub-kanomdars* do derive a valid interest under such renewal obtained from the intermediary though subject to certain conditions which are contained in that section, one of which is that the landlord is to be free to evict the tenant on the ground specified in S. 20 other than the ground of non-payment of renewal fee. Unfortunately in the present case the ground on which eviction is sued for is the ground of non-payment of renewal fee, and the right to evict on this ground is not saved by S. 26. Some stress was placed before us on sub-S. 2 of S. 26 which provides for the recovery of the proportionate share of renewal fee by the *jenmi* from the grantor of the renewal, but we are of opinion that this does not affect the amplitude of the provisions of sub-S. (1) of S. 26. There may

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be, as suggested by the appellant's advocate, a misprint in the words 'such grantee of interest' in sub-S. (2), the misprint being 'grantee' for 'grantor' and it may be there may be some difficulty in exactly calculating the proportionate share of the renewal fee in certain given cases. But we do not feel called upon to decide these matters in the present case in which they do not arise. We are satisfied, however, that these matters do not affect the decision of the general question whether S. 26 (1) does apply to a case of this kind, that is, to a case of renewal of only a portion of the original holding which had been demised on *sub-kanom* in favour of the tenant in actual possession. This point must therefore be answered against the appellant, that is to say, S. 26 (1) does apply to such renewals of even parts of the original holding. As this is the only ground on which the decrees of the Courts below are attacked it follows that this second appeal must fail. It is accordingly dismissed with costs.

K. C. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

N. Muthusami Chettiar .. *Petitioner* (1st Defendant)*

v.

Periyal Achi and another .. *Respondents (Plaintiff and 2nd Defendant).*

Muthusami Chettiar v. Periyal Achi.

Provincial Insolvency Act (V of 1920), Ss. 43 and 78—Suit filed by the legal representative of deceased insolvent impleading the Official Receiver—Subsequent annulment of adjudication—If can give retrospective validity to the suit.

Practice—Decisions on preliminary issues which are not decisions of the whole suit—When interfered with in revision.

The subsequent annulment of adjudication cannot give validity to a suit filed by an insolvent or his legal representative during the pendency of the insolvency when the property is vested in the Official Receiver. Such a suit should be dismissed.

Ordinarily the High Court will not entertain revision petitions against decisions on issues which are not decisions of the whole suit. But where such a decision relates to the question of jurisdiction of the Court to entertain the suit and it relates to a matter which if decided wrongly would result in an elaborate trial, which would otherwise be unnecessary, the High Court will interfere in revision.

Petition under Ss. 115 of Act V of 1908 and 224 of the Government of India Act, praying the High Court to revise the

* C. R. P. No. 1378 of 1938. 23rd July, 1940.

decree of the Court of the District Munsif of Tiruppur in O. S. No. 224 of 1937.

Muthusami Chettiar v. Periyal Achi.

K. V. Ramachandra Aiyar for Petitioner.

K. S. Desikan and *C. D. Venkataraman* for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner was the first defendant in a suit for recovery of money collected by the first defendant as a result of a decree which is alleged to be the property of the plaintiff's husband. The facts are rather peculiar. The decree in question was transferred from a third party to the name of the first defendant and it is alleged that the real owner was the plaintiff's husband who is now dead. The plaintiff's husband was adjudged an insolvent in 1930. He died in June, 1934, at or about the time when the first defendant effected a sale of the properties acquired in execution of the decree in question. It would appear that at the time of his death the plaintiff's husband had failed to carry out the Court's orders in prosecution of his insolvency and had not applied for a discharge. It would also appear that the debts due to creditors in the insolvency were the subject of an extra judicial composition. In June, 1937, the plaintiff, widow of the deceased insolvent sued the first defendant for the sale proceeds of the property acquired under the decree which she asserts forms part of her husband's estate. She impleaded in her suit the Official Receiver and alleged that the Official Receiver had taken no action to get possession of this money for the estate. At the time when she filed this suit, she was taking steps for the annulment of the adjudication of her husband but she does not in her plaint specifically pray that the money claimed in the suit should be made payable to the Official Receiver. She claims it for herself, possibly anticipating that the annulment of the adjudication would intervene before the suit was decreed. The adjudication was eventually annulled in an appellate order of the District Judge. At the time of the annulment the suit was barred as regards one item but was still within time as regards the other item. The learned District Judge annulled the adjudication knowing of the extra judicial composition since, having regard to the death of the insolvent and all the circumstances, he thought it unnecessary to endeavour to undo this composition.

A preliminary issue was framed in the suit on the question whether the suit was maintainable when the plaintiff's husband's

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estate had vested in the Official Receiver. Ordinarily this Court will not entertain revision petitions against decisions on issues which are not decisions of the whole suit, but in the circumstances of the present case it seems to me that the matter should be decided in revision. It essentially relates to the jurisdiction of the Court to entertain the suit and it relates to a matter which, if decided wrongly in favour of the plaintiff, may result in an elaborate trial which would otherwise be unnecessary.

The question is by no means free from difficulty. Ordinarily speaking the provisions of S. 43, Provincial Insolvency Act, regarding the annulment of an adjudication for the default of the debtor will scarcely apply to the estate of a dead man, and one would think that the proper order to pass would be one under S. 17, merely terminating the administration; the debtor being dead and no further administration being necessary in the interests of the estate. However, it does appear in this case that before the death of the insolvent there was a default from which annulment would normally result. I am not therefore prepared to say that the annulment order was improper. In any case we are not now concerned with its correctness. It has been made and is binding.

What is the effect of a subsequent annulment order upon a suit filed by the legal representative of a deceased insolvent impleading the Official Receiver, which suit should strictly have been filed by the Official Receiver himself? There is no clear authority on the subject. The Court below relies on a decision in *Lingappa* v. *Official Receiver*[1], which itself is rather an unusual case. It purports to follow *Ramasami Kottadiar* v. *Murugesa Mudali*[2] and to decide that the effect of the dismissal of an insolvency petition is to revest the debtor's property in the debtor as from the date of the order of adjudication, so that a transfer by the insolvent made after his adjudication and before the order of dismissal would be a good transfer upon which the transferee can sue. The case in *Ramasami Kottadiar* v. *Murugesa Mudali*[2], was a case under the old Act which had no provision for the annulment of adjudication for the default of the insolvent. The case in *Lingappa* v. *Official Receiver*[1], which the learned Chief Justice was considering was under the Act of 1920 and presumably the order terminating the insolvency must have been in effect one of annulment, though the word 'dismissal' is used in the

1. A.I.R. 1937 Mad. 717.
2. (1897) 7 M.L.J. 229: I.L.R. 20 Mad. 452.

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judgment. I have examined the papers in that case and find that they contain very little information. It arose from a suit filed originally by the transferee from the insolvent, who impleaded the Official Receiver as a co-plaintiff apparently after the suit had become barred by limitation. The trial Court overlooking the difficulty of limitation gave a decree in favour of the Official Receiver. The defendant filed a revision petition raising the question of limitation. The learned Chief Justice called for a report from the District Judge and as a result of what was contained in the report, ascertained that the original adjudication was an *ex parte* order, subsequently reconsidered on the intervention of the insolvent with the result that the petition was dismissed. One would have thought that the order should have been one not of dismissal but of annulment under S. 35 of the Act and it must be regarded as having the same effect. The learned Chief Justice holds that the decisions in *Ramasami Kottadiar* v. *Murugesa Mudali*[1], is authority for the position that the effect of an order setting aside an adjudication is, subject to the protection of the receiver for the acts done by him, to revest the debtor's property in the debtor as from the date of the vesting order. The learned Chief Justice infers that if the property is revested in the debtor as from the date of the vesting order, a transfer made by the debtor during the continuance of the insolvency acquires a validity by the subsequent cancellation of the insolvency, so that the title of the transferee is good and sufficient to support a decree in his favour. It is to be noted that this is not a case of a suit filed by an insolvent during the continuance of the insolvency but a case of a suit filed by a transferee from an insolvent on the strength of a title alleged to have been created by the insolvent during the continuance of his insolvency.

There is no statutory prohibition of a suit by an insolvent during the continuance of his insolvency, but it seems to follow from the fact that all the properties of the insolvent vest in the receiver, that the insolvent will during his insolvency have no such title in any part of the estate vested in the receiver as would form a basis for a suit regarding that property, and so much has been repeatedly held (vide *Subbaraya Chettiar* v. *Lakshmi Ammal*[2]). If the insolvent cannot maintain a suit regarding the property vested in the Official Receiver so long as

1. (1897) 7 M.L.J. 229: I.L.R. 20 Mad. 452. 2. (1918) M.W.N. 289.

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the insolvency enures, it is difficult to see how the insolvent can take advantage of the Court's delays in disposing of that suit so as to clothe a suit, which in its inception was bad, with a validity due only to the subsequent annulment of the insolvency. If the insolvent or his legal representative had no right of suit when the suit was filed, that suit should have been dismissed.

It is suggested that the action of the insolvent's legal representative in impleading the Official Receiver as a defendant and disclosing to the Court the full facts of the insolvency makes that suit substantially one on behalf of the estate. I find it difficult to accede to the proposition that the failure of the Official Receiver to get in a particular property makes it open to the insolvent or any one else to file a suit which should legitimately have been filed by the Official Receiver and give to that suit an appearance of regularity by impleading the Official Receiver as a defendant. The Act specifically prohibits suits against an insolvent without the leave of the Court and it has been held that when a suit is filed without leave against the insolvent during the pendency of the insolvency, a subsequent annulment of that insolvency does not give a retrospective validity to the suit (vide *Ponnuswami* v. *Kaliaperumal*[1]) and this decision has been quoted with approval in a Full Bench decision reported in *Davood Mohideen* v. *Sahubdeen*[2]. If the subsequent annulment of an insolvency does not take away the necessity for leave in respect of a suit against an insolvent filed before the annulment, it is difficult to see how a subsequent annulment can give validity to a suit filed by an insolvent or his legal representative during the pendency of the insolvency when the property vested in the Official Receiver.

Another argument which has been advanced is that the effect of S. 78, Provincial Insolvency Act, makes it clear that though an annulment in one sense puts the insolvent back to the position which he occupied before the adjudication, it is not the intention of the legislature to give a retrospective sanction to unauthorized suits filed in respect of the insolvent's estate during the pendency of the abortive insolvency. Under this section the whole of the period occupied by the abortive insolvency may be ignored for the purpose of limitation in respect of any suit which might have been brought but for the order of

1. A.I.R. 1929 Mad. 480.
2. (1937) 2 M.L.J. 223: I.L.R. (1937) Mad. 841.

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adjudication. It is true that this section will not enure to the benefit of the insolvent himself, for a suit can be brought by the Official Receiver on behalf of the insolvent and the adjudication does not prevent the assertion of rights for or on behalf of the insolvent. Still there is a suspension of limitation operating on behalf of the creditors who have proved their debts and it is clearly contemplated that to this extent at any rate the legislature does not contemplate the filing of suits during an insolvency with a view of a prospective annulment of the adjudication. This is in fact what has happened in the present case. The plaintiff hoping to get the adjudication annulled has filed this suit at a time when she had no vested interest in the estate presumably in order to save limitation.

I come to the conclusion that she had no legal basis for her suit at the time when it was filed. As however the suit was within time so far as the second item is concerned when the adjudication was annulled the suit with reference to this item is maintainable. With reference to the first item the suit will have to be dismissed on the ground that the plaintiff had no cause of action when the suit was filed, the property being vested in the Official Receiver and the suit for this item being time barred before the adjudication was annulled. The petition is therefore allowed to this extent. The petitioner will be entitled to three-fourths of his costs in revision.

K. S. *Petition allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

Sri Rajah Bommadevara Venkatarayulu Naidu Bahadur Zamindar Garu.. *Appellant* (3rd Defendant)*

v.

Kopalle Raghunadha Rao and others .. *Respondents (Plaintiffs 2 to 4).*

Sri Rajah Bommadevara Venkatarayulu Naidu Bahadur v. Raghunadha Rao.

Mesne profits—Claim for—Wrongful dispossession of property—When third parties considered joint tort feasors in respect of a wrong—Grant of patta or lease not sufficient to raise presumption of joint tort—Nature and scope of liability for the tort—Presumption of, whether permissible—Evidence necessary to establish.

No doubt ordinarily a liability to pay mesne profits goes with the actual possession of the land or in other words it is the person in lawful possession

* Appeal No. 66 of 1937. 27th September, 1939.

Sri Rajah Bommadevara Venkatarayulu Naidu Bahadur *v.* Raghunadha Rao.

who is generally sought to be made liable for mesne profits; but it does not follow that one who is not in actual wrongful possession cannot be made liable, for, if the dispossession of the plaintiffs which is the basis of the claim of mesne profits is one in which a person who did not actually take possession or continue in possession participated, or in other words, if the dispossession can be regarded as a joint act of several persons, every person who takes part in such dispossession would be liable for mesne profits even though actual profits were received only by some of the persons who took part in the dispossession. They would be regarded in such circumstances as joint tort-feasors. But the mere grant of a patta or lease by itself is not sufficient to constitute the grantor of the patta a joint tort-feasor in respect of any tort that the lessee or pattadar may think of perpetrating.

Mudun Mohun Singh v. *Ram Dass Chuckerbutty*, (1880) 6 Cal. L.R. 357, dissented from.

L. P. E. Pugh v. *Ashutosh Sen*, (1928) 56 M.L.J. 517: L.R. 56 I.A 93: I.L.R. 8 Pat. 516 at 526 (P.C.), referred to.

The abetment of a tort being itself a tort it cannot be presumed without evidence; and if a liability arises only by reason of the abetment of a tort or the taking part in a tort it must be established by some kind of evidence just like any other fact and there can be no presumption in law.

Appeal against the order of the Court of the Subordinate Judge of Masulipatam dated 26th November, 1936 and made in I. A. No. 1357 of 1936 in O. S. No. 82 of 1931.

P. Somasundaram for Appellant.

N. Rama Rao and *B. V. Ramanarasu* for Respondents.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—This appeal has been preferred under rather peculiar circumstances. There was a suit instituted in 1930 (O. S. No. 9 of 1930) on the file of the District Court of Kistna which was subsequently transferred to the Subordinate Judge's Court of Masulipatam for disposal in which the plaintiffs four in number sued for a declaration of their right to certain property as against the defendants five in number and also for recovery of possession thereof from defendants 1, 2, 4 and 5 in case the Court found that the plaintiffs were not in possession and also for mesne profits as against all the five defendants. The third defendant was the zamindar under whom the plaintiffs claimed to hold the properties as part of their holding. Defendants 1 and 2 obtained a patta from the third defendant in respect of the plaint property and they were found to have been in possession of the property along with their sub-tenants defendants 4 and 5. The suit was not resisted by the third defendant who allowed it to proceed *ex parte*. The judgment in the suit was pronounced on the 22nd November, 1932. The only question that was really decided therein was

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that the plaintiffs had title to the suit property and that defendants 1 and 2 had none. Then followed the usual direction that there would be a decree as prayed for by the plaintiffs with costs. The decree that was actually drawn up and dated 22nd November, 1932, said nothing as to who should pay the mesne profits to the plaintiff though a direction was given for an enquiry being held as to the amount of mesne profits during a certain period mentioned therein. Though in the earlier part of the decree it was only defendants 1, 2, 4 and 5 that were directed to put the plaintiffs in possession of the property nevertheless in the later portion of the decree relating to the enquiry about mesne profits there was a reference to the relinquishment of possession by defendants 1 to 5. The inclusion of the third defendant in this part of the decree was objected to by the third defendant in his petition dated 6th November, 1936, that is to say, nearly four years afterwards. He applied that instead of the words defendants 1 to 5 found in this part of the decree the words defendants 1, 2, 4 and 5 should be substituted and this application was allowed by the lower Court in its order dated 26th November, 1936, but at the same time that order made another amendment in the decree which had the result of making the third defendant also liable for the mesne profits along with the other four defendants. In other words for the first time by this amendment made by the Court either *suo motu* or at the instance of the plaintiffs in the suit a liability in respect of mesne profits was fixed upon the third defendant, and it is from this amended decree making him liable for mesne profits that the present appeal has been preferred. A Civil Revision Petition has also been filed apparently in accordance with the usual practice of observing abundant caution. The question for determination in this appeal seems to be comparatively simple, namely, whether there is any basis for making the third defendant liable for mesne profits. No doubt he allowed the suit to proceed *ex parte* but that does not absolve the plaintiffs from the necessity of adducing some *prima facie* evidence which would be sufficient in law to establish a liability in respect of mesne profits on the third defendant. The evidence is absolutely silent as to any part taken by the third defendant in the dispossession of the plaintiffs. All that is said therein is that the third defendant granted a patta in respect of the properties in favour of defendants 1 and 2. Now can the mere grant of a patta by the third defendant to defendants 1 and 2 taken along with the

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subsequent actual dispossession by defendants 1 and 2 be regarded as a sufficient basis for coming to the conclusion that the dispossession of the plaintiffs was dispossession by the third defendant acting jointly with defendants 1 and 2; or to put it in other words could it be said that the third defendant took an active part in the dispossession of the plaintiffs? No doubt ordinarily a liability to pay mesne profits goes with the actual possession of the land or in other words it is the person in wrongful possession who is generally sought to be made liable for mesne profits, but it does not follow that one who is not in actual wrongful possession cannot be made liable, for, if the dispossession of the plaintiffs which is the basis of their claim for mesne profits is one in which a person who did not actually take possession or continue in possession participated, or in other words if the dispossession can be regarded as a joint act of several persons every person who takes part in such dispossession would be liable for mesne profits even though the actual profits were received only by some of the persons who took part in the dispossession. They would in such circumstances be regarded as joint tort-feasors. But we are not aware of its having been decided in any case that the mere grant of a patta or a lease by itself is sufficient to constitute the grantor of the patta a joint tort-feasor in respect of any tort that the lessee or the pattadar may think of committing later on. Such a contention is in our opinion opposed to all principles and really finds no support in any of the decisions that have been quoted to us on behalf of the plaintiffs-respondents. The case which gives them the most assistance is the one reported in *Mudun Mohun Singh* v. *Ram Doss Chuckerbutty*[1]. But even in that case there was an actual finding that all the persons who were sought to be made liable for mesne profits had joined together in keeping the plaintiffs out of possession, and because these were the facts reliance was placed on the decision in *Doe* v. *Harlow*[2]. Their Lordships of the Privy Council who had to express an opinion as regards *Doe* v. *Harlow*[2] in *L.P. E. Pugh* v. *Ashutosh Sen*[3] after stating the facts of that case, namely *Doe* v. *Harlow*[2] pointed out that that case settled no

1. (1880) 6 Cal. L.R. 357.
2. (1838) 12 Ad. & E. 40: 113 E. R. 724.
3. (1928) 56 M.L.J. 517: L.R. 56 I.A. 93: I.L.R. 8 Pat. 516 at 526 and 527 (P.C.).

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principle at all as the Court merely held in that case that there was evidence on which a jury might properly find that Warren had made himself a party to the tort. It follows therefore that there is no basis in the evidence to support any finding that the third defendant is also liable for mesne profits in this case. As mentioned already the evidence connecting the third defendant with the trespass is really nil. It is not stated in the evidence that either he himself or his servants took part in the trespass. All that is elicited in the evidence is that he had granted a patta. That does not mean that he even encouraged the pattadars defendants 1 and 2 to take possession wrongfully or forcibly. There is no presumption in law of the commission of any wrong, and a tort cannot be presumed. The abetment of a tort being itself a tort it cannot be presumed; and if a liability arises only by reason of the abetment of a tort or the taking part in a tort it must be established by some kind of evidence just like any other fact and there is no presumption which can be availed of in this case by the plaintiffs-respondents. It follows from this that our finding on the only point for determination in this appeal must be in favour of the appellant, namely, that he is not liable for mesne profits.

The appeal is therefore allowed and the decree of the lower Court modified by deleting the third defendant from the defendants who are made liable for mesne profits. The appellant will be entitled to his costs of this appeal from the plaintiffs-respondents.

K. C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

Bala Venkatarama Chettiar .. *Appellant* (2nd Plaintiff)*

v.

The Hindu Religious Endowment Board, by its President and others .. *Respondents (Defendants).*

Bala Venkatarama Chettiar v. Hindu Religious Endowment Board.

Madras Hindu Religious Endowments Act (II of 1927), S. 63—Scheme for temple settled by Board—Suit by trustees for setting aside—One of the plaintiff trustees saying in the course of inquiry by Inspector of the Board that he had no objection to a dittam *being settled by Board—If consent to*

* Appeal No. 63 of 1938 and C. R. P. No. 759 of 1938. 7th August, 1940.

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framing a scheme operating as estoppel—Consent if can confer jurisdiction on the board to frame a scheme for an excepted temple—Trustees' consent, if can estop the institution.

Civil Procedure Code (V of 1908), O. 1, r. 10—Application to be brought on record as additional plaintiffs—Dismissal after dismissal of suit—Propriety.

On a petition to the Board against the trustees of a temple (which had already been decided by the Board to be an excepted temple) the Inspector of the Board held an inquiry. One of the trustees stated in the course of his examination "I have no objection to a *dittam* being settled by the Board for the management of the aforesaid temple. Nor do I have any objection to the appointment of a responsible man from our caste as interim trustee or to any other order being passed until the *dittam* is framed." In a suit by the trustees under S. 63 of the Religious Endowments Act for setting aside a scheme settled by the Board it was contended by the Board that the plaintiffs were estopped from questioning the scheme by reason of the statement to the Inspector.

Held, the Board having settled a scheme in a judicial capacity after hearing the parties and taking evidence, cannot be said to have been prejudiced so as to attract the doctrine of estoppel.

Assuming such a plea of estoppel can be raised the word '*dittam*' could only mean the scale of expenditure in the temple and could not have meant a scheme for management. The statement cannot be regarded as being consent given to the framing of a regular scheme for the administration of the temple.

Even otherwise any consent given to the framing of a scheme would not cover a scheme which it would be beyond the jurisdiction of the Board to frame, as the temple was decided to be an excepted temple.

In any event consent by trustees must be deemed to have been given by the trustees in their personal capacity and could not operate as an estoppel against the institution of which they were the trustees or even against the trustees themselves when suing or being sued in the capacity of trustees.

Yasim Sahib v. *Ekambara Aiyar*, (1919) 37 M.L.J. 698, followed.

Certain persons applied under O. 1, r. 10, Civil Procedure Code, to be brought on record as additional plaintiffs. The lower Court disposed of the suit on the preliminary ground of estoppel and then dismissed the application on the ground that the scheme framed by the Board had become final by reason of the dismissal of the suit. In revision,

Held, the application ought to have been allowed without further question and the *ex post facto* method of disposing of applications of this kind must be condemned unreservedly.

Appeal against the decree of the District Court of Coimbatore in O. S. No. 2 of 1937 and petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the District Court of Coimbatore dated 7th February, 1938 and passed in I. A. No. 46 of 1938 in O. S. No. 2 of 1937.

V. C. Viraraghavachari for Appellant.

Y. Govindarajulu, K. V. L. Narasimham, N. Subramanyam and *K. E. Rajagopalachariar* for Respondents.

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Pandrang Row, J.

The judgment of the Court was delivered by

Pandrang Row, J.—This appeal is from the decree of the Additional District Judge of Coimbatore in O. S. No. 2 of 1937 dismissing a suit instituted under S. 63 of the Madras Hindu Religious Endowments Act for setting aside a scheme settled by the Board, on the preliminary ground that the plaintiffs who were the trustees of the religious endowment in question, namely, Sri Kannikaparameswari Amman temple at Peria Nagaman in Pollachi Taluk were estopped from questioning the scheme. This defence of estoppel was raised by the Board (first defendant) though the right of recourse to a Civil Court from the order of the Board settling a scheme was intended to be negatived in this manner. It is difficult to understand how the Board which dealt with this matter of settling a scheme in a judicial capacity after hearing the parties and taking evidence can be said to have been prejudiced so as to attract the doctrine of estoppel. Assuming however that the Board is under no disability, so to say, of putting forward a plea of this kind in respect of a matter decided by it judicially or at least quasi-judicially the question remains whether the Court below was right in deciding this plea in favour of the Board. Reliance is mainly placed on a certain statement made by one of the plaintiffs Bala Venkatarama Chettiar before the Inspector of Religious Endowments on the 24th November, 1935, in the village itself in the course of an inquiry which he was holding into the petition presented by certain persons against the trustees of the temple. At the end of a long statement recorded from this plaintiff by the Inspector, an addition is made to the following effect:

"I have no objection to a *dittam* being settled by the Board for the management of the aforesaid temple. Nor do I have any objection to the appointment of a responsible man from our caste as interim trustee or to any other order being passed until the *dittam* is framed."

The word '*dittam*' which is found in the above statement has been taken to be equivalent to the word 'scheme' in the lower Court's judgment, but without any sufficient justification, it would appear, for the ordinary meaning of the word '*dittam*' is certainly not the same as that of the word 'scheme'. A scheme for the management of a temple is one thing, whereas a *dittam* for the conduct of affairs in a temple is different. Unfortunately in this note the word '*dittam*' is applied to the

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management of the temple, but this does not mean that the word was used in the sense of a scheme. '*Dittam*' is a word which is found used in the Hindu Religious Endowments Act itself (*vide* S. 55) where '*dittam*' is described as the scale of expenditure in the temple, and that is the sense in which it is, so far as we are aware, used with reference to temples and indeed that must be the sense in which it must have been used by a man like the person who made this statement, namely, a trustee of the temple. In other words, when a trustee of a temple speaks of *dittam*, he could only mean the scale of expenditure which is fixed for the conduct of necessary services, etc., in the temple and certainly could not have meant a scheme for management of the temple affairs involving the appointment or election of trustees and so on. It is therefore clear to us that this statement cannot be regarded as being a consent given to the framing of a regular scheme for the administration of the temple or the religious endowment. The other evidence relied upon in support of this alleged consent is quite inconclusive. Certain notes made by two Commissioners during the inquiry have been pointed out to us as showing that the parties agreed to a scheme being settled. But if the words are to be construed strictly, as the plaintiffs were not present before the Commissioners in person, they could not have agreed, and if, as is now alleged, it was the Vakil, who appeared for the plaintiffs, who gave the consent, the note should have been to this effect. If, as a matter of fact, the Vakil who appeared for the plaintiffs before the Board had consented to the framing of a scheme, it would have been quite possible to prove this fact either by examining the Vakil or at least the Vakil who appeared on the opposite side, if it was thought that it would not be consonant with the dignity of the Commissioners for one of them to give evidence in the case. The best evidence on this point has not been put before us and we are unable to regard the statements made in the notes as being sufficient to show in a matter of this importance that the plaintiffs had unreservedly given their consent to the framing of a scheme just as the Board pleased. The evidence of D.W. 1 on this point is really irrelevant being substantially nothing more than hearsay evidence. We are therefore not satisfied that in this case there was any real consent given to the Board's framing a scheme as it pleased.

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Even otherwise, any consent given to the framing of a scheme would not cover a scheme which it would be beyond the jurisdiction of the Board to frame. The temple in question was decided by the Board itself to be an excepted temple, and in view of S. 84 of the Act that decision is final as no one objected to that decision. So far as the powers of the Board to frame schemes in regard to excepted temples are concerned, they are to be found in S. 63 of the Act, and as it now stands, it provides, no doubt, for the fixing of the number of non-hereditary trustees, for the appointment of new trustees, in addition to the existing trustees or for associating persons with the trustees, but not for appointing new trustees in the place of existing trustees and in effect for the removal of the existing trustees and replacing them by others. Whether this has been done in this case or not does not seem to be established as clearly as it might have been, and we do not therefore propose to decide this point, because for other reasons we have decided that the case should go back to the Court below for disposal on the merits, and it will be left to the Court below to decide this point, namely, whether any portion of the scheme settled by the Board is beyond the jurisdiction of the Board.

A further attack on the judgment of the Court below is based on the contention that even if consent had been given to the framing of the scheme and the scheme were not beyond the jurisdiction of the Board, nevertheless the consent must be deemed to have been given by the trustees in their personal capacity and could not be said to operate as an estoppel against the institution of which they were the trustees or even against the trustees themselves when suing or being sued in the capacity of trustees. For this proposition several authorities have been quoted. It is enough to refer to the decision in *Yasim Sahib* v. *Ekambara Aiyar*[1] and the cases therein quoted. The decision is clearly in point and we intend to say no more than that we agree with the decision therein. It would thus follow that the finding of the Court below that the plaintiffs are estopped from maintaining the suit is not correct.

The revision petition raises the question whether the order of the Court below dismissing the application of certain other persons claiming to be brought on record as additional plaintiffs under O. 1, r. 10, Civil Procedure Code, is wrong. These

1. (1919) 37 M.L.J. 698.

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persons, who are petitioners in the revision petition, desired to come in as supplemental plaintiffs in the suit in order to avoid any possible prejudice to the institution by reason of the previous conduct of the old trustees (plaintiffs in the suit). The lower Court instead of passing an order on this petition before disposing of the suit on the preliminary ground of estoppel, chose to adopt the extraordinary course of waiting till the suit itself was dismissed on the preliminary ground of estoppel and then dismissing the petition made under O. 1, r. 10, Civil Procedure Code, on the ground that as the scheme framed by the Board had become final by reason of the dismissal of the suit filed by the plaintiffs, the application under O. 1, r. 10, was not maintainable. This *ex post facto* method, so to say, of disposing of applications of the kind must be condemned unreservedly. It is a denial of justice to refrain from passing orders on petitions like this till the suit is itself dismissed on some ground or other and then to say that as the suit had been dismissed there was nothing pending in the Court to which the petitioners could be made parties. Obviously having regard to the nature of the ground on which the suit was dismissed, namely, the ground of estoppel which was available only against the plaintiffs in the suit, this was an eminently fit case for the favourable consideration of the Court in the interests of the institution. We have no doubt that the lower Court erred, and erred grievously in dealing with this application in the manner it did. We have no doubt that the application ought to have been allowed without further question, especially having regard to the lower Court's own view that the suit would have to be dismissed on the ground that the plaintiffs were in effect estopped from bringing it. We therefore allow the petition, set aside the order of the Court below and direct that the petitioners in the revision petition be made additional plaintiffs in the suit. The parties will, however, bear their own costs in this revision petition.

In view of our opinion that there is no estoppel standing in the way of the plaintiffs the decree of the Court below dismissing the suit is set aside and the lower Court is directed to restore the suit to its original number on the file and dispose of it according to law. The appellant's cost of this appeal must be paid by respondents two to four; the first respondent's (Board's) costs will in accordance with law come out of the

endowment. As regards costs in the suit already incurred in the Court below and to be incurred in future, they will abide the result and should be provided in the revised decree of the lower Court. The Court-fee paid on the memorandum of appeal will be refunded to the appellant.

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K. S. *Appeal and petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE VENKATARAMANA RAO.

Pr. N. Sm. Chokkalingam Chettiar.. *Appellant** (*Respondent*)

v.

The Official Assignee of Madras .. *Respondent* (*Appellant*).

Chokkalingam Chettiar v. Official Assignee of Madras.

Insolvency—Provable debt—If one for which insolvent is personally liable—Son's insolvency—Father's creditor—If can prove—Effect of proof—Father's creditor, if entitled to priority over son's creditors in insolvency—Son inheriting to separate property of father and taking joint family property by survivorship—If makes any difference—Official Assignee consenting to claimant proving in insolvency and to pay interest—If claimant entitled to interest after date of insolvency.

Sm and his four sons *A*, *R*, *S* and *L* formed a joint Hindu family carrying on business in various places. In 1919 they entered into an arrangement in and by which each of the sons was to get Rs. 51,000 and the father to have some businesses absolutely for himself and with respect to the other properties the family should continue undivided. The father carried on business at Jaffna and Rangoon. Few months after the arrangement *R* died and the businesses of the brothers were amalgamated and were carried on by the father on behalf of the sons till 1923 when the father died. The father was carrying on his Jaffna and Rangoon businesses separately till his death in 1923 and afterwards they were continued by the sons till August, 1925. On 15th August, 1925, the sons *A* and *S* were adjudicated insolvents in Madras and on 25th August, 1925, the firm carried on by the sons at Colombo was adjudicated insolvent in Colombo. Before insolvency *A* and *S* had applied for letters of administration to the estate of their father treating him as intestate and they were granted to *E*. A suit was filed by one *P* in 1926 against *E* as administrator of the estate of *Sm* for Rs. 1,61,127 and 22 cents on the ground that the moneys were lent to *Sm* (father). The father had in fact left two wills. In 1929 the Official Assignee executed a power-of-attorney to *T* and *H* empowering them to apply for letters of administration with the wills annexed to Jaffna Court and they were issued in May, 1930, to *T* and *H* constituting them administrators. *T* and *H* then applied to be added as defendants to *P's* suit in Colombo and after a contest a decree was passed for Rs. 1,61,127 and 22 cents. Against that decree an appeal was preferred on the ground that *P* was not a creditor of the father *Sm* but only a creditor of the sons and could not claim any moneys from and out of the

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* O. S. A. Nos. 68 and 82 of 1937. 16th October, 1939.

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exclusive property of the father and therefore *P* was not entitled to claim any monies from and out of the Jaffna assets. A compromise was entered into by which *P's* son *C* (*P* having by then died) was "to share *pro rata* with all the other creditors the assets of the deceased" and to be "entitled to proceed for the recovery of any balance, that may be due to him in action No. 18800 D. C. Colombo (that is *P's* Colombo suit) from assets that may exist out of Ceylon", and a decree followed in terms of it. *C* received his *pro rata* share in Jaffna and for the balance preferred a claim before the Official Assignee, Madras and claimed that "so far as it is the liability of the joint estate the same has to be paid before the creditors of the insolvents are paid".

Held, (*i*) that the consent decree passed against *T* and *H* must be taken to have been passed against them as agents of the Official Assignee, Madras and was binding on him;

(*ii*) that though a son could not be adjudicated an insolvent on a debt of the father as there is no personal liability therefor, yet it can form a debt provable in the insolvency of the son, if on the date of the order of adjudication, the insolvents (sons) were under a liability to pay the same from and out of the joint family property in their hands or from out of the eparate property inherited by them from their father;

(*iii*) that though the decree was passed against the administrators who were administering the assets in Ceylon, still a creditor will be entitled to come and claim in the administration of the assets in British India, from the administrator who would be functioning in British India;

(*iv*) that as a result of the compromise the Official Assignee agreed to *C* proving his claim for the balance before him and sharing in the assets being administered by him *pro rata* with the other creditors entitled to share in the insolvency of the sons.

Held, further, (*v*) that even as a matter of law, apart from the compromise decree, an ordinary creditor of a father can prove in the insolvency of the son but cannot claim any priority over the sons' creditors both as regards separate property of the father and the joint family property. The separate property of the father devolving on the son and the joint family property owned by the son at the date of the insolvency, which has been augmented by the father's share devolving upon the son by survivorship on account of the father's death before the insolvency, will be property which belonged to the insolvent.

Thimmiah v. *Official Receiver, Bellary*, (1939) 1 M.L.J. 158, approved.

(*vi*) the claimant is not entitled to interest from the date of the insolvency of the sons, as the effect of the compromise is only to allow him to prove his claim in insolvency and as such it is not open to the Official Assignee to disregard the provisions of the Act and consent to interest.

On appeals from the judgment and order of the Honourable Mr. Justice Wadsworth dated 23rd August, 1937 and 21st July, 1937 and passed in the exercise of the Insolvency Jurisdiction of the High Court in Petition No. 264 of 1925, Application No. 453 of 1936.

K. Raja Aiyar for *N. T. Shamanna* for Appellant.

T. M. Krishnaswami Aiyar for *T. V. Ramiah* for Respondent.

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The judgment of the Court was delivered by

Venkataramana Rao, J.—These two connected appeals are against the order of our learned brother Wadsworth, J., on the application made by Pr. N. Sm. Chokkalingam Chettiar the appellant in O.S.A. No. 68 of 1937 to recover a sum of Rs. 1,61,127 and 22 cents and interest thereon less a sum of Rs. 47,573 and 80 cents from and out of the estate of the insolvents in the hands of the Official Assignee of Madras. The learned Judge allowed the said Chokkalingam Chettiar to prove the balance of his debt as claimed by him subject to certain limitations specified in para. 2 of the order disallowing all claims to priority in respect of any portion of the assets in the hands of the Official Assignee. O.S.A. No. 68 of 1937 is by the said Chokkalingam Chetti against the order in so far as it disallowed his claim to priority and O.S.A. No. 82 of 1937 is by the Official Assignee against the order allowing the said Chokkalingam Chetti to prove the claim in the insolvency. Before dealing with the contentions advanced in the appeals the relevant facts may be stated.

One Ar. Ar. Sm. Somasundaram Chettiar and his sons Arunachala, Ramanatha, Sundaresa and Lakshmana were members of a joint family and doing extensive business in money-lending and rice in British India, Burma and Ceylon. In 1919 an arrangement was entered into between them in and by which it was agreed that each of the sons should get a sum of Rs. 51,000 that with the sum so obtained they should establish separate businesses of their own and that the father himself should be entitled to certain businesses exclusively. It was further stipulated that Arunachala should be the guardian of Lakshmana and Ramanatha should be the guardian of Sundaresa. In regard to the rights and obligations with respect to the rest of the properties no change was effected and the family must therefore be deemed to have continued undivided. In pursuance of the said arrangement, Ramanatha and Sundaresa carried on business at Colombo and Kumbakonam; so also Arunachala and Lakshmana together in those two places. The joint family ceased to do any business in Colombo except rice business at Bankshall. The father carried on business exclusively in Jaffna and Rangoon. Ramanatha died in November, 1919, and thereupon the two businesses at Colombo which were carried on by the two sets of brothers

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were amalgamated into one and an arrangement was come to providing that the combined businesses should be carried on by the father on behalf of the sons and it was accordingly carried on until the date of his death in July, 1923. It is also in evidence that the businesses at Jaffna and Rangoon which were carried on by the father were carried on by the adult sons until August, 1925, when they were adjudicated insolvents both in Madras and in Colombo. On the 15th July, 1925, Arunachala and Sundaresa were adjudicated insolvents in Madras. On the 25th August, 1925, the firm which was carried on by the sons at Colombo was adjudicated insolvent in the Colombo District Court. Arunachala and Sundaresa before they were adjudicated insolvents applied through their Attorneys Messrs. Subbayya Naidu and Lakshmanan Chettiar for letters of administration in regard to the estate of their father in Ceylon on the basis that the father died intestate whereas in fact he had left two wills dated 2nd October, 1922 and 23rd October, 1922. The District Court of Jaffna to which the application was made issued letters of administration on 9th June, 1925, to Messrs. Subbayya Naidu and Lakshmanan Chettiar and they were therefore constituted administrators of the Ceylon assets of the father Somasundara. As these were not properly functioning, one B. Emmanuel, Secretary of the District Court of Jaffna was later appointed administrator to act with them and he seemed to have administered the assets solely until 1929 when he was transferred to another Court. On the 17th August, 1925, P. R. R. S. M. Somasundaram Chetti, the father of the said Chokkalingam Chetti filed a suit in the District Court of Colombo against all the sons of Somasundara for recovery of a sum of Rs. 1,60,531 and 47 cents alleging that that sum was borrowed by them between the 4th January, 1923 and 9th August, 1925. On the 29th August, 1925, the said Somasundaram Chetti got an affidavit filed before the Official Assignee of Madras through his son claiming a sum of Rs. 53,367-0-3 in respect of the transactions had with the insolvents at Madras and a sum of Rs. 1,60,501 and odd as due from them at Colombo. On 4th February, 1926, the plaintiff withdrew the suit which he filed in the District Court of Colombo with liberty to bring a fresh action. Even before the said suit was withdrawn, Somasundaram filed a suit on 19th January, 1926, against the said Emmanuel, Secretary of the District Court of Jaffna as official administrator

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of the estate of Somasundara for Rs. 1,61,127 and 22 cents on the ground that the money was lent to the father Somasundara between 4th January, 1923 and 30th June, 1923 and that the said defendant as administrator was bound to pay the said sum. (*See* Plaint No. 18800, District Court, Colombo, dated 19th January, 1926, subsequently amended on 12th October, 1926.) His Proctor also wrote to the Official Assignee informing him that he withdrew his claim against the insolvents for the sum of Rs. 1,60,531 as it was misconceived and as the said debt was contracted by Somasundaram Chetti, the father of the insolvents. By reason of the insolvency of the sons Arunachala and Sundaresa, all the property which they were possessed of vested in the Official Assignee. The properties which they were possessed of on the date of the insolvency would be their shares in the entire joint family properties of the family in addition to their separate property. But the share of Lakshmana and the shares of the sons of Arunachala and Sundaresa were not vested in him but by a compromise entered into with the latter all the property possessed by the joint family became vested in the Official Assignee by an order dated 6th August, 1928. It is rather extraordinary that such an order should have been passed especially when there were minors but it is unnecessary to go into the validity or otherwise of the said order because it must be taken for the purpose of these appeals that the entire joint family property and the separate property of the sons in so far as they were situate within British India vested in the Official Assignee. It must also be stated that by an order passed on 3rd August, 1925, by this Court in insolvency the District Court of Jaffna and the District Court of Colombo were directed to act in aid of the Madras Insolvency. The Colombo Court agreed but the Jaffna Court did not, so that the Official Assignee had control over all the assets of the insolvents whether in British India or at Colombo but in regard to the other Ceylon assets left by Somasundara they were under the control of the administrator of the Jaffna Court. According to the Roman-Dutch law it is stated that the property standing in the individual name of Somasundara must be taken to belong to him absolutely, and neither the theory of joint family nor the rights and obligations which flow out of that status including the pious obligation of the sons for payment of their father's debts are recognised by that law. The position

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therefore was that so far as, at any rate, the immovable property which stood in the name of Somasundara was concerned, the widow was entitled to a half and the children of Somasundara, that is, the three sons Arunachala, Sundaresa and Lakshmana and four daughters left by him were entitled to the remaining half and each of them thus had 1/14th share. The three sons of Somasundara according to that law would only be entitled to a 3/14th share in the immovable property standing in the name of Somasundara in Ceylon subject to the payment of his debts. But as a fact both the movables and immovables appear to have been treated by the Jaffna Court on the same footing. Under the will of Somasundara of the 23rd October, 1922, Somasundara purported to divide all the properties which he was possessed of barring a few exceptions into four shares to be taken by the sons after his death and if that will were to be given effect to, the sons would be entitled to get the entire property to the exclusion of the widow and daughters. The Official Assignee of Madras apparently wanted to get at the assets of the Jaffna Court and in order to enable him to do so, he applied to this Court for letters of administration with the two wills of Somasundara annexed to that on the strength of the letters so obtained he might get himself appointed administrator of the Ceylon assets of Somasundara in the Jaffna Court. Letters were issued by this Court on the 15th November, 1928. On the 18th February, 1929, the Official Assignee made an application through his power of attorney agent one M. J. Harding for the grant of letters of administration in respect of Ceylon assets and the allegations in the paras. 4 and 5 of that petition were as follows:

"4. That the deceased A. R. A. R. S. M. Somasundaram Chetti left behind properties in Ceylon to the value of Rs. 84,18,848 according to the papers filed by the administrator in this case.

5. That for the purpose of administering the estate of the said deceased in Ceylon, it is necessary that letters of administration should be taken out."

But the application was rejected by the District Court of Jaffna on the ground that a probate of a foreign Court could not be accepted under S. 3 of the Ceylon Ordinance VII of 1921. This order was passed on the 21st May, 1929. An appeal was preferred against the said order. On the 25th July, 1929, the Official Assignee executed a power of attorney in favour of Messrs. H. D. Thornton and M. J. Harding em-

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powering them to apply for letters of administration in Jaffna after complying with the formalities of Ceylon law. By that time Mr. Emmanuel who was functioning as administrator seems to have been transferred to another District Court and on the 16th September, 1929, Messrs. Harding and Thornton as attorneys of the Official Assignee made an application for an interim grant of letters to them pending decision of the appeal which they had preferred. Para. 6 of the petition runs thus:

"The petitioner as Official Assignee as aforesaid is not only a representative of the said heirs but is also a creditor to the extent of seven lakhs due to the said heirs from the late A. R. A. R. S. M. Somasundaram Chettiar."

By an order dated 16th December, 1929, it appears that letters of administration with copies of the will annexed were directed to be issued to Messrs. Thornton and Harding as attorneys of the Official Assignee of Madras, if before the 19th December, 1929, nobody shows sufficient cause to the contrary. This order was passed by Mr. Rock the District Judge but it also appears from another order passed by him on 16th April, 1930, wherein it was stated that he saw no objection to the granting of a limited power of probate to the Official Assignee. At any rate, it is clear that letters of administration were actually issued on the 19th May, 1930, to Messrs. Thornton and Harding constituting them administrators. There can be no doubt that it was issued to them as agents of the Official Assignee of Madras and they were functioning as such. After obtaining the letters they seemed to have applied to the District Court of Colombo in the suit brought by Chokkalinga Chetti's father and got themselves substituted as defendants in the place of the original defendants on record. After contest a decree was passed against them in the said suit and the decretal portion runs thus:

"It is ordered and decreed that the substituted defendants as administrators of the intestate estate of the late A. R. A. R. S. M. Somasundaram Chettiar deceased do pay to the substituted plaintiff as administrator of the estate of the late P. R. N. S. M. Somasundaram Chettiar, deceased, the sum of Rs. 1,61,127 and 22 cents with interest thereon at the rate of 9 per cent. per annum from 20th January, 1926, till payment in full and costs of suit."

So far as the scope of this decree is concerned there can be no doubt that Chokkalinga Chetti who was substituted as plaintiff in the place of his father who had died in the meanwhile obtained a decree against the administrators Messrs. Thornton and Harding as administrators of the Ceylon assets

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of Somasundara. Though the decree is against the said administrators it may be taken that it was against the Official Assignee of Madras as administrator of the Ceylon assets of Somasundara. We are not inclined to agree with the view taken by our learned brother Wadsworth, J., that the decree in the Colombo District Court is a decree which binds the sons represented by the Official Assignee with personal liability to the extent of the assets of the father in their hands. Against the said decree an appeal was preferred to the Supreme Court of Ceylon. In the meantime Chokkalinga applied to execute the decree in his favour by attaching a sum of Rs. 2 lakhs in the District Court of Jaffna and applied for a transfer of the said moneys to the credit of the suit. This was opposed by the Official Assignee as the creditor of the estate of Somasundara on the ground that the firm of the plaintiff was not registered according to Ceylon law and was not entitled to the relief claimed in the application. The ground on which the said attorneys of the Official Assignee preferred the appeal against the decree was that the case was disposed of by the trial Judge without giving sufficient opportunity to adduce necessary evidence in support of his plea. The plea that was raised by the Official Assignee in the trial Court was that Chokkalinga's father was not a creditor of the father but a creditor of the sons and he was entitled to prove only in the insolvency of the sons and could not claim any moneys from and out of the exclusive property of the father and therefore he was not entitled to claim any moneys from and out of the Jaffna assets. One object of the Official Assignee was to get as much money as possible for the son's creditors in the Jaffna Court as the estate of Somasundara was indebted largely to the firm of the sons whose property had been vested in the Official Assignee. A compromise was arrived at and the terms of the settlement were as follows:—

"Substituted plaintiff is to be paid his taxed costs incurred in 18800, District Court, Colombo, such costs not to exceed Rs. 9,000. He agrees to share *pro rata* with all the other creditors the assets of the deceased. He is entitled to proceed for the recovery of any balance that *may be due to him in action No. 18800,* District Court, Colombo, from assets that may exist out of Ceylon. The Official Administrator undertakes to withdraw his appeal in 18800, District Court, Colombo."

Thereupon a decree was passed on 17th November, 1933, by the Supreme Court of Ceylon as follows:

"Of consent it is considered and adjudged that the decree made in this

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action by the District Court of Colombo and dated the 12th January, 1933, be and the same is hereby affirmed and this appeal is dismissed subject to the terms of settlement arrived at between the parties and filed herewith. And it is further ordered and decreed that each party do bear his costs of this appeal."

The appellant Chokkalingam Chetti received from the Administrator Jaffna a sum of Rs. 47,573 and 80 cents as his *pro rata* share and after receiving the said sum he preferred a claim before the Official Assignee, Madras, for the balance due to him under the decree and the claims made on the basis of the compromise arrived at with the Official Assignee. The grounds of his claim are set out in paras. 7 and 8 of his affidavit dated 12th September, 1936, thus:

"By an arrangement however come to on or about the 21st October, 1933, and sanctioned by the District Court of Jaffna with the Official Administrator and the said defendants, it was agreed that I should take a share *pro rata* with all the other creditors of the assets of the deceased in the hands of the said Official Administrator, Jaffna and that I should be at liberty to recover the moneys due to me under the said decree from the assets that may exist out of Ceylon. The Official Administrator of Jaffna paid me as my share out of the assets then in his hands Rs. 47,573 and 80 cents. The said assets in the hands of the Official Administrator of Jaffna never formed and do not form part of the assets of the abovementioned insolvents and did not and could not vest in the Official Assignee. I say that so far as it is the liability of the joint estate the same has to be paid before the creditors of the insolvents are paid."

The Official Assignee rejected the claim and the reasons for doing so were stated by him thus in his order dated the 16th November, 1936:—

"The debt was contracted by Ar. Ar. Sm. Somasundaram Chetti in Ceylon and is repayable in Ceylon from out of the said Somasundara in the hands of the administrators. Under the Ceylon law the sons are not liable for the debts contracted by the father. Further the claimant having elected to proceed against Somasundara's estate in the hands of the administrators and obtained a decree against the said estate should be deemed to have waived his right to proceed against the sons' estate assuming he had the right which I do not admit. This claim is therefore disallowed."

Thereupon Chokkalingam Chetti preferred an appeal to the Court for rescinding the order of the Official Assignee. In the report submitted by the Official Assignee to the Court he denied that he was a party to the action in the District Court, Colombo and submitted that the consent decree passed by that Court could not have any validity and binding force so far as he was concerned. He went so far as to say that the letters were issued to Messrs. Harding and Thornton by the Jaffna Court in their individual capacities, that is, as assignees of the Ceylon insolvency of the firm Ar. Ar. Sm. and not in their

character as his attorneys. It is rather surprising that the Official Assignee should have taken the stand which he did. The various affidavits and reports filed in the case conclusively show that Messrs. Harding and Thornton were appointed by Mr. Wilson as his attorneys for the specific purpose of getting letters of administration on his behalf with the wills annexed of Somasundara in the Jaffna Court. In fact the judgment of Mr. Rock dated the 16th April, 1930, makes it clear that it was intended by him that the letters of administration should be issued to Mr. Wilson though the letters were actually issued to Messrs. Harding and Thornton. Therefore it must be taken that Messrs. Harding and Thornton were functioning as administrators in the Jaffna Court as agents of Mr. Wilson. He obtained letters of administration in this Court with the wills annexed for the purpose of getting letters of administration in the Ceylon Court, so that he could get at the Ceylon assets which were being administered by the Court at Jaffna. In fact the petition on which final orders for letters of administration were issued was filed by Mr. Wilson through his attorneys Messrs. Harding and Thornton and as already stated Mr. Wilson in that petition applied as Official Assignee as representing the heirs and creditors of the sons. The power-of-attorney issued to Messrs. Harding the Thornton gave them complete power to compromise and settle all claims against the estate. Therefore it does not lie in the mouth of Mr. Wilson to say that he was not a party to the action in the Ceylon Court and that the consent decree does not bind him. There can be no doubt that Messrs. Harding and Thornton were acting as the agents of Mr. Wilson in entering into a compromise in the capacity of administrators. It must also be said that Mr. Wilson in his capacity as the Official Assignee opposed the application of Chokkalingam Chetti to have the moneys attached by him transferred to the Jaffna Court. Therefore though it does not appear on record that the Official Assignee was a *pro forma* party to the compromise, the compromise could not have been entered into without reference to the Proctor who was functioning on his behalf and without the Official Assignee being apprised of the terms on which the consent decree was passed by the Supreme Court of Ceylon. I think it is in view of this that the concession which appears to have been made before Wadsworth, J., should be considered. The concession

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which is alleged to have been made by Mr. Wilson is thus stated by the learned Judge in the judgment under appeal:

"It was first contended that this decree against the administrator of the estate of the deceased Somasundara was not in fact a decree against the sons to the extent of the assets of their father in their hands nor a decree against the Official Assignee to the extent to which he was in possession of those assets. This contention has now been abandoned."

Mr. T. M. Krishnaswami Aiyar on behalf of the Official Assignee says that the concession was not made in the manner stated by Wadsworth, J.; but that the second part of the concession as recorded by the learned Judge was confined to the separate assets. We will have to examine the scope and effect of the compromise decree and the nature of the concession that was made by the Official Assignee at some length, but it is sufficient at this stage to say that the consent decree passed against Messrs. Harding and Thornton must be taken to have been passed against them as the agents of the Official Assignee and it is not open to Mr. Wilson to say that he was not a party to the consent decree at all. The learned Judge on a consideration of the entire evidence on record and on a construction of the compromise decree and in view of the concession made by the parties before him came to the conclusion that Chokkalingam Chetti must be placed in the same position as any of the creditors of the insolvent's father (Somasundara) in British India in proceeding against the assets, whether joint family assets or the separate assets of the father, in the hands of the Official Assignee as representing the sons but that Chokkalingam Chetti was not entitled to priority either in respect of what are deemed to be the separate assets of the father or the joint family assets wherein Somasundara and his sons were interested and the proper course according to him would be to treat the creditors of the father to the extent of the father's assets in the hands of the sons as creditors of the sons entitled to rank rateably to that extent with the son's subsequent creditors. As we have already said, both the Official Assignee and Chokkalingam Chetti have preferred appeals.

The contentions on behalf of the Official Assignee are thus formulated by Mr. Krishnaswami Aiyar: (*i*) The claim of Chokkalingam Chetti is a claim made by him as a creditor of the father of the insolvents and such a claim cannot be proved in the insolvency of the sons and his application was therefore incompetent. (*ii*) Assuming that an application lies, he could

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only prove his claim to the extent to which he could establish a personal liability of the sons, that is, a liability which could be enforced against the sons' entire property including their separate property. (*iii*) Assuming that such personal liability could be established there must be an inquiry as to how much of the debts that were subsisting on the date of the death of the father were binding on the joint family and were discharged by the insolvents and to that extent so much of the property as represented the value of the debts which have been discharged or taken over by the sons must be eliminated in coming to a conclusion as to what property would be available for distribution among the creditors. (*iv*) In any event Chokkalingam Chetti cannot claim any interest and the interest must be taken to have ceased to run from the date of the order of this Court adjudging the sons insolvents. The appeal on behalf of Chokkalingam Chetti was mainly on the ground that the learned Judge ought to have allowed priority in respect of his debt in preference to the creditors of the sons both in respect of the separate assets of the father and in respect of the joint family assets.

The first question therefore that falls to be decided is whether the application of Chokkalingam Chetti was competent. Mr. Krishnaswami Aiyar's contention is that on a debt of the father which under the Hindu Law the son may be under a pious obligation to pay the son could not be adjudicated insolvent because under the law of insolvency whether in British India or in England a person can be adjudicated insolvent in respect of any debt only if he was under a personal liability to pay it, that is to say, personal liability is a necessary foundation for an order of adjudication and if therefore a debt could not be made the foundation for an order of adjudication it is not a provable debt in insolvency. Mr. Krishnaswami Aiyar relied strongly on *Nagasubramania Mudaliar* v. *Krishnamachariar*[1], In re *Lynes*: Ex parte *Lester & Co.*[2] and In re *Hewett*: Ex parte *Levene*[3]. In *Nagasubramania Mudaliar* v. *Krishnamachariar*[1], Odgers and Venkatasubba Rao, JJ., took the view that where a decree has been passed against a person as the legal representative of another (in that case the decree was against the son for the debt of his deceased father to the extent of the assets in his hands) he could not be adjudged insolvent unless a personal

1. (1927) 53 M.L.J. 403: I.L.R. 50 Mad. 981.
2. (1893) 2 Q.B. 113.
3. (1895) 1 Q.B. 328 at 332.

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decree was obtained under S. 52 of the Code of Civil Procedure. Venkatasubba Rao, J., in the course of the judgment remarked thus:

"The proposition that any person who happens to be a debtor in his representative capacity is liable to be adjudicated an insolvent, cannot be seriously argued, for in that case any executor or administrator may be so adjudicated by reason of his occupying that limited capacity."

Then he concluded as follows:

"If the debts could not be personally enforced the debtor could not be adjudicated an insolvent."

A similar view was taken in English cases, namely, that if the debtor could not be called upon personally to pay, bankruptcy notice cannot be issued. (*Vide* In re *Hewett*: Ex parte *Levene*[1].) This position is canvassed by Mr. Rajah Aiyar for the appellant (Chokkalingam Chetti) and he went to the length of contending that the view taken in *Nagasubramania Mudaliar* v. *Krishnamachariar*[2] is wrong but it seems to us that it is not necessary to deal with this contention because a debt, though it may not be made the foundation for an order of adjudication, may still be a debt provable in insolvency. In other words, though a personal liability is a necessary foundation for an order of adjudication, it is not a necessary condition for a debt provable in insolvency. It is enough if there is a 'proprietary liability' to use the language of Lord Bown, in *Scott* v. *Morley*[3], that is, a liability in respect of property. Under S. 46 of the Presidency Towns Insolvency Act, 1883, which is word for word, S. 37 of the English Bankruptcy Act of 1883:

"All debts and liabilities, present or future, certain or contingent, to which the debtor is subject when he is adjudged an insolvent, or to which he may become subject before his discharge by reason of any obligation incurred before the date of such adjudication, shall be deemed to be debts provable in insolvency."

What is therefore required is there must be a debt or liability to which the debtor was subject on the date of the receiving order or order of adjudication. 'Subject' means 'liable', that is, liable personally or in respect of property. Therefore if the debtor is liable to pay a debt or satisfy a liability from and out of the property in his hands, it would be a provable debt in insolvency. In re *O'Gorman*: Ex parte *Bale*[4],

1. (1895) 1 Q.B. 328 at 332.
2. (1927) 53 M.L.J. 403: I.L.R. 50 Mad. 981.
3. (1887) 20 Q.B.D. 120.
4. (1899) 2 Q.B. 62.

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Wright, J., held that the damages awarded to a petitioner in a Divorce Court against a co-respondent, though they will not support a bankruptcy petition against the co-respondent, are nevertheless a debt provable in insolvency. The same view was taken in *The Official Receiver, Tinnevelly* v. *Krishna Pillai*[1], unreported judgment of 4th May, 1938, in Applications Nos. 294 and 295 of 1938 in C.S. No. 79 of 1936, High Court by Beasley, C.J. Therefore if on the date of the order of adjudication the insolvents were under a liability to pay a debt from and out of the joint family property in their hands or from and out of the separate property inherited by them from their father, such a liability would be a debt provable in insolvency. We understand that our learned brother Gentle, J., has taken the view that a father's debt can be proved in the insolvency of the son. (*Vide* Application Nos. 294 and 295 of 1938 in C. S. No. 79 of 1936.) We are therefore of opinion that the father's debt is provable in the insolvency of the son under S. 46 of the Presidency Towns Insolvency Act and that the application of Chokkalingam Chetti is competent. In this view the contention of Mr. T. M. Krishnaswami Aiyar that there should be a personal liability on the part of the son before a debt can be proved in insolvency must be negatived.

The next contention of Mr. Krishnaswami Aiyar is that assuming that the father's debt can be proved in the son's insolvency, in this case the joint family property which vested in the Official Assignee on the order of adjudication could not be deemed to be assets against which Chokkalingam Chetti could have any right. The contention is that the debts were incurred in Ceylon where the Roman-Dutch Law prevails and that that law does not recognise the theory of pious obligation and therefore the debt could not be enforced against the sons. Further, Chokkalingam Chetti's father, having elected to obtain a decree against the administrators of the estate of the insolvents' father, could not now seek to recover any monies from and out of the joint family properties in the hands of the sons as the assets of the father available for the payment of his debt. The contention of Mr. Rajah Aiyar is that the Roman-Dutch Law must be treated as applicable only with reference to immovable property situated in Ceylon and cannot apply to any

1. (1935) 69 M.L.J. 818.

movable property left by the deceased either in Ceylon or in British India, that any creditor, foreign or British Indian, can realise his debt from and out of such property which can be made available for the payment of the debt and therefore the remedies available to a foreign creditor for realising the debt from and out of the property of a deceased which is situated in British India are not taken away by the Roman-Dutch Law. It seems to us that it is unnecessary to go into the contentions based on the Roman-Dutch Law in the view we take of the consent decree passed by the District Court of Colombo. Though the decree was passed against the administrators who were administering the assets in Ceylon, still a creditor will be entitled to come and claim in the administration of the assets in British India from the administrator who would be functioning in British India. In the light of this principle the consent decree that has been passed by the Supreme Court of Ceylon must be considered. The first portion of the compromise is that Chokkalingam Chetti should share *pro rata* with all the other creditors the assets of the deceased. *Prima facie* that would apply to the assets of the deceased in Ceylon. The next portion of the compromise decree is that he is entitled to proceed for the recovery of any balance that may be due to him from the assets that may exist out of Ceylon. On the date of that order the assets of the deceased out of Ceylon must be said to have been in the hands of the Official Assignee whether as the administrator of the estate of Somasundara or as Official Assignee in the insolvency of the sons of Somasundara. If the agreement is deemed to relate to assets in the hands of the Official Assignee as administrator of British India assets by virtue of the grant of letters of administration to him by this Court, it means that the right of Chokkalingam Chetti to prove in the administration here is recognised, that is, he will be entitled to recover *pro rata* from the assets of the father in the hands of the administrator, the Official Assignee. In this connection it must not be forgotten that when the Official Assignee made an application to this Court for letters of administration with the wills annexed of Somasundara, he appeared to treat the joint family properties in the hands of the insolvents as the assets of Somasundara. In the affidavit filed by him in this Court dated the 19th December, 1928, he deposed as follows:

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"So far as I am able to gather, the position of the estate of the late Ar. Ar. Sm. Somasundaram Chettiar is this. The assets that were in the hands of the insolvents at the time of their adjudication aggregate to Rs. 60,08,399-7-8 in British India and Burma, Rs. 4,74,807-15-9 in Colombo and Rs. 7,17,067-4-0 in Jaffna, thus totalling Rs. 72,00,274-11-5.

As against the said assets, according to the account books of the insolvents and according to their valuation, the liabilities amount to as follows:— Rs. 54,71,782-5-2 in India and Burma, Rs. 17,65,846-0-10 in Colombo and Rs. 3,78,065-6-0 in Jaffna, thus totalling Rs. 76,15,693-12-0.

The above is an estimate as per the insolvents' schedule. Whatever that may be, the said estate of Ar. Ar. Sm. Somasundaram Chettiar is insolvent and I have so far declared a dividend of an anna in the rupee and I am declared a further dividend of two or three annas. I therefore state that for the purpose of the above petition the net assets are nil."

It is clear from this that he purported to treat the property which vested in him by virtue of the order of adjudication in the insolvency of the sons as the assets of Somasundara, that is, not only the joint family property but also the separate property of the sons is treated as the assets of the father. Whether the Official Assignee was in law right in so treating such assets is another matter. The fact remains that he was not administering such assets as the administrator of the father because before any grant was made to him in the testamentary matter such property vested in him by virtue of the provisions of the insolvency law and he was only administering such assets in the capacity of Official Assignee. Therefore the question arises whether "assets" in the compromise petition should not be understood as meaning assets in the hands of the Official Assignee in insolvency. It may be contended that the power of Messrs. Harding and Thornton to settle any debt could only be in their capacity as administrators and that any compromise arrived at by them beyond the scope of the power conferred upon them may not be binding upon the Official Assignee in his capacity as Assignee or upon the creditors of the sons in the insolvency of the sons. But it seems to us that the letters of administration were obtained both here and in the Ceylon Court by the Official Assignee not only as representing the insolvents but also the creditors of the insolvents in his capacity as Official Assignee, and no distinction was made by him between the father's assets and his liabilities and the sons' assets and liabilities. Further he must be deemed to have been a party to the compromise because he was a party to the proceeding in the Supreme Court which resulted in the compromise. It is hardly likely that without reference to him any

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compromise was entered into. Therefore it must have been the understanding between the parties, that after getting such amount as he could get from the assets in the Jaffna Court, the claimant Chokkalingam Chetti should be allowed to proceed to recover the balance from the British Indian assets in the hands of the Official Assignee in whatever capacity he might hold them. If this was the understanding, it could only be on the footing that Chokkalingam Chetti should share *pro rata* with all the creditors who are entitled to participate in the assets in the hands of the Official Assignee without any preference. The word 'proceed' can only be understood in the light of the circumstances then existing as referable to a claim to be made before the Official Assignee. In the light of these facts one can understand the concession alleged to have been made by the Official Assignee before Wadsworth, J. and we are not inclined to accept that the concession was only confined to the separate assets. Whether the Official Assignee and his agents were within their powers to enter into such a compromise so as to bind the son's creditors in the insolvency of the sons is another matter; but what we have to decide is whether the Official Assignee has agreed to the terms of the compromise in the Supreme Court and thus agreed to Chokkalingam Chetti proving in the insolvency of the sons. On the evidence on record we hold that he did agree. In this view the concession alleged to have been made by the Official Assignee may be understood. The decree certainly does not bear the interpretation which the concession of the Official Assignee as stated by our learned brother Wadsworth, J., seems to suggest. The concession warrants the inference that he agreed to Chokkalinga proving his claim before him and sharing in the assets being administered by him. Therefore in the circumstances of this case, Chokkalingam Chetti must be allowed to prove for the balance of the debt, after crediting the amount realised by him in the Jaffna administration, in the insolvency of the sons.

Now we shall deal with the question of priority. In the view we have already expressed of the terms of the compromise arrived at between Chokkalinga and the administrators in Ceylon and the Official Assignee, it would not be open to Chokkalinga Chetti to contend that he ought to be given a priority over the other creditors. The understanding seems to

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us to be that he should share *pro rata* along with other creditors entitled to share in the insolvency of the sons. Having regard to the first portion of the compromise where *pro rata* distribution was agreed to, it must also be taken that the understanding between the parties then was that *pro rata* distribution was the foundation and essence of the agreement irrespective of the fact against which assets the applicant would be entitled to put forward his claim for the recovery of the amount due.

Apart from the compromise, the question is whether as a matter of law Chokkalingam Chetti is entitled to claim priority on the ground that he was the father's creditor and was therefore entitled to be paid in preference to the creditors of the sons in the insolvency of the sons from and out of the separate property of the father which devolved on the sons by inheritance and from and out of the joint family properties which vested in the sons by survivorship.

The separate property in British India left by the father was the business in Rangoon and its assets The rest of the properties were owned by the father and sons as joint family property. It was the contention of Mr. T. M. Krishnaswami Aiyar on behalf of the Official Assignee that the father died heavily indebted and that the sons discharged a major portion of the father's debts before they became insolvents, so that on the date of the insolvency no property of the father was available for payment to any creditor who was not paid and that an account should be directed on the debts which the sons discharged for ascertaining from what assets the claimant could get his claim satisfied.

In regard to the separate property of the father inherited by the sons there is no difference between the nature of the obligations imposed on them and any other heir inheriting the property from his ancestor. The heir would take the property subject to the obligation of paying his ancestor's debts and in so far as he is unable to satisfy that he has applied the property in discharge of the ancestor's debts, he will be personally liable. The theory is that he takes only the residue after payment of the debts. (*Kasim Ali* v. *Sadiq Ali* and *Fakhr Jahan Begum* v. *Sadiq Ali*[1].) But the debts do not form a charge on the estate so that if the heir alienates it to a *bona fide* purchaser

1. (1938) 2 M.L.J. 210: L.R. 65 I.A. 219: I.L.R. 13 Luck. 494 at 502 (P.C.).

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for value or if a creditor of the heir seizes and sells it, the ancestor's creditor cannot reach it. So far as the Hindu Law is concerned, this principle is undoubted. It was thus stated in a very early case:

"We do not find nor can the pleader show us from any text of Hindu Law, that the property of a deceased person is so hypothecated for his debts, as to prevent his heir from disposing of it to a third party or to allow a creditor to follow it and take it out of the hands of a third party who has purchased in good faith and for valuable consideration. The creditor may hold the heir personally liable for the debt if he has alienated the property but he cannot, we think, follow the property." (*Unnopoorna Dassea* v. *Gunga Narain Paul*[1].)

Thus there is nothing to prevent a creditor of the son getting satisfaction out of the father's property which devolved on the son. Therefore questions have arisen both under S. 73, Civil Procedure Code and the law of insolvency in regard to the preferential claims of a father's creditor. Where there was a decree against a son as a legal representative of his father and also a decree obtained against the son personally by a creditor of his, our High Court took the view that the holders of both decrees are entitled to share rateably *Vadlamany Venkatesam* v. *Mangipudi Visvanathan*[2], though a different view has been taken by the Allahabad High Court, *Bhola Nath* v. *Maqbul-un-nissa*[3]. In *Gade Lakshmi Narasimham* v. *Pillalamarri Jagannadha Rao*[4], under the law of insolvency Oldfield and Sadasiva Aiyar, JJ., took the view that a father's creditor must only share rateably with a creditor of the son. But a different view was taken in *Shankar Lal* v. *Muhammad Ismail*[5], where an ancestor's creditor was held to have priority over the creditor of the heir. Mr. Rajah Aiyar laid considerable emphasis on the later decision. In that case the parties were governed by Muhammadan Law and the learned Judges took the view that under that law a creditor of a deceased Muhammadan has a general charge upon the assets left by the deceased and that it partakes of the nature of an equitable lien, so that in effect he becomes a secured creditor in the insolvency of the heir. How far this view is tenable under the Muhammadan Law is open to doubt, but at any rate it is not the Hindu Law. Even with reference to Muhammadan Law our High Court has adopted the view that no such charge exists and that the creditor of the

1. (1865) 2 W.R. 296.
2. (1917) M.W.N. 859.
3. (1903) I.L.R. 26 All. 28.
4. (1915) 30 I.C. 256.
5. A.I.R. 1930 All. 552.

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deceased is not a secured creditor but must share rateably along with the creditors of the heir. (*Vide* the observations of Odgers and Madhavan Nair, JJ., in *Nainar Rowthen* v. *Kuppai Pichai Rowthen*[1].) The learned Judges followed the decision of Oldfield and Sadasiva Aiyar, JJ., decided with reference to the Hindu Law and reported in *Gade Lakshmi Narasimham* v. *Pillalamarri Jagannadha Row*[2]. In that case a creditor of a Hindu father obtained a decree against his sons for an amount payable by them from and out of the assets of the father in their hands. Before any proceedings were taken to realise the money, the sons became insolvents and the entire property owned by them including the property which once belonged to their father vested in the Official Receiver. Subsequently the creditor who had obtained the decree wanted to attach the said property in the hands of the Official Receiver. It was contended on the creditor's behalf that he being a creditor of the father was entitled to attach and sell the property and that the son's insolvency could not affect him. Dealing with this contention the learned Judges remarked:

> "The property of a deceased Hindu is not so hypothecated for his debt as to prevent his heir disposing of it or to allow a creditor to follow it in the hands of a third party. There is therefore no question of respondent's right to a lien or charge on Balarama Doss's (the ancestor) property in the first and seventh defendants' (the sons) hands or in those of the Official Receiver who derived it from them—Balarama Doss's estates must accordingly be treated as having vested in the Official Receiver like the first and seventh defendants' other assets and as being immune from execution proceedings under S. 16 (2) of the Provincial Insolvency Act, respondents being left to prove their debts like *other unsecured creditors*,"

that is, just like any other unsecured creditor of the sons. The view is, as we shall presently show, in strict accordance with the provisions of the Insolvency Acts both Provincial and Presidency. This principle if adopted with reference to the separate property of the father devolving on his sons would apply with greater force to the joint family property which has devolved on the son by survivorship. Under the Mitakshara law by which the parties in this case are governed, the cardinal principle is that the ownership of the father and the son is equal in every item of joint family property possessed by them. The son has by birth an interest in the said property and he can deal with and dispose of it for value. On the death of

1. A.I.R. 1929 Mad. 609 at 610 and 611.
2. (1915) 30 I.C. 256.

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the father his interest in the property becomes augmented, but the nature of the rights possessed by him as owner thereof remains unchanged. No doubt the interest of the son during his father's lifetime is liable to be dealt with by the father or seized by a father's creditor for the satisfaction of the father's debt because by virtue of his relationship the Hindu Law casts upon the son a pious obligation to discharge his father's debts but it is not a personal liability and is only incidental to the property. So long as such property remains in the hands of the son, the same obligation continues even after the death of the father. The son who was owner of an undivided share during the lifetime of his father becomes on the latter's death the sole owner of the whole and not merely of the net residue of the property after deduction of the debts as in the case of inherited property. There can be therefore no question that the property is the individual property of the son and a creditor of his can seek satisfaction of the debt from the entire property possessed by the son, that is, his interest in the joint family property after it has been augmented by the death of the father. If such a creditor therefore in execution of a decree seized that property and got it sold, the alienee would get a complete title and it would not be open to any creditor of the father to come and say that the alienee is liable to pay his debt. It cannot be contended that there is any charge on the joint family property for the father's debt in the sense that it is hypothecated for the debt so as to make a father's creditor a secured creditor. The pious obligation does not fasten any such charge on the property so that he who takes the property takes it subject to that charge. It is one thing to say that a son is under an obligation to discharge the debt; it is quite another to assert that the property is charged in the sense that it is hypothecated for the debt. Where after the father's death the son becomes the sole owner of the property and the creditor becomes entitled to get satisfaction from it, it seems to us on principle that no distinction can be drawn between a father's creditor and a son's creditor. It is sufficient for our present purposes to note that neither during the father's lifetime nor after his death the son's interest in the joint family property can be said to be charged for the father's debt. Mr. Rajah Aiyar relied upon certain authorities for the position that the father's debts constitute a charge upon the inheritance and relied on the following passage in Mayne's

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Hindu Law:

"A father's debts are a first charge upon the inheritance and must be paid in full before there can be any surplus for the division" (Para. 339.)

He also relied upon the decision in *Venku Reddi* v. *Venku Reddi*[1], for the position that before partition can be effected the father's debts must be provided for and only the residue after making such provision can be divided. But neither the passage in Mayne's Hindu Law, nor the decision in *Venku Reddi* v. *Venku Reddi*[1] supports the contention of Mr. Rajah Aiyar. It is no doubt true that before a partition of joint family property can be effected, the obligations imposed by law on all the members must be provided for and one of such obligations relates to the father's debts. The theory is that if it were not so done the father would continue to be a debtor and it is incumbent upon the sons to see that he does not and thus save his soul from unhappiness in the next world. This is what Narada says:

"What remains of the paternal estate after paying off the debts of the father shall be divided among the brothers. Otherwise the father continues a debtor." (*Vyavasta Chandrika*, Vol. 1, p. 238.)

It is in this sense of obligation that the word 'charge' is used in the passage in Mayne's Hindu Law and not in the sense of the properties being hypothecated for the debt. It is one thing to say that before partition the debts of the father shall be provided for and it is another thing to say that when the son becomes the sole owner on the father's death entitled to dispose of the property as his own, there is any restriction imposed on his powers for disposing it for his own debts though he is equally under an obligation to satisfy the demand of his father's creditors. Again the obligation imposed by the Hindu Law being incidental to the property so long as the property remains in the hands of the son the property cannot escape liability, whether there is a charge or no. But once the property has been alienated to a *bona fide* alienee, the obligation cannot be pursued against the property. It seems to us that the same principle would apply where the son is divested of his ownership therein by operation of law. Bankruptcy is an involuntary alienation and by the provisions of the insolvency law there is a statutory conveyance or alienation of the said property in favour of the Official Assignee in trust for the creditors for distribution

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1. (1926) 52 M.L.J. 387: I.L.R. 50 Mad. 535 (F.B.).

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among them according to the provisions of the said law. Having regard to these principles the question of priority has to be viewed. Under S. 52 (2) of the Presidency Towns Insolvency Act all property as may belong to or be vested in the insolvent at the commencement of the insolvency will vest in the Official Assignee. The principle is the same under the Provincial Insolvency Act and under the English Law. It cannot be denied that the separate property of the father devolving on the son and the joint family property owned by the son at the date of the insolvency, which has been augmented by the father's share devolving upon the son by survivorship on account of the father's death before the date of the insolvency, will be property which belonged to the insolvent. But once that property vests in the Official Assignee, it would have to be governed by the provisions of the Insolvency law. One of the provisions of that law is S. 49 (5) which provides that subject to the provisions of the Act all debts proved in insolvency shall be paid rateably according to the amounts of such debts respectively and without any preference. Of course under S. 49 certain unsecured debts have to be paid in priority and it is in respect of them that a preference is accorded by the Act. The insolvency law is a special law having for its object the distribution of the insolvent's available assets among his creditors *pro rata*. The father's debt is not one to which a right of priority is given by the Act. The Official Assignee can only administer the assets and distribute them in accordance with the provisions of the Act. If a father's creditor chooses to prove in the insolvency of the son as a provable debt of the son, he must submit himself to the provisions of the Act which does not recognise any priority in his favour. In a recent decision reported in *Thimmiah* v. *Official Receiver, Bellary*[1], our learned brother Abdur Rahman, J., took this view and held that the unrealised debts of the father and the debts of the son stood on the same footing and that a father's creditor would not got priority over the son's creditor. In the course of the judgment the learned Judge observed thus:

"If one looks to the provisions contained in S. 61 of the Provincial Insolvency Act, it would be found to provide in sub-cl. 5 that all debts entered in the schedule have to be paid rateably according to the amount of

1. (1939) 1 M.L.J. 158.

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such debts without any preference except to those which have been otherwise specified by the Provincial Insolvency Act. . . . . The learned counsel for the petitioner has not been able to point to any provision in the Provincial Insolvency Act under which he could claim priority for the debt in question and so far as proceedings in insolvency are concerned, the petitioner, as provided in sub-cl. 5, share rateably without any preference. It is obviously the policy of the insolvency law to distribute the estate among the creditors fairly and unless a preference was given by the Act to any particular debt, it must necessarily be held to fall within the sub-clause and no priority can legitimately be claimed in regard to the same. Viewed in the light of this section the unrealised simple debts of the father and that of the son would stand on the same footing."

If we may say so with respect we think that this view is sound. The learned Judges of the Allahabad High Court in *Shankar Lal* v. *Muhammad Ismail*[1], on which Mr. Rajah Aiyar relied would seem to support their decision as to priority on S. 4 of the Provincial Insolvency Act. We are unable to understand how it can be done because that section itself says "subject to the provisions of this Act." S. 49 is one such provision. So long as a debt is not a charge upon a particular property and the obligation to pay the debt out of a particular property is imposed on the owner personally, an obligation which is not transmissible to his alienee except when the alienation is not in good faith, it cannot be said that the Official Assignee who is a statutory alienee of the property can be bound by any such obligation. Such priority if any must be deemed to have been abrogated by the provisions of the Insolvency Act. We are therefore of opinion that the contention of Mr. Rajah Aiyar that his client must be paid in preference to the creditors of the sons must be overruled.

The next question relates to the contention raised by Mr. Krishnaswami Aiyar that an account should be directed in regard to the question of separate assets and joint family properties available to satisfy the claim of the said Chokkalingam Chetti. Though this question was argued before our learned brother Wadsworth, J., it was not raised in any of the reports of the Official Assignee, nor did he allege and prove the facts to enable the Court to pronounce an opinion thereon. We therefore do not propose to go into it. Further, in the view we have taken of the scope of the compromise decree and Chokkalingam Chetti's right to priority, this question does not arise.

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1. A.I.R. 1930 All. 552.

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There remains only the question relating to interest. The contention of Mr. Krishnaswami Aiyar on behalf of the Official Assignee is that from the date of the insolvency of the sons the claimaint is not entitled to claim any interest. It is conceded by Mr. Rajah Aiyar that if the provisions of the Insolvency Act were to be applied, his client would not be entitled to interest. But what Mr. Rajah Aiyar says is that under the compromise it was stipulated that his client should get the balance of the amount under the decree in the Colombo District Court after giving credit to the amounts received by him in the Jaffna Court and therefore it was agreed that he should get interest on the decree amount. We are not inclined to agree with him in this contention. As we have already remarked, what was agreed to by the Official Assignee was that Mr. Rajah Aiyar's client could prove his claim before him. The amount payable in respect thereof must be subject to the provisions of the Insolvency law by which the Official Assignee is governed and it is not open to him to disregard the provisions of the Act and consent to anything which is contrary to the Act. We must therefore hold that interest on the claimant's debt will cease from the date of the adjudication of the sons.

In the result, we confirm the decree of our learned brother Wadsworth, J., subject to the modification as to interest as declared above and dismiss both the appeals with costs.

S.V.V. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE VENKATARAMANA RAO.

P. R. N. S. M. Chokkalingam Chetti .. *Petitioner* (Appellant)*

v.

The Official Assignee of Madras .. *Respondent (Respondent).*

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Civil Procedure Code (V of 1908), S. 110 (3)—Two appeals—One judgment—One decree—Varying with regard to one appeal—Affirming with regard to another appeal—Leave to appeal against the affirming portion of the decree—If decree to be treated as a reversing decree with regard to the whole case.

One *C* filed an application in insolvency claiming a sum from the Official Assignee and also claiming priority therefor. The Court upheld his claim

* C. M. P. No. 2156 of 1940. 3rd May, 1940.

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to prove but denied his claim to priority. Thereupon both the Official Assignee and the claimant filed two appeals against the judgment, the claimant in so far as it disallowed his claim to priority and the Official Assignee in so far as it allowed *C* to prove in the insolvency. Both the appeals were mainly dismissed but in the appeal by the Official Assignee a small modification was made as to interest. The claimant applied for leave to appeal to Privy Council treating the decree as a varying decree.

Held, that so far as the claimant is concerned, it is one of affirmance. Though one decree was issued in this case, it is in essence a document which embodies two decrees.

Ramanathan Chetti v. *Subramanian Chetti*, (1926) 51 M.L.J. 295, followed.

Perichiappa Chettiar v. *Nachiappan*, (1930) 35 L.W. 206, dissented from.

Petition presented under O. 45, rr. 2 and 3 of the Code of Civil Procedure praying that in the circumstances stated therein the High Court will be pleased to grant a certificate to enable the petitioner herein to appeal to His Majesty in Council against the judgment of the High Court, Appellate Side, dated 16th October, 1939 and passed in O. S. A. No. 68 of 1937 preferred against the judgment of the Hon'ble Mr. Justice Wadsworth, dated 21st July, 1937 and 23rd August, 1937 and passed in the Insolvency Jurisdiction of the High Court in I. P. No. 264 of 1925—Application No. 453 of 1936 (*In the matter of* Arunachalam Chetti and Sundaresa Chetti of Ar. Ar. Sm. Firm—Insolvents).

N. Srinivasa Aiyangar instructed by *N. T. Shamanna* for Petitioner.

T. M. Krishnaswami Aiyar for *T. V. Ramiah* for Respondent.

The order of the Court was delivered by

Venkata-ramana Rao, J.

Venkataramana Rao, J.—This is an application for leave to appeal to the Privy Council against the decree passed by us in O. S. A. No. 68 of 1937. This appeal was preferred by the petitioner against the decision of our learned brother Wadsworth, J., disallowing the claim to priority of the petitioner in regard to the amount claimed by him. We affirmed the decision of our learned brother Wadsworth, J., and dismissed the appeal. The decree passed by us is a decree of affirmance within the meaning of S. 110, cl. 3 of the Civil Procedure Code. It is contended by Mr. Srinivasa Aiyangar that there is one decree issued in this case and, when leave to appeal is granted in regard to the question of interest, his client is entitled as a matter of right to leave to appeal also in regard to the question of priority, because the claim is one composite

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claim and the decree is one decree. We are not inclined to agree with this contention. Though one decree was issued in this case, it is in essence a document which embodies two decrees. Against the decision of our learned brother Wadsworth, J., two appeals were preferred, one by the Official Assignee in so far as the decision went against him and the other by the petitioner herein in so far as the decision went against him. Therefore, in effect, we passed two decrees.

In *Ramanathan Chetti* v. *Subramanian Chetti*[1], the question which we have now to decide arose for consideration. In that case an appeal and the memorandum of objections were preferred against the decree of the lower Court and the High Court passed one decree by which the appeal was dismissed and the memorandum of objections was partly allowed. The question was whether the appellant in that case was entitled to leave to appeal to the Privy Council on the ground that the memorandum of objections was partly allowed and, as one decree was issued in the case, it must be taken that there was a modification of the decree as a whole and that it was not a decree of affirmance This contention was negatived. In dealing with this contention, Phillips, J., observes on page 297:—

"Does the mere fact of an order on the memorandum of objections modifying the decree of the lower Court give the plaintiff the right to reopen the whole of the case? It was held in *Chiranji Lal* v. *Behari Lal*[2], that when there had been two cross appeals against the decree of the Court of first instance and one cross appeal had been allowed and the other dismissed, there was no right of appeal against the decree dismissing the appeal, whereas an appeal lay against the decree allowing the appeal. The Court proceeded on the view that in cross appeals the decree in each was a separate one. . . . . In effect there are two orders of this Court, one dismissing the appeal and affirming the decree of the lower Court and the other allowing the memorandum of objections or cross appeal and modifying the decree of the lower Court. So far, then, as the decree affirming the decree of the lower Court is concerned, no appeal would lie to the Privy Council."

We entirely concur in this view because it is in consonance with the plain language of S. 110 of the Civil Procedure Code. Reliance was placed by Mr. Srinivasa Aiyangar on the decision in *Venkitaswami Chettiar* v. *Sekkutti Pillai*[3], but that decision does not help him. On the other hand we find the following observation of Venkatasubba Rao, J., on page 583 which is not in his favour:

"As a question of construction, we fail to see why, when there are

1. (1926) 51 M.L.J. 295. 2. (1918) 16 A.L.J. 864.
3. (1936) 71 M.L.J. 580.

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several decisions in respect of several subject-matters, the decree embodying those decisions should, by some fiction, be regarded as one and entire."

Again, reliance was placed by Mr. Srinivasa Aiyangar on the decision in *Perichiappa Chettiar* v. *Nachiappan*[1] of Reilly and Anantakrishna Aiyar, JJ. That decision gave a very wide interpretation to the decision of the Privy Council in *Annapurna Bai* v. *Ruprao*[2]; but that decision, if we may say so with respect, was rightly dissented from in *Venkitaswami Chettiar* v. *Sekkutti Pillai*[3].

Lastly Mr. Srinivasa Aiyangar submitted that, even if we take the view that the decree is one of affirmance, leave my be granted on the ground that there is a substantial question of law involved in the appeal. It will be seen from a perusal of our judgment that we came to a decision on a question of fact, namely, that under the compromise entered into with the Official Assignee by the petitioner, the petitioner is entitled only to a *pro rata* distribution whatever be the nature of the assets held by the Official Assignee, whether the assets be taken to be those of the father or those of the son. That was enough to dispose of the appeal; but, as the question of law, namely, that apart from the compromise the petitioner is entitled to claim priority, was also argued, we proceeded to deal with it. We therefore cannot say that a substantial question of law is involved in the appeal in order to enable us to exercise our discretion and grant leave under S. 110.

We therefore see no reason to grant leave to appeal in this case and the application is therefore dismissed with costs of the respondent, which we fix at Rs. 100.

S. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Rayam Duraiswamy Aiyangar and others. Petitioners* (*Defendants 1 to 4 and 6*)

v.

M. Raghavachariar .. *Respondent* (*Plaintiff*).

Duraiswamy Aiyangar v. Raghavachariar.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 8 and 9—Promissory note—Payment 'towards promissory note' generally—No appropriation to

1. (1930) 35 L.W. 206.
2. (1924) L.R. 51 I.A. 319: I.L.R. 51 Cal. 969 (P.C.).
3. (1936) 71 M.L.J. 580.

* C.R.P. No. 1607 of 1938. 19th August, 1940.

principal or interest—Effect of—If creditor can treat it as towards interest after petition to scale down is filed,

Durai-swamy Aiyangar *v.* Raghava-chariar.

Where, towards a promissory note, an open payment is made in August, 1937, towards the debt generally and it had not been appropriated by the debtor or creditor towards principal or interest, the creditor is not entitled, after the debtor has sought relief under the Madras Agriculturists Relief Act to treat the payment as appropriated towards interest. The payment is to be appropriated towards principal.

Narayanaswamy Naidu v. *Rajamanickam Pillai,* (1940) 1 M.L.J. 225: 51 L.W. 237, not followed.

Rama Shah v. *Lal Chand,* (1940) 1 M.L.J. 895: L.R. 67 I. A. 160 (P. C.), applied.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge of Chingleput in S. C. S. No. 92 of 1938.

R. Krishna Aiyar for Petitioners.

M. S. Venkatarama Aiyar for Respondent.

The judgment of the Court was delivered by

Wadsworth,

Wadsworth, J.—This petition raises a question regarding the working of S. 8 of Madras Act IV of 1938. The petitioners were some of the defendants in the suit on a promissory note for Rs. 1,900. This note was dated the 20th April, 1935 and it renewed an earlier note which was admittedly executed on 19th April, 1926, for a sum of Rs. 1,000, though this earlier note has not been exhibited. On 2nd August, 1937, a payment of Rs. 1,000 was endorsed "towards this promissory note in the matter of the sale of a house." The lower Court has held that this payment was made towards the promissory note generally, that is, towards the entire amount due including principal and interest and he has rejected the plea of actual appropriation. The petitioners are admittedly agriculturists and the lower Court has scaled down the debt by the simple process of treating the debt as one borrowed on the earlier date 19th April, 1926, doubling the original principal, subtracting the admitted payments amounting to Rs. 1,005 and giving a decree for the balance of Rs. 995 as on 1st October, 1937, with interest as from that date at 6½ per cent. under S. 12 of the Act. That is, to say the learned District Munsif has ignored cl. (1) of S. 8 and has scaled down the debt on the basis that cl. (3) of that section provides a minimum rather than a maximum which the creditor may claim. It seems to us that the method adopted by the lower Court of scaling down this debt cannot be justified. It is, however, by no means easy to lay down what is the correct way of applying this difficult section.

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It is contended for the respondent that the payment on 2nd August, 1937, must be deemed to have been appropriated in the manner most favourable to the creditor and that the scaling down process must be applied only after making such an appropriation. We do not think that this contention can be upheld. Granting that when the Court is adjusting accounts between debtor and creditor, the ordinary rule is that unappropriated payments are first to be applied towards interest; this is more a rule for the guidance of the Court than a presumption of law regarding what has in fact been done. In dealing with the subject of appropriation as affecting S. 20 of the Limitation Act, the Privy Council in a recent case *Rama Shah* v. *Lal Chand*[1] had occasion to consider whether, when there is an open payment towards a debt, a mere notional appropriation, such as is contemplated in the rule just referred to, can take the place of an actual appropriation for the purpose of saving limitation and their Lordships held that it could not. It seems to us that the same principle applies in dealing with the present facts. Here we have an open payment of Rs. 1,000 made towards the debt generally, but not appropriated by the debtor or creditor towards principal or interest. We do not consider that the creditor should be entitled, after the debtor has sought relief under Act IV of 1938, to treat this payment as having been theoretically appropriated towards interest when in fact it was not appropriated at all. We must therefore regard the debt as one in which there has been a payment, but that payment has not been appropriated either to principal or interest. Our attention has been drawn to a decision of Horwill, J., reported in *Narayanaswamy Naidu* v. *Rajamanickam Pillai*[2], where the learned Judge drew a presumption that a similar payment not expressly appropriated was at once applied in the reduction of the debt for interest. We doubt whether such theoretical appropriation can properly be postulated in order to nullify the effect of S. 8 (1) of the Act. Although there must have been an intention in due course to adjust the lump sum payment against the outstanding dues for interest and principal until such adjustment has in fact been made, it cannot in our opinion be said that there is no interest outstanding so as to bring into effect S. 8, cl. 1.

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1. (1940) 1 M.L.J. 895: L.R. 67 I.A. 160 (P.C.).
2. (1940) 1 M.L.J. 225: 51 L.W. 237.

Durai-swamy Aiyangar v Raghava-chariar.

Wads-worth, J.

Now on this basis we have to see what is the actual result. With reference to the proviso to S. 9 (1), the promissory note of 1935 must be deemed to be a debt contracted in 1926 and must be dealt with under the provisions of S. 8, that is to say, all interest outstanding on the 1st October, 1937 must be cancelled. If the interest is so cancelled, the unappropriated payment of Rs. 1,000 made on 2nd August, 1937, is sufficient to discharge the debt in full. The revision petition is therefore allowed with costs and the debt will be scaled down in the manner indicated with the result that the plaintiff's suit will be dismissed with costs.

S. V. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Doraikannu Odayar .. *Petitioner* (Petitioner-3rd defendant)*

v.

Veerasami Padayachi *alias* Veerasami Chatrakondar. *Respondent (Respondent-Plaintiff).*

Doraikannu Odayar v. Veerasami Padayachi.

Madras Agriculturists Relief Act (IV of 1938), Ss. 4 (f), 8, Explanation and S. 10 (2) (ii)—Pronote executed by purchaser of hypotheca for balance due under mortgage—If covered by explanation to S. 8—Decree on the pronote against purchaser and sons forming joint family—Right of son to relief under the Act.

A purchaser of a hypotheca executed a promissory note to the mortgagee for the balance due under the mortgage. The mortgagor obtained a decree on the promissory note against the maker and his sons as members of a joint family. In an application by the son for scaling down the decree,

Held, when a member of a joint family executes a fresh document for a pre-existing liability binding on the family, but incurred on its behalf by another member such previous debt can be regarded as renewed or included in a fresh document within the meaning of the explanation to S. 8 of the Act as the debtor in each case is the same person, namely, the joint family.

The liability to the plaintiff which the applicant seeks to scale down is not a liability in respect of which a charge is provided under S. 55 (4) of the Transfer of Property Act. The liability to the mortgagee, though it may be measured by the liability to the vendor is not the "same liability". S. 4 (f) has no application to the liability.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the order of the Court of the District Munsif

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* C. R. P. No. 602 of 1939. 22nd August, 1940.

Doraikannu Odayar v. Veerasami Padayachi.

of Shiyali dated 11th October, 1938 and made in I. A. No. 155 of 1938 in S. C. S. No. 427 of 1936.

A. Srirangachariar for Petitioner.

S. Swaminatha Aiyar for *M. S. Venkatarama Aiyar* for Respondent.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This Civil Revision Petition raises questions arising out of the explanation to S. 8 of Madras Act IV of 1938. The petitioner was the third defendant in a suit on a promissory note and he applied to scale down the decree under S. 19. The promissory note relates back to a mortgage of 1922 executed by one Samiappa in favour of Pakkiri for a sum of Rs. 500. In 1929 Pakkiri assigned the mortgage to the plaintiff. Before this assignment, a payment of Rs. 250 had been made towards the mortgage. On 25th August, 1930, the first defendant, father of defendants 2 and 3, purchased the land covered by the mortgage from the sons of Samiappa and agreed to pay Rs. 755 in discharge of the mortgage. On 21st March, 1934, the first defendant paid Rs. 830 towards the mortgage and on the same date he and his son the second defendant executed a promissory note for Rs. 150 in favour of the mortgagee and the mortgage was thereby discharged. The plaintiff sued on the promissory note alleging that it was a family debt binding on all the coparceners and impleading the third defendant as a coparcener. On this basis he got a decree on 28th September, 1936. The third defendant applied under S. 19 of Act IV of 1938 to scale down the debt on the basis that the promissory note was in effect a renewal of the mortgage executed by Samiappa. The trial Court held that it was not a renewal and it is this decision which is now under consideration.

Now in view of our decision in *Neelappa Reddiar* v. *Solaimuthu Udayan*[1] approving the decision of Somayya, J., in *Ramaswami Chettiar, In re*[2], we must hold that the explanation to S. 8 contemplates the renewal of a debt or its inclusion in a fresh document by the same debtor. But it does not necessarily follow that the parties to the first debt and the second debt must be absolutely identical. There may be cases in which a debt due jointly and severally from *A* and *B* is included in a fresh document execu-

1. (1940) 2 M.L.J. 517. 2. (1939) 2 M.L.J. 609.

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ted by *A* alone or cases in which a debt due solely by *A* is included in a fresh document executed by *A* and *B*. But we are not really concerned in the present case with either of these cases. In so far as there is a mortgage by Samiappa discharged by a promissory note executed by the first and second defendants it cannot be said that the promissory note is a renewal of the mortgage or an inclusion of the amount of that debt in a fresh document. But this does not dispose of the question. When the first defendant who must be deemed in view of the decree to have been acting as manager of the joint family purchased this land and undertook to discharge the mortgage on it, although there was no obligation to the creditor which the creditor could directly enforce by suing for the money from the first defendant, there was a liability towards that creditor which the creditor could enforce indirectly by suing on his mortgage for the sale of the hypotheca which the first defendant had purchased and this liability is a debt within the meaning of Madras Act IV of 1938. So much follows from the decision of Varadachariar and Abdur Rahman, JJ., in *Perianna* v. *Sellappa*[1]. It also seems to follow from that decision that the liability of the purchaser being traceable to the original mortgage must be scaled down with reference to the date of the mortgage. On the basis of this decision we must hold that when the first and second defendants executed the suit promissory note they were in fact renewing a pre-existing liability which bound the family; or at all events, having regard to the strict definition of the term 'renewal' in *Barber* v. *Macknell*[2], they were including this pre-existing liability in a fresh document binding on the same debtor. It seems to follow therefore that the third defendant who is under S. 19 entitled to scale down the joint family debt embodied in the decree can ask that this debt be treated as a renewal of the pre-existing liability which dates back to the mortgage of Samiappa.

It has, however, been contended that the liability in question is one in respect of which a charge is provided under S. 55 (4) (*b*) of the Transfer of Property Act and that therefore it cannot be scaled down, having regard to the provisions of S. 10 (2) (*ii*) of Madras Act IV of 1938. It seems to us that this argument involves a certain confusion of ideas. There cannot be a liability except it be due to a person. When we speak of

1. (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218.
2. (1892) 68 L.T. 29.

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'the same liability' we must necessarily mean the liability to the same person. It is true that the liability to the plaintiff under the promissory note was co-extensive with the outstanding liability of the first defendant to his vendor, in respect of which it might be contended the vendor's lien existed. But it was not identical with that liability. The liability to *A* may be measured by the extent of the liability to *B*, but when the two liabilities are due to different persons they are not, the same liability. It seems to follow that the liability to the plaintiff which the applicant seeks to scale down is not a liability in respect of which a charge is provided under S. 55 (4).

It has also been contended that S. 4 (*f*) applies; but we are unable to see how, assuming that this liability had its origin in a trust, there has been any breach of trust.

In the result therefore we are of the opinion that the decision of the lower Court is erroneous and that the third defendant is entitled to scale down the decree on the basis that the promissory note is a renewal of a pre-existing liability which dates back to the original mortgage. The effect of the payment of Rs. 250, made by the original mortgagor, on the questions arising under S. 8 (2) and (3) will depend on the answer to the question whether the original mortgagor was or was not an agriculturist. If he was an agriculturist this payment will have to be taken into account in calculating the amount paid towards the debt.

The revision petition is allowed with costs. The application is remitted to the trial Court which will scale down the debt in the light of this judgment.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

P. R. S. A. R. Periakaruppan Chettiar. *Petitioner** (*Respondent-Plaintiff*)

v.

Marappa Goundan and others .. *Respondents* (*Petitioners-Defendants 2 to 5*).

Periakaruppan Chettiar v. Marappa Goundan.

Madras Agriculturists Relief Act (IV of 1938), S. 8 (1)—Payments appropriated by creditor towards interest in his plaint filed before 1st October, 1937—If can be reopened.

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* C. R. P. No. 946 of 1939. 22nd August, 1940.

Peria-karuppan Chettiar *v.* Marappa Goundan.

In his plaint filed before 1st October, 1937, the plaintiff appropriated payments by his debtor, towards interest.

Held, these appropriations cannot be ignored for the purpose of S. 8 (1) of the Act, and scaling down must be on the basis of the amount claimed in the plaint as principal.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the order of the Court of the District Munsif of Tiruppur dated 5th November, 1938 and made in I.A. No. 180 of 1938 in S. C. S. No. 3 of 1936.

M. Krishna Bharathi for Petitioner.

Respondents not represented.

The Court delivered the following

JUDGMENT.—The plaintiff having appropriated all the payments towards interest in his plaint which was filed before 1st October, 1937, these appropriations cannot be ignored for the purpose of S. 8 (1). The most favourable way of scaling down the debt is to adopt the reduced principal of Rupees One hundred and seventy-one, annas two and pies six (Rs. 171-2-6) arrived at according to the plaint, cancel the interest remaining as on 1st October, 1937 and credit to the debt the balance of the part decree payment of Rupees Fifty-four, annas three and pies nine (Rs. 54-3-9) *minus* Rupees Forty and annas eight (Rs. 40-8-0) due for costs and give to the plaintiff a decree for the balance with interest at 6 per cent. per annum from 1st October, 1937. The petition is allowed with costs and the decree will be scaled down accordingly.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Sri Rajah Nayani Venkata Ranga Rao Bahadur *v.* Sri Rajah Tadakamalla Sita Ramachandra Rao Bahadur.

Sri Rajah Nayani Venkata Ranga Rao Bahadur Zamindar Garu .. *Petitioner* (Defendant)*

v.

Sri Rajah Tadakamalla Sita Ramachandra Rao Bahadur Zamindar Garu .. *Respondent (Plaintiff).*

Conflict of laws—Easement operating in one state in favour of land in another state—Projected works in servient tenement likely to interfere with right—Suit for injunction by occupier—Maintainability—Court-fees—Valuation for—Territorial jurisdiction—Law applicable.

* C. R. P. No. 2165 of 1939. 17th July, 1940.

Sri Rajah Nayani Venkata Ranga Rao Bahadur v. Sri Rajah Tadakamalla Sita Ramachandra Rao Bahadur.

The plaintiff's case was that irrigation works in his occupation situate within the Hyderabad state received their customary supply of water from the overflow of tanks belonging to the defendant situate in British India. The suit was for a series of injunctions restraining the defendant from carrying out projected works, which it was alleged, will endanger the customary flow of water to the plaintiff's tank.

Held, (1) a suit to establish a right of easement can be maintained by the occupier of the dominant tenement and no question as to the nature of the plaintiff's title in the estate which he occupies arises.

(2) If the right of easement is established by the evidence, there is no legal impediment which has to be removed before the injunction protecting that right will be granted; and whether the plaintiff has or has not sued for a declaration, it is not necessary for him to pay court-fee on the footing that the finding which he seeks as to his title is really a declaration necessarily required as a preliminary to the grant of the injunction. The plaint falls under S. 7 (*iv*) (*d*) of the Court-Fees Act and the plaintiff is entitled to place his own valuation on the injunctions which he seeks and however inadequate it may be the Court has no jurisdiction to revise that valuation.

(3) The suit being one for injunctions against the defendant residing in British India to protect a right of easement which though appurtenant to property in Hyderabad, had a local existence only in British India is cognizable by the British Indian Court.

(4) The easement in question being localised in British India must be determined according to the law of British India.

Petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act, praying the High Court to revise the order of the Court of the District Munsif of Bezwada dated 21st August, 1939 and made in O. S. No. 51 of 1933.

P. Satyanarayana Rao, V. Govindarajachari and *S. Venugopala Rao* for Petitioner.

B. Jagannadha Das for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition arises out of an order giving findings on three preliminary issues in a suit for an injunction restraining the defendant from doing certain acts with reference to his tanks over which the plaintiff claims a right of easement. The three issues are as follows:

"1. Whether the suit claim is not cognizable and triable by the municipal Courts and whether the same is determinable only by treaty between the British Government and H. E. H. the Nizam's Government.

2. Whether any cause of action arose within the territorial jurisdiction of this Court and whether this Court has jurisdiction.

3. Whether the reliefs are properly valued for purposes of jurisdiction and has this Court pecuniary jurisdiction to try this suit."

In order to determine these issues, it is necessary first to have a clear idea of the true nature of the plaint. The plaint

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as originally framed sought an injunction restraining the defendant from diverting the water flowing out of his tanks and from increasing the full tank level of those tanks, an injunction restraining him from diverting water to a newly dug channel, an injunction restraining him from closing the surplus weirs and diverting the water through a new canal into another tank and lastly a fixation of the full tank levels and the levels of the weirs of a number of the defendant's tanks. There was a long-fought battle on the court-fee question as affecting the jurisdiction of the District Munsif's Court in which the suit was filed. After the case had come up twice to this Court in revision, it was finally decided by the order of Krishnaswami Aiyangar, J., in C. R. P. No. 1318 of 1937 that the last prayer relating to the fixation of the levels had been properly deleted from the plaint and that the District Munsif would have to consider the question of jurisdiction on the footing of the plaint as thus amended.

It seems to me that this finally decides the question regarding the necessity for valuing the suit on the basis of the averments in the plaint as to the necessity for fixing the levels of the defendant's tanks. It is, however, contended for the first time in this Court that though the plaintiff has not prayed for a declaration of his right of easement, the suit is in substance one for a declaration and injunction and should be valued under S. 7 (*iv*) (*c*) of the Court-Fees Act and not under S. 7 (*iv*) (*d*) and it is desirable to decide this contention in the first instance. For, if S. 7 (*iv*) (*c*) applies and a declaration is in substance and of necessity sought, the case would undoubtedly fall outside the jurisdiction of the District Munsif's Court, for the easements claimed operate over a large number of tanks and the injunctions sought will, according to the averments in the plaint, affect the income of the defendant to the extent of thousands of rupees annually, whereas the refusal of the injunction would have a proportionately adverse effect on the income of the plaintiff. Moreover, the decision of the question regarding the necessity for a declaration of the plaintiff's right has a material bearing on the first issue regarding the jurisdiction of the British Indian Court to try the suit.

I may observe that the anxiety of the plaintiff to pay the minimum court-fee on this suit has led to much avoidable litigation and has involved both parties in a great deal of

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entirely unnecessary expense. Such short-sighted parsimony is very ill-advised. The position is now complicated owing to the existence of a temporary injunction which would cease to operate if the plaint were returned for presentation to a Court of higher jurisdiction, so that the question of the frame of the suit is no longer one merely of court-fees and may have an important bearing on the practical position of the parties to the suit.

The plaintiff's case is that irrigation works in his occupation, situate within the Hyderabad State, receive their customary supply of water from the overflow of tanks belonging to the defendant and situate in British India and that the plaintiff has a right to require that the defendant should do nothing to the tanks in his possession which will adversely affect the customary flow of water to the tanks of the plaintiff. Consequently, he demands a series of injunctions restraining the defendant from carrying out projected works which, it is alleged, will endanger the customary flow of water to the plaintiff's tanks. Now, it is not disputed that the plaintiff is the occupien of this estate in which the tanks which form the dominant tenement are situate. It is true that the defendant has put in issue the nature of the plaintiff's title to this estate. But seeing that a suit to establish a right of easement can be maintained by the occupier of the dominant tenement, it is difficult to see how any question as to the nature of the plaintiff's title in the estate which he occupies really arises. It is however necessary to determine whether rights of easements such as are claimed do exist in favour of the plaintiff's estate and the determination of these rights is undoubtedly a necessary preliminary to the grant or refusal of an injunction to protect those rights. The question is whether this determination of the plaintiff's rights is to be regarded merely as a finding on evidence forming the basis of the substantial relief of an injunction or whether it is to be regarded as an essential relief which is sought in this suit. Now it is well established that in matters of court-fee and pecuniary jurisdiction, one must look to the real substance of the suit and not the form in which it has been clothed. If, therefore, there is any legal necessity for the plaintiff to get a declaration of his right of easement before he can get an injunction to protect it, the suit would have to be filed under S. 7 (*iv*) (*c*) of the Court-Fees Act, even though he has

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sought this declaration by means of averments in the body of the plaint and not by praying for a declaration specifically amongst the reliefs at the end of the plaint. On this part of the case the safe rule is that when there is some legal obstacle which has to be removed before a consequential relief can be granted, it is incumbent upon the plaintiff to pray for a declaration which will have the effect of removing that obstacle. But if the plaintiff merely avers a title which can be established without the cancellation of a document or the nullification of any adverse title and only claims the relief which would naturally flow from the establishment of the title which he avers, it is not necessary for the plaintiff to pray expressly for a declaration of that title. So much seems to me to follow from the decisions of the Privy Council in *Bijoy Gopal Mukherjee* v. *Krishna Mahishi Debi*[1] and of the Full Bench of this Court in *Ramasami Aiyangar* v. *Rangachariar*[2]. It is true that the first of these decisions related to a question of limitation, but the principle on which the decision is based applies equally, to my mind, to a question of court-fee. The decision of the Full Bench just quoted related to a suit by a minor challenging alienations in seeking possession. The question raised was expressly one of court-fee and I find it difficult to distinguish this case merely on the ground that the substantial relief is one for possession and not one for an injunction. A similar case is reported in *Maung Shein* v. *Ma Lon Ton*[3]. It is not necessary for me to decide what would be the position if the plaintiff had in fact prayed for a declaration as well as for an injunction, as is the case in *Venkatakrishna Pathar*, In re[4], where Jackson, J., held that the suit fell under S. 7 (*iv*) (*c*) and that the subject-matter was not the land but the value of the easement. It seems to me that on the frame of the present suit, all that the plaintiff has to do is to prove by evidence that he has a subsisting right of easement to the extent and of the nature claimed. If the evidence establishes the existence of this right, there is no legal impediment which has to be removed before the injunction protecting that right will be granted; and whether he has or has not sued for declaration, it is not necessary for him to pay court-fee on the footing that the finding which he seeks as to his title is really a

1. (1907) 17 M.L.J. 154: L.R. 34 I.A. 87: I.L.R. 34 Cal. 329 (P.C.).
2. (1940) 1 M.L.J. 32: I.L.R. (1940) Mad. 259 (F.B.).
3. (1931) I.L.R. 9 Rang. 401.
4. (1926) 52 M.L.J. 121.

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declaration, necessarily required as a preliminary to the grant of the injunction. It follows that the plaint as now amended falls only under S. 7 (*iv*) (*d*) of the Court-Fees Act and that the plaintiff is entitled to place his own valuation on the injunctions which he seeks. No doubt the valuation which he has placed upon these injunctions is palpably inadequate, but the Court has no power to revise that valuation. It follows therefore that the suit is within the pecuniary jurisdiction of the District Munsif.

The more difficult question is whether having regard to the fact that the suit seeks to protect an easement alleged to exist in favour of land situate outside the limits of British India, the British Court has jurisdiction to try the suit. This is a question on which in spite of the elaborate researches of learned Counsel on both sides, no British or Indian authority has been discovered. There are American decisions to which I shall refer. But so far as British Courts are concerned, one is taken back to the general principles enunciated in the text books, together with such light as may be derived from somewhat analogous decisions. Dicey in his 'Conflict of Laws', Fifth Edition, lays down as his third general principle that the Courts of any country have jurisdiction over any matter with regard to which they can give an effective judgment and have no jurisdiction over any matter with regard to which they cannot give an effective judgment. R. 53 at page 203 prescribes that subject to certain exceptions, the Court has no jurisdiction to entertain an action for the determination of the title to or the right to the possession of any immovable situate out of England or the recovery of damages for trespass to such immovable. The exception states that where the Court has jurisdiction to entertain an action against a person under either r. 59 or under any of the exceptions to r. 60, the Court has jurisdiction to entertain an action against such person respecting an immovable situate out of England on the ground of either—

(*a*) a contract between the parties to the action; or

(*b*) an equity between such parties

with reference to such immovable R. 59 states that when the defendant in an action *in personam* is, at the time for the service of the writ, in England, the Court has jurisdiction in respect of any cause of action, in whatever country such cause of action arises. Under r. 60, when the defendant in an

action *in personam* is, at the time for the service of the writ, not in England, the Court has no jurisdiction to entertain the action. Except for the fact that they are imported into r. 53, we are not concerned with the exceptions to r. 60, for here we are dealing with a suit against the defendant who is a resident within the jurisdiction of our Courts. But it is to be remembered that one of the exceptions to r. 60 gives the English Courts jurisdiction even over a non-resident defendant when any injunction is sought as to anything to be done in England or any nuisance in England is sought to be prevented or removed. This is a clear indication that jurisdiction in respect of injunctions resides in the Court of the country in which the injunction is to operate.

Now, in the present suit, it is necessary to determine the title to an easement operating over land in British India, but appurtenant to land in Hyderabad State. In one aspect of the matter, it may be said that the right of easement forms part of the title to the land in Hyderabad. But in reality that which has to be determined is not the existence of any right in Hyderabad but the existence of a right in British India attached to another right situate elsewhere. It seems to me quite clear that the Hyderabad Court according to the principle enunciated by Dicey could not entertain the suit for the issue of an injunction in respect of a right of easement over property in British India or grant a decree in respect of that right against a defendant residing in British India. Not only would a decree for such an injunction be futile and unenforceable but it would in fact be a decree for the protection of immovable property situate in another State.

It is however contended that even assuming that the Hyderabad Court has no jurisdiction over a suit such as the present, it does not follow that the British Court has jurisdiction and that this may well be a case of a conflict between sovereign rights such as can only be solved by international arbitration or treaty. Now in form, there is at present no conflict between the State of Hyderabad and the Province of Madras. We have to deal with a conflict of a private owner of land in Hyderabad claiming rights in favour of his land over other land situate in British India and belonging to a British Indian resident. The Governments of the two territories have so far not intervened. It seems to me unprofitable to consider

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in detail the cases which were cited before me on questions such as the right of an English Court to entertain a suit for damages for trespass upon real property in a foreign state or concerning the inability of an English Court to grant an injunction against a defendant residing in England for the protection of a foreign title. Here, we are in substance concerned with a suit for an injunction brought against a defendant residing in British India to protect a right of easement, which, though appurtenant to property in Hyderabad, has a local existence only in British India; and moreover the suit seeks an injunction the operation of which is only over property in British India and which affects the person of the defendant who resides in British India. It seems to me that in such circumstances, it being conceded that the plaintiff is the occupier of the Hyderabad land in favour of which the right of easement is claimed, the suit must be regarded essentially as one to establish a right to immovable property in British India and to protect that right by an injunction. A right of easement is itself immovable property. That right restricts the user of other immovable property and the mere fact that it operates in favour of land situate outside the jurisdiction should not, to my mind, on the principles enunciated by Dicey, prevent the Courts having jurisdiction over the property in respect of which an injunction is sought, from deciding whether or not that injunction is to be granted.

Even if this suit is to be regarded as one to establish a foreign title, I am of opinion that it would come within the exception to r. 53 in Dicey on the ground that it is a suit to establish the existence of an equity which the plaintiff has a right to demand as against the defendant. A right to an injunction is a right which forms part of the old Chancery jurisdiction. "Equity" is defined by Ashburner as 'a claim to the interposition of the Court of Chancery' and it is no less an equity because the aid of chancery is sought to protect a legal right.

It has been suggested that the British Courts cannot exercise jurisdiction over this suit because the determination of the plaintiff's right to an easement will necessarily involve the decision of a Hyderabad title subject to Hyderabad law. This seems to me to be an erroneous contention; for a right of easement is itself an immovable and all questions concerning

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property in immovables are decided according to the *lex situs*. The easement in question here is localised and it is localised in British India and the right to that easement must be determined according to the law of British India.

Questions relating to rights of easement operating in one State in favour of land in another State seems to be of more frequent occurrence in America than in most parts of the British Empire. Washburn on Easements, Fourth Edition at page 738 summarises the law as follows:—

"If an action be for obstructing a water-course, it is local in its nature. * * * In respect to the jurisdiction which should take cognizance of this injury, the Court held that an injury to an easement by acts done in one State may be sued for in that State, though the principal estate be in another, as for obstructing a way in *A*, which is appurtenant to an estate in *B*. In this case, therefore, as the owner on the Connecticut side was injured by the act done by the other party on the Rhode Island side, the former may bring his action in Rhode Island for the injury thereby done. If, for instance, the owner on the Connecticut side instead of this were to obtain an injunction against the owner on the other side in the Courts of that state in respect to the canal by which he diverts the water, it would be inoperative and could not be enforced in Rhode Island, it being a proceeding *quasi in rem*. And it seems that one who is injured by such an act may have his action, either where the act is done, or the consequential injury is suffered, at his election."

The learned author was dealing with a case in which there was a stream dividing two States and the owner of the land in one State diverted the water to the detriment of the owner of the land in another State situate lower down the stream. Thus in America, at any rate, the principle which I have endeavoured to set forth seems to have been recognised, namely, that an action may be maintained to prevent an injury to a right of easement operating in one State in favour of land situate in another State by proceeding in the Court having jurisdiction over the land upon which the right of easement operates. The same result is achieved by applying r. 53 in Dicey along with the exception to r. 60 relating to suits for an injunction.

In the result, therefore, I hold that the suit as framed is within the pecuniary jurisdiction of the District Munsif and that it is one cognizable by a British Indian Court in respect of which the Court of the District Munsif has territorial jurisdiction. I also hold that the court-fee paid is correct. The revision petition is therefore dismissed with costs. In view of the time taken by the arguments in the case and the research

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necessary for its proper presentation, I fix the Advocate's fee at Rs. 150. I wish to add that this suit which has been pending since 1933 should now be decided with all possible expedition.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Varadarajam Pillai, minor by guardian Malayaperumal Pillai. *Petitioner* (Petitioner-6th Defendant)*

v.

Krishnamurthi Pillai .. *Respondent (Respondent-Plaintiff).*

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Madras Agriculturists Relief Act (IV of 1938), S. 8, Explanation—Creditor—Meaning of—If includes a person beneficially entitled to the money.

For interest due on a mortgage of 1926 in favour of *A*, a promissory note was executed in favour of *A's* son *B*, on 12th April, 1932, and the debtor claimed that the promissory note debt representing interest on the earlier mortgage must be deemed to be wiped out by reason of the Explanation to S. 8 of the Madras Agriculturists Relief Act IV of 1938.

Held, that it can be scaled down only as a debt of 1932 and not as one of 1926 because the creditor under the mortgage and the creditor under the promissory note are different persons, as by virtue of Ss. 8 and 78 of the Negotiable Instruments Act the father could not be regarded as the creditor, though as between the family of *A* and the son *B*, the family may be beneficially entitled to the money and further by a decree having been passed in favour of *B*, neither *A* nor the family can be regarded as the decree-holder. Creditor for purposes of the Act does not include a person beneficially entitled to the amount.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the order of the Court of the District Munsif of Chidambaram dated 20th September, 1938 and made in I. A. No. 594 of 1938 in O. S. No. 775 of 1932.

R. Desikan for Petitioner.

T. R. Srinivasan for Respondent.

The judgment of the Court was delivered by

Patanjali Sastri, J.

Patanjali Sastri, J.—This Civil Revision Petition arises out of an application by the petitioner under S. 19 of the Madras Agriculturists Relief Act to amend the decree in O. S. No. 775 of 1932 on the file of the lower Court by scaling it down in accordance with the provisions of that Act. The decree was passed on a promissory note for Rs. 2,350 executed

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* C. R. P. No. 1088 of 1939. 21st August, 1940.

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in favour of the respondent on 12th April, 1932. The sum represented the interest due on an earlier mortgage for Rs. 10,000 executed by the petitioner in favour of the respondent's father on 1st September, 1926. The respondent applied for execution of the decree by attachment and sale of the mortgaged properties but the application was resisted by the petitioner on the ground that by virtue of O. 34, r. 14, Civil Procedure Code, the mortgaged property could not be brought to sale as the claim was one arising under the mortgage and the decree-holder must be deemed to be the mortgagee himself as the respondent obtained the decree as well as the promissory note on which it was based as a mere benamidar for his father for interest due on the mortgage. This dispute was carried to this Court in C. M. S. A. No. 59 of 1938 and was decided by King, J., in favour of the respondent in the decision reported in *Varadarajam Pillai* v. *Krishnamurthi Pillai*[1], where the learned Judge observed:

"It has been strenuously urged that both the mortgagee and the decree-holder are in essence the joint family consisting of the father and the son, and that therefore the mortgagee and the decree-holder are identical, and then it is argued that the son can be described as the mortgagee as he has some interest in the mortgage or that the father can be described as the decree-holder because it is found as a fact that the promissory note was really taken benami for him. It seems to me impossible to accept any of these propositions."

A Letters Patent Appeal (No. 100 of 1938) was preferred against this decision and it was dismissed on the ground that the decree based on the promissory note could not be regarded as having been obtained on a claim arising under the mortgage, the learned Judges expressing no opinion on the point decided by King, J. On these facts, the Court below held that it was not open to the petitioner herein to contend that the creditor under the promissory note or under the decree was not the respondent whose name appears as the payee on the note and the decree-holder on the decree, and that therefore the promissory note could not be regarded as a renewal in favour of the same creditor of the earlier liability to pay interest on the mortgage-debt. It accordingly amended the decree by awarding the interest only from 1st October, 1937, at the rate of six per cent. per annum.

Learned counsel for petitioner contended before us that neither the provisions of the Negotiable Instruments Act nor those of the Civil Procedure Code which precluded a debtor

1. (1939) 1 M.L.J. 680.

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from showing that a person other than the one whose name appeared as payee or decree-holder was the real creditor were applicable to proceedings for scaling down debts under the Madras Agriculturists Relief Act, that a person beneficially entitled to a debt was also a 'creditor' within the meaning of the latter Act and that there was nothing in its provisions to bar an enquiry as to who is the real creditor. The respondent on the other hand attempted to support the decision of the Court below on an alternative ground also, namely, that even if the creditor under the promissory note and the mortgage were to be regarded as the same person, the promissory note should be treated as a distinct debt in respect of which the sum of Rs. 2,350 should be regarded as the principal, and as the application to scale down related only to this debt, the interest alone payable under the note could be scaled down under S. 8 of the Act. We may state at once that this point is covered by our judgment in C. R. P. No. 1729 of 1938 and must be rejected for the reasons there indicated.

Turning to the petitioner's contention, we are of opinion that it is untenable. The debt in question having been incurred before the 1st October, 1932, it has to be scaled down in accordance with S. 8 of the Act. Under sub-S. (1) of that section, all interest outstanding on the 1st October, 1937, 'in favour of any creditor' of an agriculturist, has to be wiped out. This applies, of course, to the interest payable under the promissory note. But the petitioner also claims to be relieved from liability in respect of the sum of Rs. 2,350 for which the promissory note was given. It was said that the promissory note was but a renewal of the original liability to pay interest on the mortgage and the explanation to S. 8 applied. But was it a renewal 'in favour of the same creditor?' 'Creditor' is not defined in the Act except as including 'his heirs, legal representatives and assigns.' It has to be noted that it does not include persons beneficially entitled to the sum lent. 'Creditor' in the ordinary sense of the term signifies a person to whom money is due. The creditor under the mortgage is the respondent's father or the joint family of which he was the manager. But the creditor in respect of the promissory note, having regard to Ss. 8 and 78 of the Negotiable Instruments Act, is and can be only the respondent. The family or its

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manager could not sue to recover the amount due on the note even assuming that the respondent took it on behalf of the family (see *Subba Narayana Vathiyar* v. *Ramaswami Aiyar*[1]) and therefore could not be regarded as the creditor though, as between the family and the respondent, it may be beneficially entitled to the amount. This position has become still more emphasised by a decree having been passed in favour of the respondent. Under the provisions of the Civil Procedure Code, it is only the decree-holder or other persons specifically empowered in that behalf (for example under O. 21, r. 16 and r. 53) that can recover the decree amount by execution but not others although they may be beneficially interested in the amount. It is therefore difficult to see how the creditor under the mortgage and the promissory note can be said to be the same person.

Petitioner's learned Counsel placed reliance on the decision of Pandrang Row, J., in *Anandam* v. *Muthukumaraswami Mudali*[2] and of Stodart, J., in C. R. P. No. 963 of 1939 which no doubt lend support to his contention, but with all respect we are unable to agree with them. In the former case, the learned Judge laid stress on the words 'in a suit thereon' in Ss. 120 and 121 of the Negotiable Instruments Act and held that the special rule of exclusion or estoppel laid down therein operates only in *suits* on the negotiable instrument and should not be extended to applications by debtors to obtain relief under Act IV of 1938. In the first place, it is difficult to see what bearing Ss. 120 and 121 have on the point under consideration. They enact a rule of estoppel against denying the original validity of the instrument in the one case and the capacity of the payee to endorse in the other, and do not relate to the question who, is entitled to sue on the instrument and can thus be regarded as the creditor under it. The important and relevant provisions are those of Ss. 8 and 78 of that Act. The learned Judge does not explain why these provisions or the decision in *Subba Narayana Vathiyar* v. *Ramaswami Aiyar*[1] should be ignored in determining who is a 'creditor' in an enquiry under the Agriculturists Relief Act. He observes:

"The object of the new Act was to give relief to agriculturist debtors and it did not matter for the purpose of granting that relief whether the original debt was incurred under a negotiable instrument or otherwise."

1. (1906) 16 M.L.J. 508: I.L.R. 30 Mad. 88 (F.B.).
2. (1939) 2 M.L.J. 658.

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This is true, but is no justification, in our view, for ignoring the provisions of the Negotiable Instruments Act or those of the Civil Procedure Code in interpreting the term 'creditor' or 'the same creditor' in relation to a promissory note or a decree debt. In the case before Stodart, J., a mortgage was originally taken by an uncle in his own name in respect of moneys belonging to his minor nephew and it was renewed in favour of the nephew after the latter attained majority. The learned Judge thought that it was 'not unreasonable' to hold that the renewal was, in those circumstances, in favour of 'the same creditor'. This decision favours an extended interpretation of the term 'creditor' as including a person beneficially entitled to the amount lent, which is not warranted by the definition in S. 3 (*v*) of the Act. As we had occasion to point out in *Kotayya* v. *Venkata Punnayya*[1], the Act is designedly expropriatory in its effect and the scope of its provisions ought not be extended under the guise of what is sometimes called a benevolent construction.

The revision petition is dismissed with costs.

S. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Boddana Ramudu and others .. *Appellants** (*Defendants 1, 3 to 6 and L.R. of Defendant 2*)

v.

Sasapu Sanyasi Naidu and another.. *Respondents* (*Plaintiffs*).

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Madras Estates Land Act (*I of 1908*), *S. 187—Applicability—Undertaking in a mortgage* (*in ignorance of occupancy right*) *to deliver possession of land to mortgagee landlord after a fixed period—Landholder's claim for possession—Tenant if estopped from setting up occupancy right.*

The policy of the legislature as enacted in S. 187 of the Act is to protect the tenant against himself and prevent him from entering into any contract by which he can deprive himself of the protection afforded by the statute. Except by voluntary surrender under S. 143 or by adopting the procedure prescribed in S. 151 of the Act a tenant cannot be deprived of possession of land wherein he had occupancy rights. Accordingly where a tenant in ignorance of his occupancy rights undertakes in a mortgage to the landlord

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1. (1940)) 2 M.L.J. 202.

* S. A. No. 384 of 1937. 24th July, 1940.

to deliver possession of the land at the end of the period stipulated for in the deed contrary to his statutory incapacity to enter into any contract to give up such occupancy right, he will not be estopped from denying the right of the landholder to claim possession.

Bateman (Lady) v. *Faber*, (1898) 1 Ch. 144, applied.

Appeal against the decree of the Court of the Subordinate Judge of Chicacole in A. S. No. 44 of 1936 preferred against the decree of the Court of the District Munsif of Parvathipur in O. S. No. 45 of 1934.

V. Govindarajachari for Appellants.

B. Jagannadha Das and *S. Suryaprakasam* for Respondents.

The Court delivered the following

JUDGMENT.—This second appeal arises out of a suit instituted by the plaintiffs as purchasers of the equity of redemption of two mortgages dated 22nd June, 1914 and 12th November, 1918. The mortgage of 22nd June, 1914, is usufructuary and that of 12th November, 1918, is simple. The plaintiffs sued for redemption of the mortgages and for recovery of possession of the lands mortgaged thereunder. The right to redeem is not denied. The amount due and payable under the mortgages is not disputed. But the point in controversy between the parties is whether the plaintiffs are entitled to recover vacant possession of the lands or are only entitled to the melvaram interest therein. The contention of the defendants is that on the date of the mortgage in 1914 they were cultivating tenants in possession of the lands and had occupancy rights therein and that what was mortgaged was only the melvaram interest. The plaintiffs said in answer that under the terms of the mortgage what was mortgaged was the entire land and not merely the melvaram interest and that the tenants had no occupancy rights but were only tenants at will and that even assuming they had occupancy rights they were precluded from asserting such rights. So the substantial questions which fell to be decided were (1) whether the defendants had occupancy rights on the date of the usufructuary mortgage in 1914 and (2) assuming they had occupancy rights whether they are estopped from contending that they had such rights. The learned District Munsif of Parvatipur who tried the case was of the opinion that as the lands were dharmilla inam lands and the defendants' father was a cultivating tenant on the date of the mortgage the defendants were entitled to occupancy rights and they were not estopped

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from resisting the plaintiffs' right to claim possession. On appeal the learned Subordinate Judge held against the defendants on both the points and gave a decree in favour of the plaintiffs as prayed for. It is against this decision that this second appeal has been preferred by the defendants. It seems to me that on both the points the view of the learned Judge is wrong.

Ex. IV (*a*) which is the deed of mortgage dated 22nd June, 1914, Ex. IV which is dated 12th November, 1918, and two other deeds of mortgage which were filed by the plaintiffs themselves (Exs. B and C) relating to the suit land describe the nature of the land as dharmilla inam. Ex. IV (*a*) clearly states that the land was under the cultivation of the defendants' father on that date; and as the learned Subordinate Judge observes it was conceded before him that the defendants were in possession as tenants on the date of the mortgage. The recitals are *prima facie* evidence as regards the nature of the tenure of the land and the learned District Munsif who came to the conclusion on those recitals that it was dharmilla inam land was perfectly warranted in doing so. What Mr. Jagannatha Das contends is that those recitals ought not to be taken as evidence against his clients because on the date of the document the executant (the plaintiffs' predecessor in title) was a minor and those recitals were made by the guardian and that an opportunity should be given to his clients for placing more evidence on record in regard to the nature of the tenure. The question whether the defendants had occupancy rights was specifically put in issue in issue 4. The plaintiffs themselves filed Ex. C which contain recitals as to the land being dharmilla inam and Exs. IV and IV (*a*) under which the mortgages were created describe the land as dharmilla inam. As I have already observed the recitals in the deeds would be *prima facie* evidence against the plaintiffs. The fact that the recitals were made by the guardian is not a reason for not taking them as *prima facie* evidence unless it can be shown that those recitals were made under a mistake or misapprehension of the nature of the tenure in regard to which the burden would certainly be on the plaintiffs. In the face of these recitals it was obviously the duty of the plaintiffs to have put before the Court other evidence to show that these recitals ought not to be acted upon. The absence of any such evidence coupled with the fact of long

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possession by the defendants certainly warrants the finding of the District Munsif. Once it is found that the land was dharmilla inam there can be no question of the defendants having occupancy rights as settled by a Full Bench of this Court in *Brahmayya* v. *Achiraju*[1] and affirmed by the Privy Council in *Narayanaraju* v. *Suryanarayudu*[2]. This is not disputed by Mr. Jagannatha Das. I am therefore of the opinion that the learned Subordinate Judge ought not to have brushed aside the recitals in the documents and should have given effect to them. I set aside the finding of the learned Subordinate Judge and hold that the lands are dharmilla inam lands and that the defendants' father was entitled to occupancy rights on the dates of the mortgages in question.

The next question is whether the defendants are estopped from denying the right of the landlord to claim possession of the land. Mr. Jagannatha Das contends that under the deed of mortgage Ex. IV (*a*) the defendant's father undertook to deliver possession of the land at the end of the period stipulated for in the deed, that the mortgage proceeds on the footing that he had no occupancy right therein and that the plaintiff's predecessor in title was entitled to get possession of the land at the end of the term. There can be no doubt that on the date of the mortgage Ex. IV (*a*) neither the plaintiffs' predecessor in title nor the defendants' father was aware of their respective rights. The plaintiffs' predecessor in title thought that he was entitled to possession and the defendants' father thought that he had no occupancy right or at any rate was not conscious of it and he believed he was bound to deliver possession at the end of the term. The question is not what the plaintiffs' predecessor in title thought or what the defendants' father thought but if in law the tenant had occupancy right and he was under a statutory incapacity to enter into any contract to give up his occupancy right and if the landlord wants to claim possession of the land free of that right, would the tenant be estopped from denying the right of the landlord to claim possession? The policy of the Legislature as enacted in S. 187 of the Act is to protect the tenant against himself and prevent him from entering into any contract by which he can deprive himself of the protection afforded by the statute. Except by voluntary surrender under

1. (1922) 43 M.L.J. 229: I.L.R. 45 Mad. 716 (F.B.).
2. (1939) 2 M.L.J. 901: I.L.R. (1940) Mad. 1 (P.C.).

Ramudu v. Sanyasi Naidu.

S. 143 of the Estates Land Act or by adopting the procedure prescribed in S. 151 of the Act a tenant cannot be deprived of possession of land wherein he has occupancy right. The contention of Mr. Jagannatha Das is that S. 187 (*g*) would not be applicable to the case of a mortgage but must be strictly applied only to cases where the landlord seeks to eject the tenant from possession of the land. It seems to me that so to construe the section would make the provision illusory. The landlord and the tenant have only to resort to the device of having a mortgage executed by which at the end of a particular period the tenant undertakes to give up possession to render the statute futile. In this connection I would like to refer to the observations of Lindley, M. R., in *Bateman (Lady)* v. *Faber*[1], where the question was whether it was competent for a married woman who was entitled to property for her separate use without power of anticipation to get rid of the restraint even by telling an untruth. The observations are to this effect:

> "A married woman cannot by hook or by crook—by any device, even by her own fraud (the cases go to that length)—deprive herself of the protection which the restraint on anticipation throws around her. About the policies of the law I will say nothing, but it has been sanctioned by the Married Women's Property Act."

I would apply the above principle to this case where the tenant acts in ignorance of his rights and hold that the defendants in this case are not estopped from denying the right of the plaintiffs to claim possession of the land.

I would therefore set aside the decree of the learned Subordinate Judge and restore that of the District Munsif with costs throughout.

Leave to appeal refused.

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Chimakurti Seshayya .. *Petitioner* (Respondent)*

v.

Sait Hirachand Chunilal Firm represented by Uttamchand. *Respondent (Petitioner).*

Seshayya v. Sait Hirachand Chunilal Firm.

Provincial Insolvency Act (V of 1920), S. 72—Insolvent obtaining credit without disclosing bankruptcy—Order directing prosecution for offence

1. (1898) 1 Ch. 144.

* C. R. P. No. 592 of 1939. 15th August, 1940.

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—*Appealability—Order on appeal—Revision—Earlier proceedings for prosecution stopped—If bar to subsequent prosecution—Discharge of insolvent pending appeal against order directing prosecution—If makes the proceedings for prosecution void.*

Substantially the provisions of S. 72 (2) of the Provincial Insolvency Act are analogous to those of S. 476 of the Criminal Procedure Code, and the Insolvency Court should give notice to the insolvent before directing his prosecution and a decision directing the prosecution for the offence of obtaining credit without disclosing his bankruptcy is a decision against which the insolvent as the aggrieved party has a right of appeal similar to that provided by S. 476 of Criminal Procedure Code The correctness of the dismissal of such an appeal by the District Judge can be canvassed in revision.

Pursingh v. *Aladkhan,* A.I.R. 1933 Nag. 9, referred to.

Where the Court had declined to proceed with a prosecution under S. 72 owing to the absence of the person who laid the information and subsequent proceedings are taken when the Court had before it more materials no question of *res judicata* arises and if it is a mere question whether the order of the Court is wise or unwise it is not a matter that should be gone into in revision. Where a prosecution is launched and the appellate Court declines to stop it the discharge of the insolvent before the appeal was dismissed cannot make those proceedings void.

Petition under S. 75 (1) of the Provincial Insolvency Act praying that the High Court will be pleased to revise the order of the District Court of Guntur dated 7th March, 1939 and made in C. M. A. No. 89 of 1938 preferred against the order of the Court of the Subordinate Judge of Tenali, dated 7th July, 1938 and made in O. P. No. 4 of 1937.

K. Kameswara Rao for Petitioner.

K. Bhimasankaran for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition is preferred against a decision in appeal against an order directing the prosecution of an insolvent for an offence under S. 72 of the Provincial Insolvency Act.

A preliminary objection was taken by the respondent on the ground that the appeal itself was incompetent. The objection is based on English decisions—*vide* In re *Marsden*[1] and Ex parte *Brown*: In re *Appleby*[2], where it is held that under the corresponding provisions of the English Bankruptcy Act, no notice should be given to the bankrupt before directing the trustee to prosecute for the offence of obtaining credit without disclosing the fact of bankruptcy and no right of appeal exists in favour of the person to be prosecuted. It seems to me that

1. (1876) 2 Ch. D. 786. 2. (1876) 2 Ch. D. 799.

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the above decisions throw very little light on the question which I have to decide. The provisions of the English Bankruptcy Act, though similar, are not identical with those of the Provincial Insolvency Act and the main reason which influenced the English Courts in denying a right of appeal or a right of notice to an insolvent are that the concession of such rights would be contrary to English criminal procedure and would imply that the person to be prosecuted had to state his defence and submit to decisions in appeal before his case was heard in the Criminal Court. It cannot be urged that such a procedure is foreign to criminal procedure in India. Substantially the provisions of S. 72 (2) of the Provincial Insolvency Act are analogous to those of S. 476 of the Criminal Procedure Code and there is nothing unreasonable in supposing that the Insolvency Court should ordinarily give notice to the insolvent before directing his prosecution or in holding that the decision to prosecute is a decision against which the aggrieved party has a right of appeal similar to that provided by S. 476-B of the Criminal Procedure Code. I note that S. 75 of the Provincial Insolvency Act gives a right of appeal to a person aggrieved not merely by an order made but by a decision come to. When the Court decides to prosecute an insolvent for an offence under S. 72 of the Act, does it not make decision which aggrieves the person to be prosecuted? Whether the creditor who moves the Court to prosecute has a grievance is another matter. There is a Nagpur decision reported in *Pursingh* v. *Aladkhan*[1], to the effect that he has no right of appeal. But it is unnecessary for me to go into that question though it may be noted as a matter of interest that in the present case there had been a prior refusal to prosecute reversed on appeal at the instance of the creditor. However that may be, I hold that there was a right of appeal to the District Judge by the insolvent against the order of the Court directing his prosecution. It follows therefore that the correctness of the dismissal of the appeal by the District Judge can be canvassed in revision.

Two main grounds have been urged in revision. The first is that the application of the creditor is barred by *res judicata* by reason of the previous decision. On 6th September, 1935, the creditor moved the Court to prosecute the insolvent for

1. A.I.R. 1933 Nag. 9.

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obtaining credit without disclosing that he was an undischarged insolvent. The then Subordinate Judge refused to prosecute, directing the creditor first to establish the fact of his debt in a Civil Court. The creditor appealed to the District Judge. As I have indicated, it is doubtful whether such an appeal lay. Nevertheless, it was entertained and the District Judge took the reasonable view that the Subordinate Judge should himself have found out whether there was a *prima facie* case on the facts before refusing to order prosecution. The matter was therefore remanded to the Subordinate Judge who was directed to hold an enquiry into the facts. On the day when the enquiry should have been commenced, the creditor was absent and on the insolvent denying his indebtedness, the petition was dismissed. An application for restoration was made by the creditor but was rejected with an observation that perhaps it is open to the creditor to file a fresh petition. The creditor did file a fresh petition and the Subordinate Judge held that there was no bar by reason of the previous order which was one for default. The reasoning of the learned Subordinate Judge is perhaps defective, but his conclusion is, I think, sound. It was upheld by the District Judge in appeal.

The point, as I understand it, is not whether the previous application was dismissed in default or dismissed on the merits. Under S. 72 (2), there is a power given, not to the interested party, but to the Court itself on being satisfied that an offence of the kind contemplated had been committed, to send the case to the Magistrate. This is a power conferred not in the interests of this or that party but in order that the Court itself may prevent an offence against the insolvency law. Presumably a creditor who has been wrongfully induced to give credit could himself complain to the Magistrate under S. 72 (1) without obtaining the leave of the Insolvency Court. We are not therefore concerned with the question whether there is a bar of *res judicata* against the individual who gives the information on which the Insolvency Court acts, but whether the Court should or should not reconsider a decision of its own not to prosecute in the light of further information. There can be no question of a bar of *res judicata* operating against the Court. The most that can be said is that the Court cannot prosecute for an offence of which an accused person has already been acquitted and the Court will not ordinarily prosecute on the strength

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of information on which it has previously declined to act. In the present case, owing to the absence of the person who laid the information, the Court declined to proceed with the prosecution. On the subsequent occasion, the Court had before it far more materials and reasonably came to the conclusion that a prosecution was desirable in the interests of the maintenance of the insolvency law. It is no longer a question whether the creditor should succeed or the insolvent should succeed. It is the question whether the Court had materials before it which placed upon it a duty to take action. In such circumstances, no question of *res judicata* arises and if it is a mere question whether the order of the Court is wise or unwise, it is not a matter that should be gone into in revision.

The second contention is based on a decision of the Calcutta High Court reported in *W. D. Jordon* v. *Mahadeolal*[1], to the effect that after an insolvent has obtained a discharge, the Insolvency Court has no jurisdiction to direct prosecution under S. 72 (2) of the Provincial Insolvency Act. Assuming that this decision is correct, though there are criticisms which might be urged against the reasoning with which it is supported, it has to my mind no bearing on the present case. When the Insolvency Court directed this complaint to be filed, the present petitioner was an undischarged insolvent over whom the Insolvency Court certainly had jurisdiction. The complaint therefore was filed by the Court empowered to institute proceedings. When the insolvent appealed to the District Judge, there was presumably a complaint pending before the Magistrate and that complaint had been regularly instituted. During the pendency of the appeal before the District Judge, the insolvent obtained his discharge. It is argued that the judgment of the District Judge dismissing the appeal amounts to an order under S. 72 (2) of the Provincial Insolvency Act directing the filing of a complaint and that, having been passed after the discharge of the insolvent, that order is without jurisdiction. I cannot accept this contention. We are not here concerned with a decree of the trial Court becoming merged in the decree of the appellate Court. We are concerned with the act of the Insolvency Court in filing a complaint which act is subject to review by an appellate Court under S. 75 of the Provincial Insolvency Act. It cannot be contended that when the appellate Court

1. (1934) I.L.R. 61 Cal. 605.

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declines to stop the proceedings instituted by the Insolvency Court, it is for the first time instituting those proceedings. The proceedings have already been instituted and all that has happened is that an attempt to get them stopped has failed. They were instituted when the Court directing them had jurisdiction and the subsequent discharge of the insolvent before the appeal was dismissed cannot make those proceedings void.

In the result therefore I dismiss the civil revision petition with costs.

K. S. *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD ROMER, LORD JUSTICE LUXMOORE AND MR. M. R. JAYAKAR.

Mahalingam Chettiar, M.L.M., minor by his next friend, Rao Sahib R. Krishna Aiyar .. *Appellant** (*Appellant*)

v.

Ramanathan Chettiar and others .. *Respondents* (*Respondents*).

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Civil Procedure Code (V of 1908), O. 21, rr. 18, 53 (1) (b) and 53 (3), and S. 73—Cross-decrees in separate suits for payment of money between the same parties—Set-off in execution—Absence of actual attachment at the time of application for execution—If fatal to right of set-off—Attachment by third parties—Effect—Consent or concurrence of other attaching creditors—If necessary for execution—Attachment by another Court by 'request' under O. 21, r. 53 (1) (b)—Effect on executability of attached decree by other creditors.

A obtained a decree on 27th November, 1911, against *R* for Rs. 46,253 and odd with further interest and costs. *R* obtained a decree against *A* in the same Court for Rs. 33,068-0-9 and further interest on 12th September, 1917, which decree was affirmed by the High Court on 26th April, 1928. On 25th July, 1928, *A* applied for execution of his decree and asked (1) for the attachment of *R's* decree against himself; (2) that the attached decree, should be executed by himself as attaching decree-holder; and (3) that the amounts realized by execution of the actual decree should be set-off against the decretal amount due to him. The decree against *A* was accordingly attached on 14th November, 1928. By another application on 2nd November, 1928, in the execution proceedings, *A* asked that execution should be ordered for the balance due to him after deducting the amount due under the attached decree and also filed a memorandum of satisfaction of the attached decree. *R* and other creditors of *R* who had on varying dates from 26th August, 1918, also attached

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* P.C. Appeal No. 49 of 1939. 30th May, 1940.

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the decree, opposed the applications of *A*. The decree of one of such creditors was of another Court and the attachment was effected by a letter of request under O. 21, r. 53 (1) (*b*).

Held, (1) *A* is not precluded from obtaining an order under O. 21, r. 18, Civil Procedure Code, for set-off, by the absence of an actual attachment at the time when his applications for execution were made.

(2) The right given to the holder of a decree by O. 21, r. 18 of setting off a cross-decree for the same or a lesser amount cannot be defeated by the attachment of the cross-decree by third parties. There is no right of rateable distribution as the set-off will extinguish the decree and no assets representing the decree will ever come into the possession of the Court. *Rajman Ram* v. *Sarju Prasad*, A.I.R. 1937 All. 422, approved.

[As to what would be the result if the larger decree was passed after the attachment of the smaller decree by strangers their Lordships expressed no opinion.]

(3) Where a decree has been attached by more than one creditor, one of them can apply for execution of the decree without the concurrence or consent of all the others.

(4) The decree is capable of execution by the Court that passed it in spite of and before the fulfilment of the conditions in the 'request' issued by another Court. The object of the 'request' is only to ensure that the holder of the decree does not himself proceed to execution without the leave of the Court making the attachment. It is not intended to prevent other attaching creditors from asking for execution of the decree.

Decision of the Madras High Court reversed.

Consolidated appeal against the orders of the High Court, Madras (Madhavan Nair and Pandrang Row, JJ.) dated the 2nd October, 1934 and the 1st February, 1935, affirming the orders dated 23rd December, 1931, of the Subordinate Judge of Ramnad at Madura.—

[The necessary facts and relevant provisions of the Code appear sufficiently in the judgment of the Board.]

L. P. E. Pugh, K. C. and *Subba Rao* for Appellant.

S. Khambatta for Respondents.

30th May, 1940. Their Lordships' judgment was delivered by

Lord Romer.

Lord Romer.—This is a consolidated appeal against the orders, dated the 2nd October, 1934, and the 1st February, 1935, of the High Court of Madras affirming two orders, dated the 23rd December, 1931, of the Court of the Subordinate Judge of Ramnad at Madura. The appeal arises out of certain execution proceedings, and the principal question to be determined is whether in the case of cross-decrees for money the right of the party holding the decree for the larger amount to

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set off the smaller decree against him is defeated by reason of the smaller decree having been attached by third parties.

The facts that give rise to the appeal are not in dispute and can be stated with reasonable brevity.

On the 27th November, 1911, the appellant's father, one Ramanathan Chettiar, obtained a decree for a sum of Rs. 46,253 odd with further interest and costs against the first respondent and his father Subrahmanyam Chettiar in O. S. No. 77 of 1911 in the Court of the Temporary Subordinate Judge of Ramnad. On the 12th September, 1917, the first respondent's father the said Subrahmanyam obtained a decree in Suit No. 153 of 1910 against the said Ramanathan Chettiar in the same Court for Rs. 33,068-0-9 and further interest. This decree was affirmed by the High Court on the 26th April, 1928. Thereupon, namely, on the 25th July, 1928, the appellant's father applied for execution of his decree in Suit No. 77 of 1911 by execution petition No. 109 of 1928. He asked (1) that the decree obtained against him by the first respondent's father in Suit No. 153 of 1910 should be attached; (2) that the decree so attached should be executed by him as attaching decree-holder, and (3) that the amount realized by execution of the attached decree should be set-off against the decretal amount due to him in Suit No. 77 of 1911.

The decree in Suit No. 153 of 1910 was accordingly attached by order of the 14th November, 1928. The two decrees having been passed by the same Court the order was made under r. 53 (1) (*a*) of O. 21. By virtue of sub-S. (3) of the same rule the attaching creditor thereupon became the representative of the holder of the attached decree. By this time, however, both the father of the appellant and the father of the first respondent had died and the appellant and the first respondent had become the respective holders of the two decrees.

On the 2nd November 1928, the appellant filed in the execution proceedings execution application No. 518 of 1928, which is one of the subjects of this appeal. By it he asked that execution should be ordered for the balance due to him from the first respondent after deducting the amount due from him under the decree in Suit No. 153 of 1910. The appellant also on the same date filed a memorandum of satisfaction of the

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decree in Suit No. 153 of 1910. This memorandum is the other subject-matter of this appeal.

The application for set-off and for execution of the balance of the decree in Suit No. 77 of 1911 and an application by the appellant to have the memorandum of satisfaction recorded came on for hearing together before the Subordinate Judge of Ramnad. The applications were opposed both by the first respondent as the judgment-creditor in Suit No. 153 of 1910 as well as by the respondents 2 to 10 inclusive. These last mentioned respondents as judgment-creditors of the first respondent's father had attached the decree in the last mentioned suit on varying dates of which the 26th August, 1918, would appear to have been the earliest. The attachment of that date had been obtained by the holder of a decree that had been passed in another Court in Suit No. 110 of 1915. The attachment had therefore been effected under the provision of r. 53 (1) (*b*) of O. 21 by the issue to the Court of the Subordinate Judge of Ramnad at Madura by the Court effecting this attachment of a notice in the words following:—

"You are therefore requested to stay the execution of the decree of your Court until you receive an intimation from this Court that the present notice has been cancelled or until execution of the said decree is applied for by the holder of the decree now sought to be executed or by his judgment-debtor."

Before continuing this narrative of the facts it will be convenient to set out the relevant part of O. 21, r. 18 upon which the appellant relied in support of his applications, and the relevant part of S. 73 of the Code of Civil Procedure upon which the opposition of the respondents was based. They are as follows:—

"R. 18. (1) Where applications are made to a Court for the execution of cross-decrees in separate suits for the payment of two sums of money passed between the same parties and capable of execution at the same time by such Court, then—

(*a*) if the two sums are equal, satisfaction shall be entered upon both decrees; and

(*b*) if the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction of the decree for the smaller sum."

"S. 73. Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same

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judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons."

The two applications were dismissed by the Subordinate Judge by orders of the 23rd December, 1931. He appears to have taken the view that all the attaching creditors were interested in the smaller decree and that without their concurrence it could not be set-off against the larger decree.

The appellant thereupon preferred two separate appeals to the High Court, the one against the order refusing to execute for the balance in Suit No. 77 of 1911, after allowing a set-off of the smaller decree, and the other against the rejection of the memorandum of satisfaction of the smaller decree. The appeals came before Madhavan Nair and Pandrang Row, JJ., who on the 2nd October, 1934, delivered judgment dismissing both appeals. They rightly pointed out that O. 21, r. 18 only applies where both the decrees are before the Court for execution. But they considered that as the decree in Suit No. 153 of 1910 had not been actually attached by the appellant's father when he filed his execution petition on the 25th July, 1928, he was not at that time entitled to execute that decree. They further held that even if this objection—which they agreed was an extremely technical one—was got over, the decree could not be said to be before the Court for execution as it had been attached by other decree-holders and without their concurrence or except on their behalf, the appellant alone could not have the right to execute it. They were also of opinion that the decree was not "capable of execution" in view of the fact that it had been attached by amongst others the decree-holder in Suit No. 110 of 1915 at whose instance a request had been directed to the Court of the Subordinate Judge of Ramnad at Madura in the terms that have been referred to earlier in this judgment. "This notice," they said, "has not been cancelled and execution of the decree has not been applied for by the holder of the decree in O. S. No. 110 of 1915 or by his judgment-debtor." They accordingly held that the appellant was not entitled to claim the set-off in question, and his appeal against the refusal of the Subordinate Judge to allow it was dismissed by order, dated the 1st February, 1935. It necessarily followed that the appeal against the refusal to record the memorandum of satisfaction was also dismissed, and the formal order to this effect was dated the 2nd October, 1934.

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From these two orders an appeal has now been brought before His Majesty in Council.

It will be seen from this narrative of the facts that the appeal raises questions of considerable general importance. But before considering these questions it is necessary to dispose of a preliminary question that is peculiar to the present case. It is the question whether the appellant is precluded from obtaining an order under O. 21, r. 18 by reason of the fact that neither at the time when his father presented his execution petition, No. 109 of 1928, nor at the time when the appellant filed his execution application, No. 518 of 1928, the decree in Suit No. 153 of 1910 had actually been attached. The objection is a highly technical one without any merits and their Lordships are reluctant to allow it to prevail. The execution petition sought execution of the decree in Suit No. 77 of 1911 by attaching the decree in Suit No. 153 of 1910 and also execution of the latter decree. It is obvious that relief under the second head could not have been granted at the request of the appellant's father until he had attached the latter decree. But when the appellant's execution application came before the Subordinate Judge on the 23rd December, 1931, the decree had been attached for over three years. There was therefore at that time an application for the execution of the two decrees by the decree-holder in the one case and the representative of the decree-holder in the second. The fact that this state of affairs did not exist and could not have existed at the time when the execution petition was filed should not, in their Lordships' opinion, be regarded as fatal to the appellant's case.

The other questions arising on the appeal are however both substantial and of general importance. They are the following: (1) Is the right given to the holder of a decree by O. 21, r. 18 of setting off a cross-decree for the same or a lesser amount defeated by the attachment by third parties of the cross-decree? (2) Where a decree has been attached by more than one judgment-creditor, can one of them apply for execution of the decree without the concurrence or consent of all the others? (3) Where a judgment-creditor has attached a decree under the provisions of r. 53 (1) (*b*) of O. 21, is that decree 'capable of execution' by the Court that passed it before Condition (i) or Condition (ii) mentioned in the request addressed to that Court by the Court making the attachment have been fulfilled?

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As to the answer to be given to the first of these questions their Lordships are unable to entertain any doubt. The moment that cross-decrees such as are mentioned in r. 18 are in existence the decree-holders become entitled to the right of set-off. It is true that effect cannot be given to the set-off until applications are made to the Court for the execution of the two decrees. The right nevertheless is there, and this right of the holder of one decree cannot be defeated by an attachment in favour of a third party of the other decree made after the right of set-off has arisen. Whatever may be the true position in law of an attaching creditor, it is plain that he can have no higher rights in respect of an attached decree than were possessed by his judgment-debtor. If at the time of the attachment of a decree the decree-holder is liable to have his debt extinguished by being set-off against a cross-decree against him, the attaching creditor is subjected in respect of the decree to the same liability. The contention that this is not so is founded upon a misapprehension of the true effect of S. 73 of the Code. The right of having the assets of a judgment-debtor rateably distributed amongst the executing creditors therein mentioned is confined to assets held by the Court. Where one of the judgment-debtor's assets is a decree for the payment to him of a sum of money which is liable to be extinguished by being set-off against a cross-decree against him, no assets representing that decree will ever come into the possession of the Court if the right of set-off be exercised. This was the view taken by Sulaiman, C.J. and Bennet, J., in the recent case of *Rajman Ram* v. *Sarju Prasad*[1]. In the judgment in that case it was said:

"Where there are cross-decrees under O. 21, r. 18, a smaller decree must always be set-off against the larger decree, and if the smaller decree is attached by some other decree-holder, that other decree-holder has no greater right than the decree-holder whose decree has been attached, and the attaching decree-holder cannot claim that he has a right to execute the smaller decree in spite of the existence of a larger decree held by the judgment-debtor. In other words the rule laid down by O. 21, r. 18 must be first applied before any question can arise for rateable distribution under S. 73."

With these observations their Lordships desire to express their respectful agreement. But they express no opinion as to what would be the result if the larger decree was passed after the attachment of the smaller one.

1. A.I.R. 1937 All. 422.

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The two remaining questions can be dealt with more shortly. Their Lordships can see no reason for thinking that a judgment-creditor who has succeeded in attaching a decree is unable to apply to the Court for execution of the decree without obtaining the concurrence or consent of other attaching creditors. On the contrary, r. 53 (3) of O. 21 provides in terms that an attaching creditor shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute the attached decree in any manner lawful for the holder thereof. The fact that there may be other attaching creditors in the same position is immaterial. Any money recovered by the execution creditor will be held by the Court and be subject to the provisions of S. 73 of the Code. Any payments made out of Court to the attaching creditor as representative of the holder of the attached decree would be avoided as against the other attaching creditors by S. 64 of the Code. The other attaching creditors are therefore adequately protected, and their concurrence in or consent to the execution is unnecessary.

The third question mentioned above must, in their Lordships' opinion, also be answered in favour of the appellant. To answer it otherwise would be tantamount to saying that though one of several attaching creditors may apply for execution of the attached decree, he can never obtain any practical result, if any one of the other attaching creditors has obtained his own decree in a Court different from the one that passed the attached decree and does not join in the application. In their Lordships' judgment a request made under r. 53 (1) (*b*) does not have this effect. It is a mere request. The rule does not purport to prohibit the Court to which it is addressed from executing the decree unless the conditions contained in the request are fulfilled. The object of the request is to ensure that the holder of the decree does not himself proceed to execution without the leave of the Court making the attachment. It is not intended to prevent other attaching creditors from asking for execution of the decree.

For these reasons their Lordships are of opinion that the appeal should be allowed. The orders of the 23rd December, 1931, the 2nd October, 1934, and the 1st February, 1935, should be discharged, and an order made as asked by the appellant's execution application. No. 518 of 1928, and as asked by his

application to have recorded the memorandum of satisfaction of the decree in Suit No. 153 of 1910. The costs of the appellant in the Courts below and his costs of this appeal must be paid by respondents 1 to 10 inclusive. In the case of the 11th respondent, who was added merely as a formal party for the purposes of this appeal, there will be no order as to costs.

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Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellant: *Hy. S. L. Polak & Co.*

Solicitors for Respondents: *Harold Sheppard.*

K. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Venkatammal .. *Petitioner* (Petitioner-4th Defendant)*

v.

K. V. Ramaswami Aiyar and others. *Respondents (Respondents-Plaintiff and Defendants 1 to 3).*

Venkatammal v. Ramaswami Aiyar.

Madras Agriculturists Relief Act (IV of 1938), S. 8, Explanation and Ss. 10 (2) (ii), 11 and 19—Purchaser of hypotheca—Suit on the mortgage—Compromise decree—Liability of purchaser—If personal—Liability if excluded from scaling down provisions under S. 10 (2) (ii)—Liability one in renewal of original mortgage—If execution costs also included in costs provided for in Ss. 11 and 19.

A mortgage was executed by *S* on 16th August, 1917, in favour of the plaintiffs. On 13th December, 1923, the wife and daughter of *S* (defendants 1 and 2) executed a fresh mortgage in renewal of the earlier one by *S*. On 27th December, 1933, defendants 1 and 2 sold the hypotheca to the 4th defendant who undertook to discharge the mortgage by payment of Rs. 2,500 out of the purchase price. Then a suit on the mortgage resulted in a compromise decree by which defendants 2 and 4 were enabled to satisfy the decree by paying Rs. 1,500 by 24th August, 1935 and Rs. 2,050 by 16th July, 1936, but in default of such payments the decree was to be a final decree for the full plaint claim (Rs. 4,348-8-0) with interest and costs. Towards the decree Rs. 500 was paid on 1st March, 1936; Rs. 1,000 on 13th July, 1936; and Rs. 1,000 on 5th January, 1937. The fourth defendant filed an application under S. 19 of Act IV of 1938 for scaling down.

Held, (1) as the liability sought to be scaled down is not the liability of the applicant to her vendors but the liability to the mortgagee S. 10 (2) (*ii*) of Act IV of 1938 has no applicability.

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* C. R. P. No. 61 of 1939. 11th September, 1940.

Venkatammal v. Ramaswami Aiyar.

(2) The liability under the compromise decree was a renewal of the previous mortgage liability and must be deemed to be a liability of the purchaser, which he, being an agriculturist, can seek to scale down as against the mortgagee, the original mortgagor being also an agriculturist.

(3) When both the original mortgagor and his purchaser are agriculturists, the purchaser can claim to have the debt scaled down on the basis that the mortgage debt for which the purchaser of the hypotheca became liable is itself a renewal of an earlier debt in favour of the same creditor.

(4) The provisions of S. 11 like those of S. 19 relate only to costs originally decreed and do not cover costs of execution.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Coimbatore dated 19th August, 1938 and made in E. A. No. 592 of 1938 in E.P.R. No. 341 of 1937 in O. S. No. 214 of 1934.

V. C. Veeraragavachariar for Petitioner.

K. V. Ramachandra Aiyar for Respondents.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This petition is preferred by the fourth defendant in a mortgage suit, who filed an application under S. 19 of the Madras Agriculturists Relief Act to scale down the decree. The application was unsuccessful to the extent of Rs. 2,500 which the learned Subordinate Judge held to be protected by the provisions of S. 10 (2) (*ii*) of the Act and it is this decision which the petitioner seeks to revise. The suit was based on a mortgage dated 13th December, 1923, executed by defendants 1 and 2 in favour of the plaintiff. This mortgage is alleged to be a renewal of an earlier mortgage dated 16th August, 1917, executed in favour of the same creditor by Subbaraya Goundar, who is said to have been the husband of the first defendant and the father of the second defendant. After the execution of the mortgage of 1923, the mortgagors on 27th December, 1933, sold the hypotheca to the petitioner (fourth defendant) under a sale deed in which she specifically undertook to discharge the mortgage by payment of Rs. 2,500 out of the purchase price. She did not pay and the mortgagee filed a suit which resulted in a compromise decree, by the terms of which defendants 2 and 4 were enabled to satisfy the decree by paying Rs. 1,500 by 24th August, 1935 and Rs. 2,050 by 16th July, 1936, but in default of such payments the compromise decree was to be a final decree for the full plaint claim (Rs. 4,348-8-0) with interest and costs. This default clause became operative, for the only payments made were Rs. 500 on

1st March, 1936; Rs. 1,000 on 13th July, 1936; and Rs. 1,000 on 5th January, 1937.

The decision of the learned Subordinate Judge that the decree is protected to the extent of Rs. 2,500 under S. 10 (2) (*ii*) cannot be upheld in view of our decision in C. R. P. No. 602 of 1939. The liability which the petitioner seeks to scale down is not the liability to her vendors, in respect of which the charge is provided, but the liability to the mortgagee.

The plaintiff-respondent has, however, sought to resist the scaling down on the basis that the decree is a compromise decree under which for the first time a direct liability is placed upon the purchaser. We are unable to see how the fact that the decree is on a compromise can affect the position of the petitioner having regard to the facts of the case. We have held in C. R. P. No. 2010 of 1939 that when it can be shown that the liability under the compromise is a renewal of a pre-existing liability to the same creditor, the debt must be scaled down under S. 8 (if this section applies) on the basis of the principal amount originally advanced together with the amount of any subsequent advances. There is no difficulty on the present facts in holding that the whole of the liability under the compromise was nothing else than a renewal of the previous mortgage liability. Provided that this debt was the debt of an agriculturist, the liability is one which must be deemed to be a liability of the purchaser which he, being an agriculturist, can seek to scale down as against the mortgagee. (Vide *Perianna* v. *Sellappa*[1].)

There has been some discussion before us of the question whether the fact that the purchaser is under a liability which can be traced back to the liability under the mortgage, makes available to the purchaser the plea which would be open to the original mortgagors that the mortgage debt is itself a renewal of an earlier debt. The question is not free from difficulty and we have been referred to no previous decision directly covering this question. But the judgment of Varadachariar, J., in *Perianna* v. *Sellappa*[1] assumes that an heir-at-law is under the same liability as the person to whom he inherits and is entitled to the same remedy under the Act and the learned Judge treats the purchaser of mortgaged property as under the same liability as his vendor. It would appear to follow that if the debt for

1. (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218.

Venkatammal v. Ramaswami Aiyar. — Wadsworth, J.

which the purchaser is liable is essentially the same debt as the debt of the original mortgagor and the latter debt is a renewal of an earlier debt in favour of the same creditor, the purchaser will be entitled to claim that the liability which he has incurred is a renewal and that the principal must be the principal originally advanced together with the amounts subsequently advanced as principal. We must point out that this is not a case of a novatio by a different debtor such as we had before us in C. R. P. No. 223 of 1939. The compromise is a renewal of the pre-existing liability of the purchaser, which liability is traceable to the mortgage debt, which debt is itself a renewal. We are of opinion that when both the mortgagor and the purchaser are agriculturists, the purchaser can claim to have the debt scaled down on the basis that the mortgage debt for which he became liable is itself a renewal of an earlier debt in favour of the same creditor. The plaintiff-respondent has contended that by reason of S. 11, the costs of execution can be recovered in addition to the amount recoverable under the provisions of Ss. 8 and 9. We are of opinion that the provisions of S. 11, like those of S. 19, relate only to costs as decreed and do not cover costs of execution.

In the result the petition is allowed with costs as against the plaintiff-respondent and the application is remanded to the lower Court for fresh disposal in the light of this judgment.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HORWILL.

Pachaiammal and another .. *Appellants* (Plaintiffs)*

v.

The Hindustan Co-operative Insurance Society, Limited, Madras, an Incorporated Company carrying on business in Armenian Street, Madras, and others. *Respondents (Defendants).*

Pachaiammal v. Hindustan Co-operative Insurance Society, Ltd., Madras.

Letters Patent (Madras), cl. 12—Insurance company with head office at Calcutta having a branch office at Madras—Branch office merely for canvass-

* O. S. A. No. 13 of 1939. 16th August, 1940.

ing proposals and forwarding them to head office where the contracts were concluded—If company " carries on business" at Madras.

Pachai-ammal *v.* Hindustan Co-operative Insurance Society, Ltd., Madras.

An insurance company had its head office at Calcutta and a branch office at Madras which did everything in connection with the company's business, except entering into formal contracts of insurance and authorizing payments in respect thereof. The power to accept proposals for policies was reserved entirely to the head office which alone had power to issue policies and authorize payments in respect thereto. In a suit in Madras in respect of a policy effected by a person in the Chingleput District,

Held, it is settled by judicial decisions that a company 'carries on business' where it enters into contracts relating to its business, and not at places where it may have canvassers or agents for the purpose of obtaining offers of business and attending to matters ancillary thereto.

Case-law (English and Indian) discussed.

G. D. John v. *Sambamurthi Aiyar*, (1928) 56 M.L.J. 299, followed.

Decision of *Mockett, J.*, affirmed.

On appeal from the judgment of the Hon'ble Mr. Justice Mockett, dated 8th February, 1939 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 158 of 1936.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *K. S. Rajagopala Aiyangar* for Appellants.

T. R. Venkatarama Sastri, A. V. Seshayya and *S. Ramachandra Aiyar* for Respondents.

The Court delivered the following

JUDGMENT.—The question which falls for decision in this appeal is whether the respondent company, the Hindustan Co-operative Insurance Society, Limited, carries on business in Madras within the meaning of cl. 12 of the Letters Patent of this Court. The first appellant is the widow and the second appellant is the daughter of one C. T. Subramania Mudali, who died on the 31st May, 1926. The deceased lived at Little Conjeevaram in the Chingleput District and therefore outside the limits of this Court's original jurisdiction. He insured his life with the company for a sum of Rs. 5,000, payable at the age of sixty years. According to the pleadings the policy was issued on the 6th August, 1925 and the assured died on 31st May, 1926. The company repudiated liability on the ground that the assured had failed to disclose that he was suffering from certain diseases when he made the proposal. The suit was filed on the Original Side of this Court by the appel-

Pachaiammal v. Hindustan Co-operative Insurance Society, Ltd., Madras.

lants, who claimed that the Court had jurisdiction because the company was carrying on business in Madras. In its written statement the company raised the question of the Court's jurisdiction and its contention that the Court had no jurisdiction was upheld by Mockett, J., who accordingly dismissed the suit. The appeal is from that decision.

It is common ground that if the company cannot be deemed to be carrying on business in Madras the present suit cannot be maintained, because no part of the cause of action arose here. As a matter of fact the leave of the Court to file the suit was neither sought nor given. The head office of the company is in Calcutta and it has branch offices in many places in India. In Madras the company has a very large branch office. The Madras office employs about 400 canvassing agents and its establishment charges amount to Rs. 67,000 a year. The supervision of the canvassers employed in the Madras Presidency rests entirely with the Madras office. When a proposal is made in the Madras Presidency it is forwarded to the head office at Calcutta through the Madras office, which arranges for the medical examination of the person making the proposal. Although premia may be paid to the head office they are usually paid to the Madras office. The payments here made in respect of premia amount to over Rs. 6,00,000 a year. The Madras office, however, has no power to accept proposals for policies. That power is reserved entirely to the head office and it alone has power to issue policies and to authorize payments in respect of policies. Therefore so far as the Madras Presidency is concerned the position is this. The Madras office does everything in connection with the company's business, except entering into formal contracts of insurance and authorizing payments in respect thereof. The appellants claim that in these circumstances it is contrary to common sense to say that the company is not carrying on business in the City of Madras. When considered without regard to authority this assertion does not appear to be unreasonable, but what is meant by carrying on business has been the subject of much judicial discussion and it must now be regarded as settled that a company only carries on business where it enters into contracts relating to its business, not at places where it may have canvassers or agents for the purpose of obtaining offers of business and attending to matters ancillary to its business.

Pachai-ammal v. Hindustan Co-operative Insurance Society, Ltd. Madras.

The question of what is meant by carrying on business has frequently been discussed in England in cases relating to liability to income-tax, but it is not necessary to refer to all the cases which have been cited in arguments in this connection. It will be sufficient to refer to the well-known case of *Grainger & Son* v. *William Lane Gough*[1] and to two later decisions. In *Grainger & Son* v. *William Lane Gough*[1], the House of Lords held that a wine merchant in France who merely canvassed through agents for orders for the sale of his wines to customers in the United Kingdom, did not carry on business in the United Kingdom, as all contracts for the sale of wines and all deliveries to customers were made in France. In the course of his judgment in this case Lord Herschell said:

> "If all that a merchant does in any particular country is to solicit orders, I do not think he can reasonably be said to exercise or carry on his trade in that country. What is done there is only ancillary to the exercise of his trade in the country where he buys or makes, stores, and sells his goods."

In *De Beers Consolidated Mines, Limited* v. *Howe*[2], Lord Loreburn, L.C., observed that the true rule was that a company resided for purposes of income-tax where its real business was carried on, and the real business was carried on where the central management and control actually abided. In *Smidth & Co.* v. *Greenwood*[3], the Court of Appeal had to decide whether a Danish firm resident in Copenhagen which manufactured and dealt in cement-making machinery was liable to income-tax in the United Kingdom. The firm had an office in London which was in the charge of a qualified engineer, who was a whole time servant. He answered inquiries from prospective customers and advised them, but he had no power to enter into contracts. That power was reserved to the office in Copenhagen and it was from there that the goods were shipped to England. It was held that the firm exercised its trade in Denmark and was not resident in the United Kingdom. Atkin, L.J., put the case this way. The question was where did the operations take place from which the profits in substance arose, and relying on the observations of Lord Herschell and Lord Watson in *Grainger & Son* v. *William Lane Gough*[1], held the firm must be deemed to be carrying on business in Copenhagen. The branch office in Madras of the respondent company is very much in the same

1. (1896) A.C. 325.
2. (1906) A.C. 455.
3. (1921) 3 K.B. 583.

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position as the office of the Danish firm in London. Proposals are solicited, inquiries are answered and everything ancillary to the transaction of the business of the company is done here, but the contracts of insurance are not made here. They are made in Calcutta, and the entering into contracts of insurance is the real business of the company.

The learned Advocate-General has referred to certain decisions in England with regard to the jurisdiction of the Supreme Court. Residence in England gives the Court jurisdiction, and in *De Beers Consolidated Mines, Ltd.* v. *Howe*[1], Lord Loreburn, L.C., agreeing with the Master of the Rolls, observed that the residence of a company within the meaning of the Income-tax Acts was not necessarily the same thing as residence for the purpose of serving a writ. The learned Advocate-General has contended that the income-tax cases stand on a different footing from the cases relating to jurisdiction, but they show no divergence of opinion on the question of what is meant by "carrying on business." The learned Advocate-General has referred us to *La Compagnie Generale Trans-Atlantique* v. *Thomas Law & Co.*[2], *Leoneux Limon & Co.* v. *Hong Kong and Shanghai Banking Corporation*[3], *Dunlop Pneumatic Tyre Co., Ltd.* v. *Actien-Gesellchaft Fur Motor und Motorfahrzeugbau Vorm. Cudell & Co.*[4], *Saccharin Corporation, Ltd.* v. *Chemische Fabrik von Heyden Aktiengesellschaft*[5], *Actiesselskabet Dampskib "Hercules"* v. *Grand Trunk Pacific Railway Co.*[6] and *Okura & Co., Ltd.* v. *Forsbacka Jernverks Aktiebolag*[7]. When the facts are examined it will be found that in all these cases, except the last, the companies carried on business in England within the meaning of the income-tax cases. In the last mentioned case the company did not carry on business in England and consequently it was held that the service of a writ on its agents was not good service. It is not necessary to consider in what respect residence within the meaning of the English Income-tax Acts may differ from residence for the purpose of serving a writ, because all that the Court is concerned with in the present case is what is meant by

1. (1906) A.C. 455.
2. (1899) A.C. 431.
3. (1886) 33 Ch. D. 446.
4. (1902) 1 K.B. 342.
5. (1911) 2 K.B. 516.
6. (1912) 1 K.B. 222.
7. (1914) 1 K.B. 715.

"carrying on business" and both the income-tax cases and the jurisdiction cases are in agreement here.

There are decisions of our own Court which are also directly opposed to the appellants' case. In the *Municipal Council of Cocanada* v. *The 'Clan Line' Steamers, Ltd.*[1], a Bench of this Court held that a Shipping Company which earned money by carrying goods by sea and called regularly at Cocanada for the purpose of loading and unloading cargo was not carrying on business in Cocanada, because there was only a sub-agent there and all contracts with the shippers were entered into by the agent of the company in Madras. Therefore the company was not exercising any trade or carrying on business in Cocanada so as to be liable to be taxed under S. 53 of the Madras District Municipalities Act. Another Bench of this Court approved of and followed that decision in the *Municipal Council, Dindigul* v. *The Bombay Co., Ltd., Madras*[2]. It was there held that the expression "transacting business" is the same as "carrying on business". A case in which the facts were exactly similar to the facts in this case was *G. D. John* v. *Sambamurthi Aiyar*[3], where Kumaraswami Sastri, J., held that a life insurance company which had its head office in Bombay and a branch office in Madras with no power to enter into contracts, but merely to forward proposals and send moneys to the head office, was not carrying on business in Madras. This decision was followed by Lakshmana Rao, J., in C. S. No. 120 of 1937.

The English authorities are against the appellants and decisions of this Court are also against them. We agree with the learned Judge that the authorities are such that the Court is bound to hold that the respondent company is not carrying on business in Madras within the meaning of the Letters Patent. Consequently the appeal must be dismissed with costs. The appellants could have sued in the Subordinate Court if they had so chosen and it is regrettable that that course was not adopted, the authorities being so emphatically against them.

K.S. *Appeal dismissed.*

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1. (1918) 36 M.L.J. 226: I.L.R. 42 Mad. 455.
2. (1928) 56 M.L.J. 525: I.L.R. 52 Mad. 207.
3. (1928) 56 M.L.J. 299.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Narasimhalu Naidu .. *Appellant** (*Defendant-Respondent*)

v.

Pemmati Naga Reddy .. *Respondent* (*Plaintiff-Appellant*).

Narasimhalu Naidu *v.* Naga Reddy.

Madras Abkari Act (I of 1886), S. 24—Grant of licence for sale of toddy—Agreement of partnership after date of bid by licensee with another—Transfer whether permissible—Contract illegal.

Where before the grant of license but after a successful bid for a toddy shop, the appellant entered into an agreement with the respondent according to which the appellant should bear one half of the expenses of running the business and the sale proceeds were to be divided between the two every month, and the respondent filed a suit for accounts on the ground that the appellant had not paid his share of the profits, and the defence was that the agreement of partnership was illegal,

Held, that the facts of the case were covered by the Full Bench decision in *Ramanaidu* v. *Seetharamayya*, (1934) 68 M.L.J. 570: I.L.R. 58 Mad. 727 (F.B.) and that the formation of the partnership was a transfer of the privilege of the supply and sale of toddy which had been acquired on the bid being accepted and as such prohibited by the Abkari Act.

Appeal against the order of the Court of the Subordinate Judge of Chittoor dated 11th February, 1939 in A. S. No. 65 of 1938 (O. S. No. 370 of 1936, District Munsif Court, Sholinghur).

A. Viswanatha Aiyar and *A. Sundaresan* for Appellant.

S. A. Seshadri Aiyangar for Respondent.

The Court delivered the following

JUDGMENT.—The appellant in this appeal was the licensee of the toddy shop at Minnal for the year beginning 1st October, 1932. The auction at which defendant's bid was accepted was on 8th August, 1932. On the 31st August appellant entered into an agreement with the respondent which is embodied in Ex. A. This is a brief document called a 'partition' and apart from a penalty clause with which I am not now concerned, its terms are that appellant should bear one half of the expenses of running the business and that the sale proceeds should be divided between appellant and respondent every month. Respondent alleging that appellant had not paid him his half share of the profits, filed a suit for accounts. Appellant contended,

* A. A. O. No. 164 of 1939. 30th July. 1940.

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amongst other things, that the agreement was illegal and could not therefore be enforced. The District Munsif of Sholinghur accepted this contention, the Subordinate Judge of Chittoor rejected it and remanded the suit for disposal after taking accounts. Against that order of remand the present appeal has been filed.

The decision of the appeal depends upon the determination of the question whether the privilege of the supply and sale of toddy has or has not been transferred by the appellant. Such a transfer is admittedly prohibited by the terms of the licence. The learned Subordinate Judge holds that there is no such transfer on two grounds:

(i) because appellant and respondent did not enter into any partnership; and

(ii) because their agreement was anterior to the actual issue of the licence.

It is difficult to understand how the Subordinate Judge arrived at the first of these conclusions. The issues framed by the District Munsiff assume that the relation between appellant and respondent was a partnership. They certainly agreed in the words of the definition (Contract Act, S. 239) to 'combine their property, labour or skill' in the business and to 'share its profits'. I find that the agreement constituted appellant and respondent partners.

The question then arises whether by the constitution of this partnership there was any transfer of the privilege of selling toddy in this particular shop. The Subordinate Judge holds in effect that that privilege comes into existence only with the grant of the licence and therefore on the date of the agreement there was nothing to transfer. It is argued for the appellant on the other hand that the privilege was acquired as soon as appellant's bid was accepted. If that be so, it is clear that appellant has transferred that privilege to the partnership.

Though the issue was not perhaps raised in this direct form it seems to me that the decision of the Full Bench in *Ramanaidu* v. *Seetharamayya*[1], is conclusive on this point in favour of the appellant. That was a case of a partnership constituted after the date of the auction and before the date of the issue of licence. The judgment sets out these dates on

1. (1934) 68 M.L.J. 570: I.L.R. 58 Mad. 727 (F.B.).

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page 733 and states:

"The money was therefore lent to the partnership after the first defendant had become the successful bidder at the auction and was the person in whose name the licence would be issued."

Again on page 734 it is stated

"The partnership was formed after the first defendant had become the successful bidder. The licence would therefore be issued in his name".

These passages seem to me to show that the learned Judges in that case took it for granted that the issue of a licence was something following automatically upon the acceptance of a bid and that it is the acceptance of the bid which confers the privilege. The decision, I think, can be explained on no other ground. The learned Subordinate Judge, however, has preferred to rely upon two later decisions each that of a single Judge.

The first of these *Satyala Sanyasi* v. *Bhogavalli Sanyasi*[1], is obviously of no assistance to the respondent. That is a clear case of a partnership formed before the auction and in giving his decision Venkatasubba Rao, J., expressly distinguishes the Full Bench ruling by quoting the words:

"The partnership was formed after the first defendant had become the successful bidder."

The second case is reported in *Rangaswami Pillai* v. *Narayanaswami Naicken*[2], and this certainly does support the Subordinate Judge's judgment. But this is only because in my opinion, and with all respect to him, the learned Judge who decided it has not correctly stated what the Full Bench decided. In *Rangaswami Pillai* v. *Narayanaswami Naicken*[2], no dates are given, but it is stated that the partnership was formed 'at least a month before the actual grant of licence.' On p. 692 the learned Judge says:

"If a case is authority for what it decides the Full Bench decision is only an authority for the proposition that where a partnership is entered into subsequent to the grant of licence it would be illegal . . . . "

I am entirely unable to see how such an appreciation of the Full Bench decision can be formed when the Full Bench after setting out the dates, declares to be illegal a partnership formed *before* the grant of a licence.

I am accordingly of opinion that the facts of this case are covered by the Full Bench decision and that the formation of the partnership was a transfer.

1. (1935) 69 M.L.J. 490. 2. (1935) 70 M L J. 691.

Narasimhalu Naidu v. Naga Reddy.

One final argument is however urged for the respondent and that is that what was transferred was *not* the privilege of supply and sale of toddy because respondent's duties in the partnership were confined to the supervision of the procuring of toddy from the trees and had nothing to do with the actual process of selling it. I am unable to accept any such narrow interpretation of the words 'Privilege of supply and sale'. The privilege or right which was conferred upon appellant by the Government was that of carrying on the whole business of selling toddy, and in that business the procuring of toddy from trees is obviously a necessary part. The agreement contains no clause to the effect that respondent was prohibited from controlling in any way the operation and methods of sale —and from the legal point of view, appellant, his partner, is also his agent in the business which he personally carries on on behalf of the partnership. It is argued further that the *reasons* for the prohibition of transfer are in no way affected by the agreement in this case. It is not for me to speculate upon those reasons. It is enough to recognise that transfer is in fact prohibited, and to hold, as I do hold, that the partnership in this case amounts to such a transfer.

This appeal must therefore be allowed, and the decree of the District Munsif restored, and respondent's suit be dismissed with costs throughout.

Leave refused.

K. C. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HORWILL.

R. C. Bhide .. *Appellant** (*Applicant*)

v.

The Travancore National and Quilon Bank, Ltd., in liquidation by its Official Liquidator. *Respondents* (*Respondents*).

Bhide v. Travancore National & Quilon Bank, Ltd.

Companies Act (*VII of 1913 as amended in 1936*), *S. 230-A—Application for rescission of contract on the winding up of company—Maintainability.*

The appellant had entered into a contract with the bank for financing some contract work. After suspension of payment by the bank amounts under the contract were not advanced.

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* O. S. A. No. 46 of 1939. 22nd August, 1940.

Bhide v. Travancore National & Quilon Bank, Ltd.

Held (reversing the decision of Venkataramana Rao, J., directing the appellant to file a regular suit), that an application under S. 230-A of the Companies Act for rescinding the contract and other reliefs, would lie to the Court which wound up the company and no suit can be filed.

On appeal from the judgment and order of the Hon'ble Mr. Justice Venkataramana Rao dated the 1st day of September, 1939, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 1546 of 1939 in O. P. No. 158 of 1938.

R. Krishnaswami and *C. R. Pattabhi Rama Aiyar* for *C. V. Nilakantan* for Appellant.

C. Krishnaswami instructed by *King and Partridge* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant claims to be a creditor of the Travancore National and Quilon Bank, Ltd., which is now in liquidation under an order passed by this Court for its compulsory winding up. In February 1938 the appellant entered into an agreement with the bank under which the bank was to allow him on certain conditions to overdraw his account up to the sum of Rs. 75,000 for the purpose of financing a contract which he had entered into with the Travancore Government. The bank suspended payment on the 20th June, 1938. The petition for winding up was filed on the 21st June, 1938 and the order for compulsory winding up was passed on the 4th September, 1938. On the date of suspension of payment by the bank the appellant had overdrawn his account to the extent of Rs. 56,000. After suspension of payment he was, of course, not allowed to draw further on his account and he says that in consequence the bank has committed a breach of contract. He also alleges that the contract is a continuing one. On this basis he filed an application under S. 230-A of the Indian Companies Act for an order rescinding the contract and awarding him damages. Other reliefs were also asked for but the learned Judge refused to consider the application and directed the appellant to file a regular suit. The appellant contends that the learned Judge erred in so doing. In the first place he says that the learned Judge had no power to relegate him to a regular suit and in the second place that he should have heard the application and passed such order thereon as the circumstances demanded. If the appellant was not entitled to an order under

with the company, make an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise as the Court thinks just, and any damages payable under the order to any such person may be proved by him as a debt in the winding up."

Leach, C.J.

The discretion here given to the Court is a discretion to make an order rescinding the contract. Of course if a contract has already been rescinded an application under this section will not lie, and it is the case of the liquidators that this contract has been terminated by a notice calling in the amount due on the overdraft. It is said that the liquidators had a right to do this because the contract between the appellant and the bank provided that the amount was to be repayable on demand.

S. 229 of the Indian Companies Act states that in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and to debts provable as are in force under the law of insolvency and that all persons who in such a case would be entitled to prove for and receive dividends out of the assets of the company may come in under the winding up and make such claims against the company as they are entitled to by virtue of the section. Therefore the general law of insolvency applies to the winding up of an insolvent company. A creditor in insolvency cannot in ordinary circumstances bring a suit against the Official Assignee. If he claims to be a creditor he must file a proof of his debt with the Official Assignee. If his claim is rejected, then he has the right of asking the Judge sitting in insolvency to reverse the Official Assignee's decision. The Presidency Towns Insolvency Act contains a section similar to S. 230-A of the Indian Companies Act, namely, S. 65. When it is not a question of rescinding a contract and assessing damages under S. 65 a person who has contracted with an insolvent may file a proof of the damages suffered by him by virtue of the provisions of S. 46 of the Presidency Towns Insolvency Act.

The position then is this. The appellant was entitled to have his application heard. If the Court then came to the con-

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Kamalath-ammal v. Harihara Aiyar.

Cause Courts Act even without such transfer to deal with it, the decree passed by the Court is to be regarded as a decree passed by a Court exercising original civil jurisdiction and will be appealable. In such a case an appeal also lies from an order of the District Munsif refusing to set aside an *ex parte* decree passed by that Court. When the suit is taken up by the District Munsif's Court on its original side it becomes "a case open to appeal" within the meaning of O. 43, r. 1 (*d*), Civil Procedure Code. Observations of Stone, J., in *Ramaswami Muthirian* v. *Arunachalam Chettiar*, (1935) 69 M.L.J. 443, not followed.

Gopala Krishna Naicker v. *Madhavanayaki Ammal*, (1937) 1 M.L.J. 14: 44 L.W. 874, distinguished.

Bhagwati Pande v. *Badri Pande*, (1931) I.L.R. 54 All. 171 (F.B.); *Selvarayan Samson* v. *Amalorpavanadham*, (1927) 55 M.L.J. 262 and *Mahendra Chandra Datta Ray* v. *Basir Uddin*, I.L.R. (1937) 1 Cal. 135, referred to.

Petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act, praying that the High Court will be pleased to revise the decree of the District Court of East Tanjore at Negapatam in C.M.A. No. 4 of 1939 (I. A. No. 691 of 1938, District Munsif's Court, Tiruvarur, in S. C. S. No. 73 of 1937, Sub-Court, Tiruvarur).

S. Thyagaraja Aiyar and *T. N. Sundaresa Aiyar* for Petitioner.

T. L. Venkatarama Aiyar for Respondent.

The Court delivered the following

JUDGMENT.—This revision petition raises a question of jurisdiction on which there has been considerable divergence of judicial opinion.

The facts may be briefly stated. The petitioner obtained an *ex parte* decree in S. C. S. No. 73 of 1937 on the file of the Subordinate Judge's Court of Tiruvarur. The respondent who was the first defendant in the case applied to the Court to set aside the *ex parte* decree which was set aside on 31st August, 1937, on certain terms which are not material for the purpose of this petition. A revision petition was filed against that order and this Court set it aside and remitted the proceeding for disposal according to law. Before, however, it could be disposed of, the Court of the Subordinate Judge of Tiruvarur was abolished with effect from 1st November, 1938, and by the District Court's proceedings dated 29th October, 1938, the application to set aside the *ex parte* decree was ordered to be transferred from the Subordinate Judge's Court to the District Munsif's Court, Tiruvarur, and the transfer was accordingly made by the Subordinate Judge on

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Kamalathammal v. Harihara Aiyar.

ble by a Court of Small Causes shall not be tried by any other Court having jurisdiction within the local limits of the jurisdiction of the Court of Small Causes by which the suit is triable. S. 35 (1) provides that:

"Where a Court of Small Causes or a Court invested with the jurisdiction of a Court of Small Causes, has from any cause ceased to have jurisdiction with respect to any case, any proceeding in relation to the case, whether before or after decree, which, if the Court had not ceased to have jurisdiction, might have been had therein, may be had in the Court which, if the suit out of which the proceeding has arisen were about to be instituted, would have jurisdiction to try the suit."

It will be observed that this section does not say that the Court which is empowered thereunder to entertain proceedings owing to a Small Cause Court ceasing to have jurisdiction with reference to the case, should have jurisdiction to try the suit *as a Court of Small Causes.* It is sufficient if it has jurisdiction to try the suit. It is not disputed that the District Munsif's Court, Tiruvarur, would be the Court having jurisdiction to try the suit out of which these proceedings have arisen, if that suit were to be instituted at the time when the application to set aside the *ex parte* decree was transferred to it, as no other Court had jurisdiction to try it as a Court of Small Causes within the same local limits. The District Munsif's Court, however, was competent to entertain the suit only on its original side, owing to the limitation placed on its small cause powers. S. 24, Civil Procedure Code, empowers the High Court or the District Court to transfer any suit, appeal or other proceeding pending in any Court subordinate to it to any other Court subordinate to it and competent to try or dispose of the same and it is provided in sub-S. (4) that:

"The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes."

The section makes it clear—and it has also been decided (vide *Chockalingam* v. *Palaniappa*[1]) that a District Court may transfer any proceeding from a Court of Small Causes to a Court not having adequate small cause powers to deal with it as a Court of Small Causes. But, nevertheless, the latter Court shall be deemed to be a Court of Small Causes for the purposes of the suit transferred. While, therefore, both under S. 24, Civil Procedure Code and S. 35 of the Provincial Small

1. (1932) 63 M.L.J. 689: I.L.R. 55 Mad. 960.

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Kamalathammal v. Harihara Aiyar.

The petitioner argued broadly that the suit having been originally instituted as a small cause suit in a Court having jurisdiction to try it as such, the character of the suit could not be changed though it was subsequently dealt with under S. 35 by another Court as an original suit owing to want of adequate small cause powers. This contention is supported by the observations of Stone, J., in *Ramaswami Muthirian* v. *Arunachalam Chettiar*[1]. These observations were however largely *obiter*, as in that case the Court which finally disposed of the suit was competent to try it as a small cause suit and must be deemed to have dealt with it as such, as it could not have dealt with it otherwise having regard to S. 16 of the Act. No doubt the view adumbrated by the learned Judge, namely, the suit remains what it was when it began has the merit of simplicity but I am unable to find any warrant for it in the relevant statutory provisions. The learned Judge observes:

"Now it was urged that S. 35 of the Provincial Small Cause Courts Act operates to change in some way a small cause suit into an original suit. In my opinion, it does nothing of the sort. What S. 35 does is to invest, a Court which otherwise would be incompetent to hear any, or certain, small cause suits, with power to hear certain of such suits, namely, those pending in that Court at the time that Court's jurisdiction is changed."

This is not entirely correct, as S. 35 provides not only for the continuance of pending proceedings in the same Court when that Court's jurisdiction is changed, but also for their continuance in a different Court on the abolition of the original Court. Apart from this, if, as the learned Judge thinks, there is nothing in S. 35 to turn a small cause suit into an original suit, it is difficult to see anything in it to turn a Civil Court into a Court of Small Causes, so as to attract the application of S. 27 barring appeals in respect of a decree or order made by a Court of Small Causes. It is significant that S. 35 contains no provision similar to S. 24 (4), Civil Procedure Code. It seems to me that the rule laid down by the learned Judge would be an unwarranted extension of the latter provision to cases falling under S. 35, and is not supported by the authorities referred to by him. In the Full Bench case in *Kollipara Seethapathy* v. *Kantipati Subbayya*[2], it appears that the District Munsif who tried the suit on the original side had jurisdiction to try it as a small cause suit and it was held that the Court must be

1. (1935) 69 M.L.J. 443.
2. (1909) 20 M.L.J. 718: I.L.R. 33 Mad. 323 (F.B.).

Kamalath-ammal v. Harihara Aiyar.

regarded as having tried it as a Court of Small Causes. The case was not one under S. 35 and it does not support the wide proposition laid down by the learned Judge. The decision of Cornish, J., in *Gopalakrishna Naicker* v. *Madhavanayaki Ammal*[1], is also distinguishable on the same ground, namely, that the Court which ultimately tried the suit had jurisdiction to try it as a small cause suit. Though the learned Judge referred to the decision of Stone, J., in *Ramaswami Muthirian* v. *Arunachalam Chettiar*[2], it is evident that he did not rely upon the wide general observations contained in that case as he referred to the Full Bench decision in *Bhagwati Pande* v. *Badri Pande*[3], as not being inconsistent with *Ramaswami Muthirian* v. *Arunachalam Chettiar*[2]. This Full Bench held that a suit instituted as a small cause suit, if tried as an original suit in the circumstances mentioned in S. 35 when there was no other Judge in the local areas with adequate small cause powers to try it as a small cause suit, should be regarded as an original suit, and the decree passed in it would be appealable. I respectfully agree with this view and hold that S. 27 of the Provincial Small Cause Courts Act does not operate in the circumstances of the case to bar any appeal from the order of the District Munsif's Court, Tiruvarur, refusing to set aside the *ex parte* decree in question.

The question next arises whether an appeal lies from the said order under O. 43, r. (1) (*d*). The petitioner contends that the qualifying words "in a case open to appeal" should be understood as referring to the appealability of the decree which is sought to be set aside and as in this case, the decree which was originally passed by a Court of Small Causes, was not appealable, the order refusing to set it aside was also not appealable under this clause. This contention is supported by the decision of a single Judge reported in *Hira Lal* v. *Jhunni Lal*[4], but a Bench of this Court in *Selvarayan Samson* v. *Amalorpavanadham*[5] was not inclined to accept that restricted interpretation of those words. The question was whether an appeal lay against an order refusing to set aside an *ex parte* decree passed on an application filed under para. 20 of Sch. II of the Civil Procedure Code and registered as a suit. It was

1. (1937) 1 M.L.J. 14: 44 L.W. 874.
2. (1935) 69 M.L.J. 443.
3. (1931) I.L.R. 54 All. 171 (F.B.).
4. (1922) 20 A.L.J. 208.
5. (1927) 55 M.L.J. 262.

gued that no appeal lay as it was not a "case open to appeal" the decree passed was not in excess of the award and there-re not appealable. The learned Judges observed: | Kamalath-ammal v. Harihara Aiyar.

"It cannot be said that the words 'a case open to appeal' should be neces-:ily construed only with reference to the decree and to no other order."

They held that an appeal lay because there was an order ing the award and an appeal could have been filed against it. ıis view was approved and followed in *Mahendra Chandra ıtta Roy* v. *Basir Uddin*[1]. It seems to me that when the pro-eding was taken up by the District Munsif of Tiruvarur on e original side of his jurisdiction, it must be deemed thereafter be a case open to appeal, as, if the District Munsif had set ide the *ex parte* decree and passed a fresh decree after re-trial, ch decree would have been appealable, in the view I have ken on the first point. If the restricted interpretation contended r by the petitioner must be rejected as untenable, there seems be no reason why the general words should not be held to clude a case of the kind now before me.

For these reasons, I hold that the appeal to the Court low was competent and dismiss this Civil Revision Petition th costs.

B. V. V. *Petition dismissed.*

I THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE ATANJALI SASTRI.

ılani Goundan .. *Petitioner* (Petitioner-3rd Defendant)*

v.

uthuswami Goundan *alias* Avanashi Goundan. *Respondent (Respondent-Plaintiff).*

Palani Goundan v. Muthu-swami Goundan.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 11 and 19—Decree for ıts—Liability to be scaled down.

When there is a decree for costs, which forms part of a decree ıght to be scaled down under S. 19, the provisions of the decree ating to interest on costs should be amended by the process laid down in 8 and 9.

Petition under S. 115 of Act V of 1908, praying that the igh Court will be pleased to revise the order of the Court of the

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1. I.L.R. (1937) 1 Cal. 135.

* C. R. P. No. 1723 of 1938. 26th August, 1940.

Palani Goundan v. Muthuswami Goundan.

Subordinate Judge of Coimbatore, dated 15th November, 1938 and made in I. A. No. 1269 of 1938 in O. S. No. 118 of 1931.

S. Ramachandra Aiyar for *M. Krishna Bharathi* for Petitioner.

A. C. Sampath Aiyangar for Respondent.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—The petitioner was the third defendant in a mortgage suit and he applied under Ss. 8 and 19 of Madras Act IV of 1938 to scale down the decree. The learned Subordinate Judge has given a decree for the principal amount of the debt with interest at 6 per cent. from 1st October, 1937 and also for Rs. 1,855-3-0 for costs and has provided that this amount awarded for costs shall carry interest at six per cent. from the date of the decree which is 12th March, 1932. Petitioner seeks to revise this order by applying to the decree for costs the scaling down provisions of the Act so as to cancel the interest as on 1st October, 1937. There is nothing in the Act which excludes from the scaling down operation interest on costs. The principal sections dealing with costs are Ss. 11 and 19. S. 11 states that where a debt includes any sum decreed as costs by any Court or sums lawfully expended by a mortgagee or other person in order to preserve the property mortgaged, such sum or sums shall be recoverable in addition to the sum recoverable under the provisions of Ss. 8 and 9. We doubt whether this section was intended to safeguard not only costs but interest thereon, for the section couples costs with sums recoverable as having been lawfully expended by a mortgagee. Such sums would normally be added to the principal amount of the mortgage and would bear interest at the contract rate. If it had been the intention to exclude interest on such sums due to the mortgagee from the scaling down provisions, surely there would have been an express indication of the fact. We are constrained to the view that there was no intention to safeguard interest on sums payable to a mortgagee and if there was no such intention, similarly there can be no intention to exclude from the scaling down provisions interest on any sum decreed as costs.

The other main provision relating to costs is found in the proviso to S. 19 which is to the effect that payments in respect of a decree shall first be applied in payment of all costs as originally decreed to the creditor. It is contended that the

for was intended to be only in respect of the principal sum for costs or that this provision had any other object than to give effect to the provisions of S. 11. We are of opinion that when there is a decree for costs which forms part of a decree being scaled down under S. 19, the provisions of the decree relating to interest on costs should be amended by the process laid down in Ss. 8 and 9. In the present case, the result will be that the amount decreed for costs will carry interest at six per cent. per annum with effect from 1st October, 1937.

The revision petition is allowed with costs and the decretal order of the lower Court will be amended in the light of this judgment.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

S. K. Subba Naicker .. *Appellant* (1st Respondent-Plaintiff)*

v.

Savarimuthu Pillai and others .. *Respondents (Appellants-Petitioners-Defendants 14, 15, 21 and 22).*

Madras Agriculturists' Relief Act (IV of 1938), S. 23—Construction—Sale in execution—When can be set aside—Revisability of order.

In S. 23, the clause 'notwithstanding the sale has been confirmed' in no way affects the main provisions of the section and obviously cannot be used to introduce any *new* provisos, as for example, 'that a sale shall not have been followed by delivery of property'. The interpretation of S. 23 is an important matter coming within the scope of S. 115 of the Code of Civil Procedure though no first appeal lies against the District Munsif's order on the section.

Appeal against the order of the Court of the Subordinate Judge of Tuticorin, dated 16th February, 1939 and passed in A. S. No. 109 of 1938 preferred against the order of the Court of the District Munsif of Tuticorin, dated 2nd September, 1938 and passed in E. A. No. 356 of 1938 in O. S. No. 121 of 1935.

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* C. M. S. A. No. 44 of 1939. 30th August, 1940.

The Court delivered the following

JUDGMENT.—This appeal is entitled to s
und that no appeal lay to the lower appell
wanatha Aiyar v. *Narayanaswami Aiyar*[1], 1
rpretation of S. 23 of the Act (Agriculturis
IV of 1938) is an important matter com
e in my opinion, of S. 115, Civil Procedu
rdingly proceed to deal with the decision
trict Munsif in revision. The interpretation
ion admits of no doubt whatever. It enact

THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE .TANJALI SASTRI.

ırayanasami Reddy .. *Petitioner** (*Petitioner-Defendant*)

v.

:erasami Reddy and another .. *Respondents* (*Respondents-Plaintiffs Nos. 2 and 3*).

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (ii) Proviso and (5) .andholder—Several estates owned by single person—Aggregate peshkush :eeding Five Hundred Rupees—Right to apply for scaling down—Con-ıctive purchaser as landholder.

Narayana sami Reddy v. Veerasam Reddy

Where the petitioner was possessed of more than one estate and the al peshkush payable in respect of those estates exceeded Rs. 500 but no : of the estates paid as much as Rs. 500 by way of peshkush,

Held, that the petitioner was a landholder within the meaning of the dras Agriculturists Relief Act and that he was not entitled to relief 'ing regard to Proviso (D) of S. 3 (ii) of the Act.

A landholder under S. 3 (5) of Madras Act IV of 1938 is a person ııing the estate and includes every person entitled to collect the rents of estate. In respect of an estate purchased in the applicant's name in ırt auction he is either the owner or the person entitled to collect the ts.

Petition under S. 115 of Act V of 1908 praying that the gh Court will be pleased to revise the order of the Court of : District Munsif of Chingleput, dated 12th September, 1938 d made in E. A. No. 758 of 1938 in O. S. No. 26 of 1936.

T. R. Srinivasan for Petitioner.

A. Srirangachariar for Respondents.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—The question in this revision petition is .ether the petitioner is entitled to the benefits of an agricul-'ist, having regard to the terms of Proviso (D) to S. 3 (*ii*) Madras Act IV of 1938.

The petitioner was at the time of his application the land-lder of more than one estate. The total peshkush payable in pect of these estates exceeded Rs. 500, but no one of the ates paid so much as Rs. 500 peshkush. Petitioner contends :refore that he is not the landholder of an estate in respect of .ich estate a sum exceeding Rs. 500 is paid as peshkush. We : unable to accept this contention. Reading the definition ng with S. 3 (35) of the Madras General Clauses Act, we

* C. R. P. No. 1634 of 1938. 20th August, 1940.

Narayanasami Reddy v. Veerasami Reddy.

Wadsworth, J.

must hold that the definition is to be read as covering a landholder, of an estate or estates, in respect of which estate or estates a sum exceeding Rs. 500 is paid as peshkush. That is the view taken by the Court below.

It is also suggested that the petitioner comes within the definition of agriculturist because in one of the estates standing in his name he is not the real owner. We cannot accept this contention. A landholder under S. 3 (5) of the Madras Estates Land Act is a person owning an estate and includes every person entitled to collect the rents of the estate. There is no doubt that in respect of the estate which was purchased in Court auction in the name of the applicant, he was either the owner or the person entitled to collect the rents.

In the result therefore the Civil Revision Petition is dismissed with costs.

B. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Vasudevan Nambudri .. *Petitioner** (*Petitioner*)

v.

Raman Nambudri .. *Respondent* (*Respondent*).

Vasudevan Nambudri v. Raman Nambudri.

Madras Agriculturists' Relief Act (IV of 1938), S. 15—'Panayam purappad'—*Possessory mortgage—Surplus of income from property repayable to mortgagor—If rent—Applicability of S. 15.*

A possessory mortgage styled *Kaivasam panayam* provided that the mortgagee was to appropriate, out of an estimated yield of 490 paras of paddy 200 paras in lieu of interest on the mortgage money, pay 60 paras for assessment on the property and pay the balance of 230 paras to the mortgagor as '*panayam purappad*' in two instalments during the harvest season. In case of default in payment of '*panayam purappad*' provision was made for its application together with fixed interest in payment of the mortgage money calculating the value of paddy at current rate. A charge was provided on the standing crops for the arrears of *purappad* after default in payment. A purchaser of the mortgagee's rights in execution sale claimed the benefit of S. 15 of Act IV of 1938 depositing the *purappad* for 1937-38. *Held*, the amount which had to be paid as *panayam purappad* is not 'rent' in the proper sense of the term and does not fall within the mischief of S. 15 of Madras Act IV of 1938.

Petition under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the

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* C. R. P. No. 824 of 1939. 11th September, 1940.

District Munsif of Walluvanad dated 11th November, 1938 and made in O. P. No. 145 of 1938.

Vasudev Nambud v. Raman Nambud

P. Govinda Menon for Petitioner.

K. V. Gopalakrishna Nair for *D. H. Nambudripad* for Respondent.

The judgement of the Court was delivered by

Patanja Sastri, .

Patanjali Sastri, J.—The question that falls to be decided in this Civil Revision Petition is whether S. 15 of the Madras Agriculturists Relief Act is applicable to the surplus reserved as payable to the mortgagor under a possessory mortgage after appropriating part of the usufruct in lieu of interest due on the mortgage money. The petitioner's predecessor-in-interest held the lands here in question on a kanom granted by the respondent on May 25, 1911, for Rs. 1,137-2-4. In consideration of a further advance of Rs. 862-13-8 making up a total of Rs. 2,000 the respondent executed on August 17, 1925, the deed (Ex. A) styled 'Kaivasam panayam' (possessory mortgage) under which he mortgagee was to appropriate, out of an estimated yield of 490 paras of paddy, 200 paras in lieu of interest on he mortgage money, pay 60 paras for assessment on the property and then pay the balance of 230 paras to the respondent as *'panaya purappad'* in two instalments during the harvest season. The document further provided that if the *panaya purappad* and assessment were allowed to fall into arrears, such arrears together with interest at the rate fixed hould be applied in payment of the mortgage money, the value of paddy being calculated at the current market rate. There was also a provision charging such arrears of purappad, ssessment and interest on the crops standing on the properties, he improvements thereon, and also the mortgage money. The *anaya purappad* fell into arrears and the petitioner who urchased the mortgagee's rights in execution sale and obtained elivery of the properties claims the benefit of S. 15 of Madras ct IV of 1938, depositing the *purappad* due for the year 1937-938. It is not disputed that the petitioner is an agriculturist ithin the meaning of the Act and the only question is whether he *purappad* reserved under the *panayam* deed as payable to he *jenmi* is 'rent' within the meaning of the definition in . 3, cl. (iii) of the Act, so as to entitle the petitioner to he benefit of S. 15. The Court below held that it was not nd dismissed the petitioner's application. This revision etition is directed against that order.

;ued for the petitioner that the transaction embodi- though styled a possessory mortgage operates also far as the amount of paddy fixed as payable to the cerned, and stress is laid on the use of the word rent) in the document. The respondent, on the contends that Ex. A is nothing more than a ıortgage with an undertaking by the mortgagee to ıortgagor the estimated surplus profits after paying nt due on the land and appropriating a specified ıe usufruct in lieu of interest. The use of the word t is urged, is inconclusive and stress is laid on the ready referred to that if the *purappad* is allowed to ears, the same with interest shall be applied in the mortgage money. We are of opinion that the or the respondent is supported by the authorities s behalf and must prevail. In *Venkateswara* v. *tti*[1], there was a mortgage with possession for a ht years of a piece of ground with a warehouse ereon. The rent of the warehouse was fixed at per annum and it was agreed that out of this ›rtgagee should appropriate Rs. 14 towards the interest on the principal, and pay Rs. 2-12-0 as mortgagor. Sometime after the mortgage the vas destroyed by fire but not owing to any fault or ıe mortgagee who thereupon ceased to pay the rent the mortgagor. In a suit by the latter to recover ther with arrears of rent on the ground of default of the rent, the question arose whether there was a tenancy apart from the mortgage and the mortgagor to call upon the mortgagee to pay the rent reserved ding the destruction of the premises. The Court ere was no agreement to let the premises apart from ge and dismissed the suit as the plaintiff was not ı to redeem the mortgage. Innes, J., observed:

of the agreement was not a letting of the premises with a but a usufructuary mortgage of the premises with a certain of the income of it made payable to plaintiff."

swami Aiyar, J., put the matter thus:

ısaction between the parties is really a mortgage with posses- m of eight years. The contract to pay Rs. 2¾ per mensem is

1. (1879) I.L.R. 2 Mad. 187.

Vasudevan Nambudri v. Raman Nambudri.

Patanjali Sastri, J.

rather a subsidiary arrangement regarding the disposal of the surplus usufruct, or, in other words, an agreement to treat as money had and received for the plaintiff's use the surplus which, as mortgagee, the defendant must otherwise credit to the principal amount of the mortgage, than an independent engagement to pay rent as in an ordinary lease. I take the defendant to have really got into possession not as a tenant—not because he engaged to pay the plaintiff Rs. 2¼ a month for the use of the warehouse—but as a mortgagee, and because of the assignment of the usufruct in lieu of interest amounting to Rs. 14 per mensem."

The other decision cited for the respondent, *Immani Seshayya* v. *Dronamraju Lakshminarasimha Rao Pantulu*[1] takes more or less the same view of a transaction of the kind now before us. Both the learned Judges held that it was only a possessory mortgage and not a lease.

In view of these decisions, we hold that the amount which the petitioner was bound to pay under Ex. A is not 'rent' in the proper sense of the term, and does not fall within the mischief of S. 15 of the Madras Agriculturists Relief Act. The Civil Revision Petition is dismissed with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE MOCKETT.

Beggam Appalanarasayya .. *Prisoner* (Appellant-Accused No. 1).*

Appalanarasayya, *In re.*

Evidence Act (I of 1872), S. 32—Motive for murder—Statements made by deceased to his relations—Admissibility—Criminal Procedure Code (V of 1898), Ss. 162 and 164—Statement by accused to Police—Admissibility—Difference between English and Indian Law—Statement made to Magistrate.

Where the statements of the deceased made to his wife and to his wife's sister merely suggested that the deceased suspected the accused of having betrayed his wife's sister in a civil case, and they were in no way associated with the actual murder,

Held, that the statements were not admissible in evidence to prove the motive of the accused, as they were not statements made by the deceased as to the cause of his death or to circumstances of the transaction which resulted in his death.

Pakala Narayanaswami v. *The King-Emperor*, (1939) 1 M.L.J. 756: L. R. 66 I.A. 66: I.L.R. 18 Pat. 234 applied.

In view of the provisions of S. 162, Criminal Procedure Code, it is not possible for an arrested person to make a statement to the police which can be used at the trial. Evidence of what an accused person said when arrested,—often so valuable to innocent accused—according to English experience,

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1. (1929) 57 M.L.J. 800.

* R. T. No. 89 of 1940. (Crl. App. No. 353 of 1940.) 30th July, 1940.

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Pat. 234 (P. C.)

Lord Atkin (at page 763) points out that:

"The circumstances must be circumstances of the transaction; general expressions indicating fear or suspicion whether of a particular individual or otherwise and not directly related to the occasion of death will not be admissible."

In this appeal the deceased's statements provide nothing more than grounds for supporting that the deceased suspected the accused of having betrayed his wife's sister in a civil case. They in no way are to be associated with the actual murder.

Evidence of these statements should have been excluded.

There was thus no admissible evidence of motive on the record. On the other hand as we have indicated there was evidence showing the contrary and friendship between two persons is not consistent with a desire on the part of one to murder the other in the absence of evidence to the contrary. On the day in question it is in our view beyond dispute that the leceased and the appellant set out together to go to Mentada village. We think they were going out together on a drinking bout. This is probablised by the evidence of the deceased's wife and in fact there is the evidence of P. Ws. 5 and 6 that at about dusk on the evening in question the appellant and the leceased were drinking together in Mentada. P. W. 4 also proves that the deceased and the appellant went together because he lent a stick to the deceased and pieces of that stick were found at the place of the murder. It is convenient to pause here and say that at about 3 P. M. on the 3rd August, that is, the next day after these two went to Mentada together, P.W. 21 found in his field which is marked on the plan the body of a man. He at once sent a report Ex. H to the Village Munsif. The body was identified as that of Thalada Ramawami and it is beyond doubt that he had been murdered. The medical officer P.W. 1 in his certificate Ex. A describes the injuries. The skull was fractured in no less than four places. In all there were ten injuries, cuts and bruises; and all the injuries, says the doctor, could have been caused by blows with a stick and in fact portions of a broken stick were found upon the scene.

So the position is that the appellant and the deceased were together in Mentada on that evening at about dusk. The next evidence of their movements is given by P.Ws. 14, 15 and 16 and their evidence can be summarised very shortly. They were proceeding in a jutka from Gajapatinagaram railway station to

Mentada. There were three people by the side of the road near the place where the body was found. A little beyond, that is to say, on the Mentada side P.W. 14 saw the appellant and the deceased. P.Ws. 15 and 16 saw the deceased and another man the difference being that P.W. 14 identifies the appellant, the other two are unable to do so. P.W. 15 says that they were reeling along the road as if they were drunk which is entirely consistent with the information which P.Ws. 5 and 6 have given about what they were doing in Mentada. So P.Ws. 14 to 16 prove that at a spot they passed three unknown men whom they later identified as the 2nd, 3rd and 4th accused waiting by the side of the road and beyond them were coming towards the village the deceased and the appellant and we have no doubt that they were both under the influence of drink. The only other evidence of what happened on the road is given by P.W. 18. With regard to P.W. 18, evidence has been led by the defence and his cross-examination casts some doubt on whether he was there at all. However the probabilities are that he was there. But his evidence amounts to no more than this. He says that on the road between Chittavalasa and Mentada he saw accused 1, 2 and 3—he does not mention the 4th accused—and Ramaswami fighting and abusing each other. He goes on:

"I did not see who beat whom. They were all fighting together. I ran away as I was afraid."

Ten days later only he says did he hear of Ramaswamy's death and four days later he was examined by the Sub-Inspector. He was able to identify accused 2 and 3. And that is the evidence led by the Crown.

The appellant followed a course which might well be followed more often. It must be remembered that in view of the provisions of S. 162, Criminal Procedure Code, it is not possible for an arrested person to make a statement to the police which can be used in evidence at the trial. Evidence of what an accused person said when arrested—often so valuable to innocent accused—according to English experience is denied to the defence under the Indian procedure. But an accused person can—if he knows it—make a statement of his version of the case before a magistrate and this is what the appellant at once did. He made a statement under S. 164, Criminal Procedure Code, giving his version of what happened and his story is consistent with the case for the prosecution. He says that on

the day in question he proceeded to Mentada with the deceased and that on their way home he saw Muppadi Krishnamurti who is P. W. 14 thereby bearing out what that witness said and P. W. 14 was in his jutka as he had stated According to the appellant the deceased said that he did not wish to be seen in the state in which they were, that is, under the influence of drink and they stepped aside from the path. A little further the three other accused Bugatha Sanyasi, Kalla Ramaswami and Divakalla Ramudu were waiting and according to him they set upon Ramaswami, put a rope round his neck and beat him with sticks and a pen-knife with a folding blade. He says that the pala stick to which reference has been made and which had been lent by P. W. 4 was broken. According to the appellant these three men threatened him not to say 'anywhere' which presumably means anything to anyone. Taking this evidence at its highest, we only have a statement by P. W. 18 that a melee took place on that road that night. There is nothing to show that the appellant was doing anything hostile to the deceased. Indeed the probabilities are from the fact that they had been out for the evening together under circumstances that made for friendship that he would have been on the deceased's side rather than against him. It is not impossible that having seen this man attacked in this manner and living as he did in the village with the three persons concerned he might have been afraid that he might meet a similar fate and quite wrongly kept silence. We are not however dealing with what was the proper procedure for a village officer under the circumstances but with the question whether he has been proved to be guilty of murder. The learned Sessions Judge has arrived at the conclusion that he is guilty for the following reasons. Holding rightly that Ex. C was admissible (*vide* the observations of Lord Atkin at page 767 of the report to which we have referred) the learned Sessions Judge referring to Ex. C says:

"It does prove beyond doubt that not only was the first accused with the deceased when the deceased was last seen near the place where he was murdered, but that he continued to be with him until he had been beaten to death. The first accused is a karnam and a man in position of authority. It cannot be believed that he was taken by surprise, stood by horrified and then kept quiet because he was afraid of the threats of his assailants."

(With regard to this it must be remembered there was evidence that he was very much under the influence of drink.)

"The only conclusion that can be drawn is that he either took part in the beating himself or was a party to it. I am of opinion, therefore, that the prosecution has proved its case against the first accused."

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE GENTLE.

In the matter of the Indian Companies Act (VII of 1913)
and
In the matter of the Canara Banking Corporation, Limited.

Madhava Ramachandra Kamath, son of Ankola Ramachandra Krishna Kamath, residing at Tenkpet, Udipi Town, South Canara District ... *Petitioner**

v.

The Canara Banking Corporation, Limited, a Banking Company incorporated under Act VI of 1882 on the 28th May, 1906, having its registered office at Udipi, South Canara District. ... *Respondent.*

Madhava Ramachandra Kamath *v.* Canara Banking Corporation Ltd.

Indian Companies Act (VII of 1913), S. 34 and S. 38 (a)—Expulsion of member—Name from the membership register struck off—Whether expulsion sufficient to empower a transfer of shares—Articles amended without notice to shareholder—Retention of membership in spite of special resolution—Striking out a name if omission from register within meaning of S. 38 (a).

The striking out of the name of a shareholder in the register of members amounts to an omission of his name within the meaning of S. 38 (1) of the Indian Companies Act.

Where a shareholder was expelled by a special resolution of the general body of a Banking Corporation under the Articles of Association for wrongful conduct, but since there could be no forfeiture of shares under the circumstances, the Articles of the company had to be amended and were in fact altered subsequently without notice to the expelled shareholder, by which the company could in effect force an expelled member to sell his shares to any person at any price fixed under the Articles,

Held, that on the date of expulsion there was no power in the Directors of the company to transfer shares in the absence of an instrument of transfer, and to do it was clearly *ultra vires* of S. 34 of the Companies Act.

Again, the alteration of Articles after the date of the resolution for expelling the member could not in any way be binding on him. As the powers of the company at the date when the petitioner was purported to be expelled did not empower it to deprive him of his share and while he remained a shareholder he could also remain a member, it followed that the resolution of expulsion had no effect. Therefore the sale of his share in law could not be carried out. Further he could not be compelled under any of the provisions of the Articles to transfer his share to any other person. The petitioner would be placed in the position in which he had always been—a shareholder of the company.

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* O. P. No. 109 of 1940. 26th July, 1940.

Madhava Ramachandra Kamath v. Canara Banking Corporation, Ltd.

K. Srinivasa Rao for Petitioner.

K. P. Sarvothama Rao for Respondent.

The Court delivered the following

JUDGMENT.—This is a petition by a shareholder of the Canara Banking Corporation, Ltd., under S. 38 (1) of the Companies Act. This section, so far as it is material, provides that if the name of any person is without sufficient cause entered in or omitted from the register of members of a company, the person aggrieved may apply to the Court for rectification of the register. The petitioner is the holder of one share only and the company at a general meeting purported to act under Art. 173 of the Articles of Association and expelled him from membership. This Article provides to the effect that if any shareholder unjustly or unlawfully has recourse to law in any matter whatever connected with the Corporation, he shall render himself liable to expulsion and on such expulsion he shall never again be admitted into the Corporation.

The petitioner preferred a complaint to the District Magistrate of South Canara seeking sanction under S. 196-A of the Code of Criminal Procedure to prosecute some Directors and ex-Directors of the company for conspiracy in the preparation of a balance sheet or balance sheets of the company. The learned Magistrate refused to grant the process sought and in the course of his order he gave the following reasons for his decision. The respondents (Directors) were all highly respectable gentlemen; the balance sheet has been accorded sanction at a general body meeting of the shareholders; petitions to the Registrar of Joint Stock Companies and to Government to initiate an enquiry into the affairs of the company had been rejected, and he had been forced to think that the petitioner was working against the Bank out of sheer malice. He added that from the attitude of the Registrar and the Government it was apparent that there was no reason to think that the respondents in the proceedings before the Magistrate had any reason whatever to conspire to cheat the shareholders. It is said and not disputed that a copy of the order of the Magistrate was circulated to all the shareholders of the company. A meeting was called on the 20th July, 1939. The petitioner attended and objected to the meeting continuing, nevertheless a resolution was passed that, in view of his conduct in filing an application before the District Magistrate of South Canara seeking sanction

Madhava Rama-chandra Kamath v. Canara Banking Corporation, Ltd.

to prosecute some of the Directors and ex-Directors, thereby acting contrary to Art. 173 as seen from the order of the District Magistrate, he be expelled from the membership of the Corporation. On the date when this resolution was passed the petitioner was undoubtedly a member of the company. There was no power for the company to deal with the share or shares which were held by a person whom the company at a general meeting purported to expel from membership. The Articles provide for forfeiture of shares by members in certain contingencies but these contingencies do not include purported expulsion of a member under Art. 173. Ordinarily, a company is unable to sell its own shares but when shares are forfeited it can resell or dispose of them as provided in the Articles.

Subsequent to the passing of the resolution of expulsion the company has altered its Articles by making an addition to Art. 173. Notice of the meeting at which these Articles were changed was not given to the petitioner. Under the additional Articles provision is made by which the company can, in effect, force an expelled member to sell his shares to any person at a price which is fixed under the provisions of the Articles and the company is enabled to authorise a Director to sign the necessary transfer instrument on behalf of such transferor if he fails to do so. S. 34 (3) of the Companies Act provides that it shall not be lawful to register a transfer of shares unless a proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company. There are of course occasions when the transferor does not or cannot sign, such as when a Court sale has been held. In that event O. 21, r. 80 of the Code of Civil Procedure provides for the Judge or an officer of Court directed by him signing the transfer instrument. Art. 52 (3) of the Companies Articles, it would seem, purports to confer upon the Directors of the company power to transfer shares in spite of the absence of an instrument of transfer. It says:

"Unless sanctioned by the Board of Directors, it shall not be lawful for the Corporation to register a transfer of shares unless a proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the Corporation."

If this Article does purport to confer power on the Directors to transfer shares in the absence of an instrument of transfer, it is clearly *ultra vires* of S. 34 of the Companies Act.

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Madhava Rama-chandra Kamath v. Canara Banking Corporation Ltd.

remedy only when the name of any person is without sufficient cause entered in or omitted from the register of members. The name of the petitioner was included in the register of members and was struck out when his expulsion took place or when the company purported to force him to sell his share to some other person. Some two months after the resolution expelling him, the company wrote to the petitioner, on the 23rd October, 1939, that his share had that day been transferred to Mr. V. Achutha Srinivasa Kamath, and a cheque for Rs. 70 was sent to him as the price for such share. The petitioner wrote objecting to the action of the company and said that he did not propose to cash the cheque and he has not done so. This action by the company took place after the addition to the Articles had been made to which I have referred earlier. The striking out of the name of the petitioner from the register containing the names of the members apparently would have taken place at or about the date when the company wrote to the petitioner that his share had been sold to the transferee. Learned Counsel on behalf of the company contended that the word 'omitted' in S. 38 (1) (*a*) does not include the striking out of the name of a member which had been previously in the register. When the name of a person, who is a member of the company, has been struck out, the effect is the same as if his name had never been entered. The striking out of his name in the register thus causes his name to be omitted from it and I hold that, when a person's name has been struck out or expunged, then it is an omission of his name within the meaning of the section.

A further point was taken on behalf of the company by learned counsel that the present petition is abortive inasmuch as the name of the transferee has not been added as a party. In my view there has been no valid or legal transfer of the share which the petitioner held in the company to any transferee and he is still the holder of the share; therefore his name must be included in the list of members. The petitioner still holds the certificate recording that he is the holder of one share in the company and I direct that there be a rectification of the register and the company will add to the names of members that of the petitioner. The relief which I am granting in this petition is to place the petitioner in the position in which he has always been—a shareholder of the company. The petitioner is entitled to his costs against the company.

Madhava Ramachandra Kamath *v.* Canara Banking Corporation Ltd.

Learned counsel for the petitioner has asked me to fix the amount of costs. He has spent Rs. 40 as out of pockets. I fix the total costs including the out of pocket expenses at Rs. 150.

K. C. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE ABDUR RAHMAN.

T. S. P. L. S. Thinnappa Chettiar, by his authorised agent, A. S. Arunachalam Chettiar — *Appellant* (Plaintiff)*

v.

Putti Krishna Rao, minor by guardian and mother Padmavati Ammal and others. — *Respondents (Defendants 1 to 5, 7 to 9 and 6th Defendant's L. Rs.).*

Thinnappa Chettiar *v.* Krishna Rao.

Limitation Act (IX of 1908), S. 20—Mortgagor selling property not comprised in mortgage directing vendee to pay and discharge mortgage—Payments and endorsements by such vendee—If sufficient to keep alive the debt—Ratification by mortgagor after selling away mortgaged properties and after debt had become barred—Effect—Indian Contract Act, S. 200—Applicability.

A mortgagor sold property not included in the mortgage and directed his vendee to pay and discharge the mortgage. The vendee, in pursuance of the direction made certain payments the last of which was within twelve years from the last payment made by the mortgagor. The mortgagor had alienated the mortgaged properties also to strangers when he made the last payment. In a suit on the mortgage,

Held, a direction or power to discharge a debt does not make the donee of the power—the vendee—an agent duly authorised to make a part payment so as to keep alive the debt. *Alagappa Chettiar* v. *Subramania Pandia Thevar*, (1914) 26 M.L.J. 509, followed. Apart from any question of agency the vendee would not be a "person liable to pay the debt" within the meaning of S. 20 of the Limitation Act. [*Bradshaw* v. *Widdrington*, (1902) 2 Ch. 430, held not applicable to construction of Indian Limitation Act, S. 20.] Case-law discussed.

Payment and endorsement by the mortgagor subsequent to those by the vendee, though a ratification of the acts of the vendee, being on a date when the right to enforce the mortgage was barred by limitation is not binding on the mortgagor's sons and the alienees of the mortgaged property. The provisions of the Indian Contract Act relating to agency are not meant to be exhaustive and S. 200 and other provisions relating to ratification do not affect the general principle of the law of agency that the general rule as

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* Appeal No. 148 of 1937 and C. M. P. Nos. 4852 and 4853 of 1939. — 2nd November, 1939.

Thinnappa Chettiar v. Krishna Rao.

to ratification would not apply when it would affect the rights of third parties.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly dated 11th January, 1937 and made in O. S. No. 65 of 1936, etc.

B. Sitarama Rao, T. K. Sundararaman and *C. S. Rama Rao Saheb* for Appellant.

K. Aravamuda Aiyangar, V. C. Viraraghavan, T. V. Muthukrishna Aiyar and *P. J. Kuppanna Rao* for Respondents.

The judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.—The question for decision in this appeal is whether the plaintiff's suit is barred by limitation. The relevant facts are few and not in dispute. One Jaya Rao since deceased executed a deed of mortgage to one Sundaram Aiyar on 18th June, 1919. In execution of a decree against the said Sundaram Aiyar the plaintiff on 10th April, 1935, purchased the rights under the said mortgage-deed. After giving credit to certain payments received towards interest and principal, the plaintiff sues for recovery of the balance due thereunder. The amount due on the date of the plaint was Rs. 9,432. The plaintiff waived Rs. 432 and claimed only Rs. 9,000. Defendants 1 to 3 are the sons of the mortgagor Jaya Rao; the fourth defendant is a divided brother of Jaya Rao and defendants 5 to 8 are alienees from Jaya Rao of some of the properties claiming under alienations subsequent to the date of the mortgage. The main defence was one of limitation. To save limitation the plaintiff relied on the five following payments endorsed on the deed of mortgage: Rs. 400 on 15th July, 1922 (Ex. A-2); Rs. 700 on 20th May, 1923 (Ex. A-3); Rs. 150 on 4th June, 1923 (Ex. A-4); Rs. 125 on 20th April, 1924 (Ex. A-5); and Rs. 5 on 16th December, 1935 (Ex. A-6). The first four payments were made and signed by the fourth defendant and the last payment was by Jaya Rao and signed by him. The case for the plaintiff is that three years after the date of the said mortgage Jaya Rao sold certain property belonging to him but not comprised in the deed of mortgage to the fourth defendant and another by a sale deed dated 23rd June, 1922 (Ex. C) and directed him to pay and discharge the said mortgage, that the payments were made and signed by the fourth defendant in pursuance of Ex. C, that the last payment made by Jaya Rao was within twelve years of the last

Thinnappa Chettiar v. Krishna Rao.

Venkataramana Rao, J.

person deriving title from him and who could have been sued by the mortgagee; fourth defendant would not come under any of these categories; he was at best an agent empowered to discharge the debt and not to keep it alive by a part payment; the alleged ratification is not valid as it would operate to the prejudice of his clients. Before dealing with these contentions, it is necessary to find the relationship of the vendees under Ex. C and therefore of the fourth defendant to Jaya Rao, the mortgagor. Ex. C, so far as is material for the purpose of the present discussion, runs thus:

"Deed of absolute sale executed, on 9th Ani of Thunthubi, corresponding to the 23rd June, 1922, to you, namely, (1) Putti K. Sethu Rao and (2) Putti Dasu Rao . . . . by Putti Jaya Rao . . . . . . the undermentioned property has, this day, been sold to you and the amount received is Rs. 4,000. Particulars of receipt of this sum of rupees four thousand: As I have directed you to pay and discharge the amount of principal and interest due under the mortgage deed for Rs. 3,000 executed by me in favour of Sundaram Aiyar, residing at Karur, amount paid to me is Rs. 3,400. As I have directed you to pay and discharge the amount due by me to the Co-operative Credit Bank at Andankoil, amount paid to me is Rs. 600. As in all Rupees four thousand was paid to me as aforesaid, you shall yourselves hold and enjoy the undermentioned nanja lands from this date hereditarily from son to grandson and so on in succession with powers of alienation by way of gift, exchange, sale."

The substance of the transaction as disclosed by the language of the document is that from and out of the consideration money of Rs. 4,000 the vendees were directed to discharge two debts, namely, a sum of Rs. 3,400 in discharge of the suit mortgage which was then the amount due and payable thereunder and Rs. 600 in discharge of a debt due to the Co-operative Credit Bank at Andankoil. *Prima facie* it is a mandate by the vendor to the vendees to put an end to the said debts. The relationship is therefore one of agency. The question is, does it confer a power to keep alive the debt? Under S. 20 of the Limitation Act, the agent whose payment would keep alive the debt must be one who was duly authorised to make the part payment of interest or principal. Ex. C confers only a power to discharge and extinguish the debt. A power to extinguish the debt would not, in our opinion, carry with it a power to keep alive the debt. Our High Court has consistently taken the view that a direction or power to discharge a debt does not make the donee of the power an agent authorised to make a part payment so as to keep alive the debt. (Vide *Chidambaram Pillai* v.

Thinnappa Chettiar v. Krishna Rao.

Venkataramana Rao, J.

Veerappa Chettiar[1].) In *Alagappa Chettiar* v. *Subramania Pandia Thevan*[2], the facts were as follows. Defendants 1 and 2 in that case executed a deed of mortgage in favour of the third defendant therein for Rs. 26,000. It was alleged in the deed of mortgage that from and out of Rs. 26,000 which formed the consideration of the mortgage a sum of Rs. 10,920 was stated to have been received as follows:—

"Defendants 1 and 2 have executed two registered bonds on 14th December, 1896 and 17th March, 1897, for Rs. 2,000 and Rs. 4,000 respectively in favour of the plaintiff's assignees. The sum received by us in the matter of our having given you permission to pay off and obtain return of the same is Rs. 10,920."

In pursuance of this deed, the mortgagee paid a sum of Rs. 4,170 towards interest on the bond dated 17th March, 1897. The question was whether this payment of interest by the said third defendant would keep alive the debt due under the said bond. Wallis and Sadasiva Aiyar, JJ., held that it would not, observing that though the mortgagee had authority to pay off the debt in full he had no authority to make a part payment of interest as such so as to bring the case within S. 20 of the Indian Limitation Act. The principle of this case was applied consistently in subsequent decisions: *Balaguruswami Naicken* v. *Guruswami Naicken*[3] (Devadoss and Wallace, JJ.); *Ramaswami* v. *Kasinatha*[4] (Kumaraswami Sastri and Curgenven, JJ.); and *Subbakka* v. *Venkata Setti*[5], (Ramesam, J.). If the principle of these decisions is to be followed, there can be no question that the part payments made by the fourth defendant would not be payments by an agent duly authorised within the meaning of S. 20 of the Limitation Act.

But Mr. Sitarama Rao contends that apart from any doctrine of agency the fourth defendant having under Ex. C become liable to pay the mortgage debt is a person liable to pay the debt within the meaning of S. 20 of the Limitation Act. He very strongly relied on *Bradshaw* v. *Widdrington*,[6] in support of his contention and particularly the observations of Buckley, J., in that case with which we shall presently deal. He also relied on certain passages from English text-writers who referred to *Bradshaw* v. *Widdrington*[6] as establishing the proposition he is contending for. (*Vide* Banning on Limitation, page 168; Halsbury's Laws of England, Vol. 19, pages 94 and

1. (1917) 43 I.C. 865 at 869.
2. (1914) 26 M.L.J. 509.
3. (1924) 48 M.L.J. 506.
4. A.I.R. 1928 Mad. 226.
5. (1932) M.W.N. 1193.
6. (1902) 2 Ch. 430.

Thinnappa Chettiar v. Krishna Rao
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Venkataramana Rao, J.

95.) We may point out at once that the case in *Bradshaw* v. *Widdrington*,[1] was noticed by their Lordships of the Judicial Committee in *National Bank of Upper India, Ltd.* v. *Bansidhar*[2] where their Lordships had to deal with a question of part payment on facts almost similar to the said case. They did not apply the principle enunciated by Buckley, J., because they considered it unnecessary in the view they took of the facts, namely, the person who made the payments was the duly authorized agent of the debtor to make the payment. They however remarked thus at page 9 with reference to the English case of *Bradshaw* v. *Widdrington*[1] and other decisions relied upon:

"Their Lordships do not think it necessary to discuss the applicability of these cases to the construction of the Indian Act . . . . whether the English cases to which reference has been made above would engraft a larger principle upon the section may possibly have to be considered on some future occasion. Their Lordships note that Farwell, L.J., in Re *Lacey*[3] appeared to regard *Bradshaw* v. *Widdrington*[1] as one only of implied agency."

Their Lordships thus left the question open.

Before considering the applicability of *Bradshaw* v. *Widdrington*[1] to the construction of S. 20 of the Indian Limitation Act, we think it necessary to examine whether there was any warrant even in English Law in support of the said principle. A reference to the history of the English legislation relating to part payments may not be out of place in this connection because until 1902 as noticed by Buckley, J., himself no case has gone the length of enunciating the principle in the way he has done. Under early English Law the only statute of limitation was that relating to simple contract debts, 21 Jac. 1, c. 16. Under that statute the remedy to recover a debt became barred after six years. There was no provision relating to acknowledgment or part payment of a debt. The decisions evolved a rule that if there was acknowledgment of a debt which amounted to a fresh promise to pay the debt, a cause of action could be laid thereon, that is, not on the original debt but on the new promise to pay. It was generally assumed that the acknowledgment of a debt implied a promise to pay and from the part payment of interest, an acknowledgment was implied thus implying a fresh promise to pay. Lord Tenterden's Act, 9 Geo. IV, c. 14, modified the effect of the decisions relating to acknowledgments by providing that acknowledgments of a debt must be in writing signed by the party charged but left the question of part payments un-

1. (1902) 2 Ch. 430. 2. (1929) L R. 57 I.A. 1 (P.C.).
3. (1907) 1 Ch. 330.

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touched. As the measure of the creditor's right is thus based on the new promise, it evidently followed that the acknowledgment or part payment must be by a person liable under the contract to pay the debt or his real or personal representative apart from the doctrine of agency. (*Vide* Lightwood on Time Limit, page 341.) There was no special statute of limitation relating to specialty debts or debts charged upon land though Courts of Law and Equity established twenty years as the period after which they would presume payment. It was only in 1833, two statutes were passed, namely, 3 and 4 William IV, c. 27, which by Ss. 40 and 42 provided for the recovery of sums of money charged upon land and arrears of interest in respect thereof and 3 and 4 William IV, c. 42 which provided for the recovery of specialty debts. The relevant provisions of these statutes in so far as they have got a bearing on the question in issue run thus:

3 and 4 William IV, c. 27:

"40. After the said 31st day of December, 1833, no action or suit, or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien or otherwise charged upon or payable out of any land—but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same unless in the meantime some part of the principal money or some interest thereon shall have been paid or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable or his agent to the person entitled thereto or his agent . . . . . ."

"42. After the said 31st day of December, 1833, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land, shall be recovered by any distress, action or suit but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent . . . . . ."

3 and 4 William IV, c. 42:

"3. All actions of covenant or debt upon any bond or other specialty . . . . . . shall be commenced and sued within the time and limitation hereinafter expressed and not after . . . . . ."

"5. Provided always, that if any acknowledgment shall have been made either by writing signed by the party liable by virtue of such indenture, specialty or recognisance, or his agent, or by part payment, or part satisfaction on account of any principal or interest being then due thereon . . . . . . within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid."

It will be seen that the acknowledgments and part payments are put on the same footing and no difference is made between the part payment of principal or interest in regard to its legal

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effect. The relevant expressions whose interpretation may have a bearing on the construction of the Indian enactment are 'the person by whom the same shall be payable or his agent' which are contained in Ss. 40 and 42 of 3 and 4 Will. IV, c. 27 and the words 'by the party liable' contained in S. 5 of 3 and 4 Will. IV, c. 42. This was the prevailing law until 1874 and S. 40 of 3 and 4 Will. IV, c. 27 was replaced by S. 8 of the Real Property Limitation Act, 1874, which substituted twelve years for twenty years. In 1857 in *Roddam* v. *Morley*[1], S. 5 of 3 and 4 Will. IV, c. 42, that is, the statute relating to specialty debt became the subject of judicial interpretation. The question in that case was whether a payment by a tenant for life of certain land under a will would save limitation in respect of a debt due under a bond by an ancestor by which he and his heirs were bound as against the remaindermen. It was held by Lord Cranworth overruling Sir Page Wood that the devisee would be a person liable to pay the debt within the meaning of S. 5 of the Act. Before giving his decision Lord Cranworth referred the matter to the opinion of two Common Law Judges, Mr. Justice Williams and Mr. Justice Crowder, who gave their opinion that the devisee would properly be said to be liable by virtue of the indenture as either the real or personal representative within the meaning of the Act. The Lord Chancellor accepting that opinion remarked that the person who would save limitation must be a person who was interested in making the payment; and the question was whether a devisee for life was a party so interested. He pointed out that though under the terms of the bond the heirs of the ancestor were bound inasmuch as the property in the hands of the devisee was liable to be proceeded against, he would be a person liable to be sued and therefore a person liable to pay the debt. Under the law then prevailing both the heirs and the devisee were liable to be sued and they were both interested in resisting the demand of the creditor. He therefore deduced the principle that where there are several persons liable in respect of a debt payment by any one of them would be enough to save limitation because the statutory power did not require that the payment must be by all the persons liable. The principle of this case was later applied in English Courts in the case of simple contract debts in *Hollingshead* v. *Webster*[2],

1. (1857) 44 E. R. 622. 2. (1888) 37 Ch. D. 651.

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where Chitty, J., in the course of the judgment observed at page 659 as follows:—

"The right principle to adopt is, that so far as the real estate is concerned, there is no one else but the tenant for life to pay the interest; that in making such payment he represents the whole estate; that the payment is an admission of the liability to the debt affecting the real estate of which he is in possession."

Subsequent to this decision *Roddam* v. *Morley*[1] Lord Westbury in *Bolding* v. *Lane*[2] had to construe the words, "the person by whom the same was payable" in S. 42, 3 and 4 Will. IV, c. 27. He observed:

"These words do not denote merely the persons liable to pay the debt but all the persons against whom the payment of such arrears may be enforced by any action or suit and by whom therefore as they have a right to pay such interest, interest may be properly said to be payble......"

These words appear to have been selected as a description capable of including not only every person liable to be sued at law but every person who having interest in the land sought to be charged may be properly sued as a defendant in a suit in

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were held to be persons by whom money was payable is that they are all persons against whom an action at law or suit in equity could be maintained by the creditor for the recovery of the debt. It was on this basis Lord Westbury rested his judgment both in *Bolding* v. *Lane*[1] and *Chinnery* v. *Evans*[2]. That was also the basis of the decision in *Roddam* v. *Morley*[3], the principle of which is thus put by Farwell, L.J.:

"*Roddam* v. *Morley*[3] appears to me to rest upon the joint liability of a number of persons *standing in equal peril of suit* and who all benefit by the discharge of all or any part of such liability." (*Lacey*, In re: *Howard* v. *Lightfoot*[4].)

Payment made by the agent of the above persons will be equally operative. It is useful in this connection to refer to the case *Chinnery* v. *Evans*[2], which clearly illustrates the doctrine of agency for the purpose of the said statutes. In that case lands in Cork, Kerry and Limerick were mortgaged by the owner. Subsequent to the mortgage the owner sold the Kerry estate to one *M*. Some time later he demised the lands in Cork to Chinnery who subsequently obtained by sale the estate of Kerry. At the instance of the mortgagee a receiver was appointed and he was only able to obtain possession of the Limerick estate. From the rents and profits collected out of the said lands, he made payments of interest towards the mortgage. The question was whether such payments would save limitation even as against Chinnery in whom the lands in Cork and Kerry were vested. It was held that the payments saved limitation on the ground that they must be deemed to have been made by the receiver as the agent of the mortgagor. Lord Westbury in the course of the judgment made the following observations at page 1282:

"I think no reasonable doubt can be entertained, that under the statute the receiver in the receipt of the rents of the Limerick estate is, in point of fact as well as of law, the receiver of the mortgagor, the owner of the estate subject to the mortgage, and that any payment made by the receiver in pursuance of the order, is payment in law by the legal agent of the person liable to pay."

This case is therefore a clear authority for the position that payment made by a person who represents the mortgagor will be sufficient to save limitation, that the agency need not arise out of a contract and the agency may arise by operation of law. The scope of this decision was explained by Jessel,

1. (1863) 46 E.R. 47.
2. (1864) 11 E.R. 1274.
3. (1857) 44 E.R. 622.
4. (1907) 1 Ch. 330 at 346.

kburn v. *Edwards*[1], where the learned Judge refer-
tery v. *Evans*[2] remarked as follows:

:here arose under the statute of limitations 3 and 4 Will. IV, it question to be decided was whether a payment in order to of statute must be made *by the party chargeable or his agent* that it must. Then arose the question whether the payments re so made. The payments were made by a receiver, who, een appointed at the instance of the mortgagee, and the whether such payments were made by or on behalf of the . . . The payments therefore were payments made by an ortgagor. The decision is that payments, in order to take a statute, must be so made"

:efore clear that Jessel, M.R., understands the case *v. Evans*[2] as a case of agency. One thing that is e decisions is that payments in order to operate as to the statute must not be made by a stranger, that making the payment must be either a party to the y which the debt was created or interested in the ch would be liable for the payment of the said debt ossession of which the person interested becomes the debt. In dealing with the question whether a nterest by a stranger would keep alive the mort- Vestbury remarked thus:

y necessary to deal with such an improbable case as that; to it, I think, would be this: that money paid, that is money *y a stranger to the contract* under which it was paid, to the led to receive it would not have the characteristics and the payment. It would be a voluntary tender, a gift or donation, *a party not in any respect subject to liability, to the individual be entitled to receive from the person so rendering it* any part hich it is supposed would be so paid." (*Chinnery* v. *Evans*[2].)

also made very clear by the decision of the Privy *ewin* v. *Wilson*[3]. In that case one Howie and a joint and several bond to one *C* to secure the a sum of £1,000 advanced by *C*. As between White, White was a surety but they were both tors to the obligee. On the same day both Howie nortgaged some property to the obligee to secure . White's mortgage contained a condition that if ie or either of them, their, or either of their heirs, administrators shall pay to *C* the sum borrowed, deed is to be void, otherwise to remain in full force.

18 Ch. D. 449 at 457. 2. (1864) 11 E.R. 1274 at 1282.
3. (1886) 11 A.C. 639.

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A question arose whether payments made by Howie would prevent time from running in favour of White in respect of the said mortgage. It was contended that Howie was a stranger to White's mortgage and therefore any payment made by him could not save limitation. Their Lordships negatived this contention and held that that view was quite inconsistent with the terms of the contract "by which Howie was bound to pay the debt and was expressly named as a person entitled to come in and work a defeasance of White's conveyance." The observations of their Lordships are very significant and instructive on the construction of the statutes 3 and 4 Will., c. 27, Ss. 40 and 42. After referring to the case of *Chinnery* v. *Evans*[1], Lord Hobhouse remarked as follows at page 646:

"They consider that money brought in by a stranger to the mortgage contract would not have the characteristics or legal quality of payment; it would be a gift from a person not entitled to tender it to a person not entitled to demand it . . . . . . In this case their Lordships think it sufficient to say that payments made by a person who under the terms of the contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender of money for the defeasance or redemption of the mortgage, are payments which by S. 30 give a new starting point for the lapse of time. And Howie was clearly such a person."

In another portion of the judgment, he observed as follows:

"Their Lordships have not been referred to any case where it has been decided that payments made by some person concerned to answer the debt has been held to be insufficient to keep a right alive against the party charged in the suit merely because he was not that party or his agent."

It is clear in what sense their Lordships used the words 'person concerned to answer the debt.' Howie was the principal debtor as between himself and White and was concerned to answer the debt. It seems to follow from this decision that if a stranger to the contract were to make the payment it can only be supported on the ground of agency; otherwise the payments made by him could not save limitation. As their Lordships clearly say, the payment made by such a stranger would not have the characteristics or legal quality of payment. This was the state of the English Law till *Bradshaw* v. *Widdrington*[2]. As that case formed the subject of considerable discussion at the Bar, we shall state what the facts of that case are and what the scope of that decision is. On August 1, 1879, J. E. Bradshaw executed a mortgage of Fair Oaks estate in favour of one Moss to secure £5,171-14-6 with

1. (1864) 11 E.R. 1274.
2. (1902) 2 Ch. 430.

barred as any payment towards interest by or on behalf of William Bradshaw could not save limitation. It was held that the mortgage was subsisting by reason of the payments made by or on behalf of William Bradshaw. Buckley, J., stated the principles which according to him should be applied thus:

> "Now looking upon it upon principle, in the first instance, apart from authority, it seems to me that all principle and common sense lead to the conclusion that it is sufficient that the payment be made by a person, who as between himself and the mortgagor is bound to pay. You have to see whether the mortgagor has made an admission. That is the basis of it all." (*Bradshaw* v. *Widdrington*[1].)

After remarking that he was not able to put his hand upon a case in which that exact point had arisen, the learned Judge proceeded to justify his conclusion from three decisions, namely, *Chinnery* v. *Evans*[2], *Harlock* v. *Ashberry*[3] and *Lewin* v. *Wilson*[4]. He said that the statute would be justified if the payment was made by the person entitled to pay—not a person bound as between himself and the mortgagee, but a person as

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1. (1902) 2 Ch. 430 at 436 and 437.
2. (1864) 11 E.R. 1274.
3. (1882) 19 Ch. D. 539.
4. (1886) 11 A.C. 639.

between himself and the mortgagor. He concluded the judgment thus:

"For the present purpose I am assuming that William Bradshaw was not his agent. Assuming that he was not his agent, still it was made by William who was, I think, as between himself and his father, the person who was bound to pay. Inasmuch as that was so, William's payment, made in pursuance of his contractual obligations towards his father, was, it appears to me, his father's admission of liability."

It will be seen from a perusal of the judgment of Buckley, J., that he rests his decision both on the ground that the son is an agent of the father and also apart from the question of agency. The decision on the basis of agency is intelligible enough by reason of the contract between the father and the son; the father put forward the son to act for him in the matter of the payment of the debt. But apart from the question of agency, it is difficult to understand how the payment made by William Bradshaw could be a legal payment to use the language of the Judicial Committee in *Lewin* v. *Wilson*[1]. When Buckley, J., says that William Bradshaw's payment made in pursuance of the contract was his father's admission of liability, it is tantamount to saying that William Bradshaw made an admission on behalf of his father which brings in the question of agency. Therefore it is difficult to divest the notion of agency from the observations of Buckley, J., himself. At page 437, Buckley, J., remarks thus:

"If the mortgagor has himself paid, or whether he has called upon somebody else and bound somebody else towards him to pay and that person has paid, equally, as it appears to me, the mortgagor has made an admission. That is how I regard it upon principle."

If *A* calls on *B* to pay for him, *A* authorises *B* to make the payment for him. *B* therefore acts as *A's* agent in making the payment. On the general principles of law, a person can be bound by his own admissions or admissions made on his behalf by some one who is authorised to make it whether expressly or impliedly. If by reason of contractual relationship another man is put forward to do an act for him, it would be a question of implied agency. The authorisation may also result by operation of law as in the case of a receiver. Apart from agency, it is impossible to bind one man by the admissions of another. I think Farwell, J., puts the correct legal position, if I may say so with respect, when he remarked as follows on the scope of the

1. (1886) 11 A.C. 639.

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decision in *Bradshaw* v. *Widdrington*[1]:

"I read it as a decision on the words 'or agent' and as shewing that a man can be an 'agent' within the meaning of the Act, not only when he acts for a principal properly so called but also when he makes the payment on behalf of the debtor, because he has bound himself by deed for value so to do. I think that the case proceeds on the same reasoning as Lord Wensleydale's judgment in *Forsyth* v. *Bristowe*[2], as explained by Chitty, J. in *Dibb* v. *Walker*[3].

In *Forsyth* v. *Bristowe*[2], the question was whether a payment by an assignee of equity of redemption would save the operation of the statute. After holding that it would, Baron Parke held that the assignee in that case could be deemed to be an agent of the mortgagor because he covenanted to pay the debt. He therefore inferred an agency by reason of the said covenant. Again, the three decisions referred to by Buckley, J., when examined do not support the broad proposition laid down by him that apart from the question of agency a person who became liable to the mortgagor (debtor) to pay the debt will be a person liable to pay the debt within the meaning of the statute. *Chinnery* v. *Evans*[4] as already explained was a pure case of agency. But what Buckley, J., relies on in support of the proposition which he was enunciating was a passage from Lord Cranworth's judgment which runs thus:

"The payments in this case were not payments by a stranger; for though a receiver appointed under the Irish statute is an officer of the Court, yet he is certainly no stranger to the mortgagor; but a person paying for him and on his account what he is bound to pay."

On this Buckley, J., makes the following comment:

"The context in which that language occurs is this; if a mere stranger to the whole transaction—to both mortgagor and mortgagee—comes and pays, that is not an admission at all; if a mere outsider, a stranger to both comes and pays, that is no admission; but if a person who is not a stranger to the mortgagor (that is what Lord Cranworth says) comes and pays, that will do for the purposes of the statute."

It is not possible to understand how the statement of Lord Cranworth supports Buckley, J. When Lord Cranworth says that the receiver is not a stranger to the mortgagor, what the learned Lord means is he was the agent of the mortgagor. That is plain from the language "a person paying for him and on his account"; that is, acting as an agent. The learned Lord does not say that any person who is a stranger to the mortgage contract

1. (1902) 2 Ch. 430.
2. (1853) 8 Ex. 716.
3. (1893) 2 Ch. 429.
4. (1864) 11 E.R. 1274.

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or to the mortgage transaction apart from any question of agency can make a payment which would be a legal payment for the purpose of the statute. Then Buckley, J., relies upon the observations of Jessel, Master of the Rolls, in *Harlock* v. *Ashberry*[1]. The observation relied on is this:

"On principle and on authority I think that the payment to take the case out of the statute must be a payment by a person who is bound to pay the principal or interest of the mortgage money and this is not such a payment."

There Jessel, M. R., was dealing with the case of a tenant paying rent to the mortgagee. It was held that the payment by the tenant cannot be said to be a payment by a person liable to pay because as observed by Jessel, M.R., it was not a payment on behalf of a mortgagor but simply a payment which a tenant as tenant is bound to make. The learned Judge in the passage relied on was referring to the case of a receiver in *Chinnery* v. *Evans*[2] as a person who under the law was bound to make the payment as the agent of the mortgagor and on his behalf. In view of the pronouncement of Jessel, M.R., himself in *Cockburn* v. *Edwards*[3] as to the scope of *Chinnery* v. *Evans*[2] it cannot be said that Jessel, M.R., was understanding the said case differently in *Harlock* v. *Ashberry*[1]. Again Buckley, J., relies on the following observations of Brett, L. J., in *Harlock* v. *Ashberry*[1]:

"On the ordinary rules of construction, and on the authority of *Chinnery* v. *Evans*[2], I feel bound to say that a payment, to come within 1 Vict., Ch. 28 must be a payment by a person liable as mortgagor or some person on his behalf or such a person as was the receiver—a person entitled to pay on his behalf."

Buckley, J., deduces from this a principle that the person entitled to pay on his behalf must be a person entitled by reason of the relations between himself and the mortgagor to pay money on his behalf. If that were so, it does not support the proposition of Buckley, J., namely, that the person bound to pay is not a person as between himself and the mortgagee but a person bound as between himself and the mortgagor. What Brett, L.J., said was that a person to make the payment must be such a person as the receiver who as described by Lord Westbury was a legal agent. The class of persons mentioned by Brett, L.J., would be persons like the guardian of an infant (vide *Annappa Gauda* v. *Sangadigyapa*[4]), the Court of Wards making payment on behalf of the Ward (*Beti*

1. (1882) 19 Ch. D. 539 at 549.
2 (1864) 11 E.R. 1274.
3. (1881) 18 Ch.D. 449 at 456.
4. (1901) I.L.R. 26 Bom. 221 (F.B.).

[illegible] v. Collector of Etawah[1]) and the Committee of a lunatic on behalf of a lunatic. All these persons would be legal agents entitled to act as agents for the mortgagor as the receiver in *Chinnery* v. *Evans*[2]. The other case relied on by Buckley, J., is *Lewin* v. *Wilson*[3], where Lord Hobhouse referred to the case of a person concerned to answer the debt. In that case Howie was the principal debtor under the original contract by which the debt was borrowed. Further in one sense he can be termed as agent for White because he was designated in the mortgage contract itself as the person from whom the mortgagee could receive a tender and Howie could therefore act for White. Therefore there was no warrant in any of the cases relied on by Buckley, J., for the proposition which he laid down. When the matter went up to the Court of Appeal, Collins, M. R., practically rested his decision on the question of agency. This is clear from the following passage in his judgment:

"The payment must be one which will operate as an acknowledgment by the mortgagor of the subsistence of the security......That acknowledgment results as much when there is an arrangement between the mortgagor and a third person, either by a contract or by a mere mandate, that that person shall make the payment for him. Whether the person who makes the payment does so under an obligation imposed upon him by law as a legal agent without his assent, or whether he is appointed under some arrangement with the mortgagor, so long as he pays with the assent, expressed or implied, of the mortgagor, the payment as it seems to me, will keep alive the liability of the mortgagor, being in point of law an admission by him of the subsistence of the security."

The only question therefore is that if the payment by the fourth defendant could be justified it could only be on the ground that by virtue of the contract contained in Ex. C he must be deemed to be an agent for Jaya Rao and if he is deemed to be an agent, the part payment must be within the scope of his agency. As already indicated by me he was only an agent to extinguish the debt and not to keep alive the debt.

Whatever may be the justification for the interpretation placed by Buckley, J., on the words 'person liable to pay' in the English statute, the question is, does the Indian Limitation Act warrant that interpretation. The relevant section of the Indian Act is S. 20 of the Limitation Act, which runs thus:

"Where interest on a debt or legacy is before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy,

1. (1894) L.R. 22 I.A. 31: I.L.R. 17 All. 198 (P.C.).
2. (1864) 11 E.R. 1274.
3. (1886) 11 A.C. 639.

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r by his agent duly authorized in this behalf, or where part of the principal f a debt is before the expiration of the prescribed period, paid by the ebtor or by his agent duly authorized in this behalf, a fresh period of imitation shall be computed from the time when the payment was made."

It will be seen that this section makes no difference etween a simple contract debt and a specialty debt or a debt harged on land like the English statutes. In regard to the ayment of interest it is stated that the person by whom he payment should be made is the person liable to pay the debt; n the case of part payment of a principal, the person by whom the payment should be made is the debtor or his agent. The question is what is the interpretation to be placed upon he words 'person liable to pay.' So far as the part payment of principal is concerned, the section specifically says, 'the debtor'. Literally construed, it would mean the person who contracted he debt. We do not think that the Legislature intended by the ise of the word 'debtor' to have that restricted interpretation. It would seem to us that the word 'debtor' was intended to onnote not only the person who contracted the debt but his egal representative and in the case of a debt charged on land the erson who derived title from him; in short the person who can e rendered liable for the debt by the creditor, that is, the person against whom the debt can be enforced. That is, the liability need not be personal in the sense of being liable to be arrested; it may be proprietary; that is, liability arising from the possession of property. (Cf. *Askaram Sowkar* v. *Venkataswami Naidu*[1] and *Parthasarathy Aiyangar* v. *Ekambara Mudaliar*[2].) We do not think that the Legislature intended to draw a distinction between the payment of interest and the payment of principal in saving limitation. If the history of this section is taken into consideration it would seem to be clear beyond doubt that it was hardly in the contemplation of the Legislature to draw any such distinction or to warrant the interpretation placed on the English Statute by Buckley, J. The first Limitation Act introduced by the Indian Legislature was Act XIV of 1859. The only provision relating to acknowledgment was S. 4 of the Act which ran thus:

"If in respect of any legacy or debt, the person, who, but for the law of limitation, would be liable, to pay the same, shall have admitted that such debt or legacy or any part thereof is due, by an acknowledgment in writing

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1. (1920) 40 M.L.J. 218: I.L.R. 44 Mad. 544.
2. (1938) 1 M.L.J. 624.

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signed by him, a new period of limitatio original liability, shall be computed from

Under that section it will be s statute of limitation is suspended been an acknowledgment in writi to pay. It would be seen that n an agent would save limitation nc or interest would keep alive th departure from English Law. T IX of 1871 and S. 4 of Act XIV the Ss. 20 and 21; S. 20 related change that was effected was tha by the party to be charged therew as part payments are concerned which runs thus:

> "When interest on a debt or legacy is, cribed period, paid as such by the person by his agent generally or specially autho the principal of a debt is, before the ex paid by the debtor or by his agent genera behalf."

This section has in substan subsequent Limitation Acts. The English Law then prevailing at *Roddam* v. *Morley*[1], *Bolding* v. *L* (See the introduction to the India Whitly Stokes at page 945 in V Codes.) Under the English statu and 42 no difference was made bet part payment of principal in rega suspension of the operation of t shown what interpretation was p liable to pay' in the English sta different interpretation was intend Legislature in enacting either S. considerable support from the d 'debtor' as the person by whom pa be made. The expression 'person first clause of the section with ref apparently as suggested by Mitra i

1. (1857) 44 E

2. (1863) 46 E.R. 47.

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the Limitation Act for the purpose of having a common expression for both debts and legacies because it would be incongruous to use the expression 'debtor' with reference to a person liable to pay the legacy. (*Vide* 1909, Vol. 2, page 819.) Therefore the expression "person liable to pay the debt" must also connote the debtor or person liable to be charged with the debt. That both the person liable to pay the debt and the debtor must mean the same thing seems to be suggested by the judgment of Jenkins, C. J., in *Annappa Gauda* v. *Sangadigyapa*[1], where the learned Judge had to consider the position of a guardian in regard to acknowledgment made by him on behalf of his ward. The learned Judge considered him to be a legal agent just like an agent in *Chinnery* v. *Evans*[2] and held that the payment made by a guardian would save limitation and he would be the ward's agent duly authorized within the meaning of S. 20. In the course of the judgment he considered whether the guardian would be personally liable to pay the debt and he held that he would not, observing thus:

"The guardian is not a person liable to pay the debt within the meaning of the section, and this, I think, is made clear by the use of the word 'debtor' in the latter part of the section."

This observation seems to suggest that in the view of the learned Judge the word 'debtor' and the expression 'the person liable to pay the debt' were intended to convey the same meaning. Whether this view is correct or not, we are clearly of the opinion that the expression 'the person liable to pay the debt' in S. 21 of the Limitation Act of 1871 and S. 20 of the Limitation Act of 1908 cannot bear the interpretation put on the corresponding expression in the English statute by Buckley, J. Therefore apart from any question of agency the fourth defendant would not be a person liable to pay the debt within the meaning of S. 20 of the Limitation Act.

The remaining question is whether there has been a valid ratification by Jaya Rao of the payments made by the fourth defendant. When the payment was made by Jaya Rao he had already alienated the property in favour of defendants 5 to 8 and whatever may be the effect of such a ratification on Jaya Rao or his sons defendants 1 to 3, the ratification could not be held to operate to the prejudice of the alienees, defendants 5 to 8. Mr. Sitarama Rao has relied on S. 200 of the Indian

1. (1901) I.L.R. 26 Bom 221 (F.B.).
2. (1864) 11 E.R. 1274.

subjecting a third person to damages or of term
right or interest of a third person and the ratificat
Rao did not have that effect so far as defendant
concerned. We are not inclined to agree with this
of Mr. Sitarama Rao. The provisions of the C
relating to agency are not meant to be exhaustive.
think that S. 200 of the Indian Contract Act or th
visions relating to ratification affect the general prin
of agency that the general rule as to ratification wou

ar as Jaya Rao is concerned, the ratification must be deemed to e valid. As we have already stated the fourth defendant was cting as the agent of Jaya Rao in making the payments and hus admitting the debt though in excess of the authority onferred upon him. It is open to Jaya Rao to ratify the nauthorized acts of an agent. Therefore the decree of the earned Judge must be modified by giving a mortgage decree in avour of the plaintiff for the amount claimed against the nterest of the mortgagor in the mortgaged properties—leaving he extent of his interest open—other than those alienated to lefendants 5 to 8 to the extent of the interest of the alienees herein. Time for redemption three months.

Thimmappa Chettiar v. Krishna Rao. Venkataramana Rao, J.

Subject to this modification the appeal fails and is dismissed vith costs of respondents 5, 7, 9 to 11, one set.

[Petitions for scaling down under the Agriculturists Relief Act were sent down to the lower Court for disposal.]

K. S. *Subject to modification appeal dismissed.*

N THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PATANJALI SASTRI.

n the matter of K. M. Narayanan Nambudripad, an insolvent.*

In the matter of Narayanan Nambudripad.

Madras Nambudri Act (XXI of 1933)—Member of an illon*—Insolvency f—Official Assignee's right to bring his interest in the* illon *to sale on behalf f creditors.*

There is no provision in the Madras Nambudri Act (XXI of 1933) hich could be considered a restriction on the right of the Official Assignee bring the interest of an insolvent member of an *illom* to sale on behalf of is creditors.

P. G. Krishna Aiyar for Insolvent.

The Official Assignee in person.

The Court delivered the following

JUDGMENT.—Learned counsel for the insolvent's *illom* has gued that the share of the insolvent in the properties belong g to the *illom* is not liable to be sold in insolvency for the scharge of his debts. S. 3 of the Madras Nambudri ct XXI of 1933 says that every member of an *illom* shall ve an equal proprietary interest in its properties. *Prima facie* erefore the insolvent has an interest in the *illom* properties to hich he is entitled in his own right and this should, in the sence of any provision in the Act to the contrary, be available

* Petition No. 424 of 1927. 3rd July, 1940.
(Application No. 168 of 1940.)

In the matter of Narayanan Nambudripad.

for the discharge of the debts due from him to his creditors. Mr. Krishna Aiyar relies upon Ss. 5 and 23 of the Act as indicating that the interest of the insolvent in the *illom* properties is not liable to be proceeded against by his creditors. But I see nothing in those provisions having the effect contended for by the learned counsel. S. 5 deals with the karnavan's power of alienation of *illom* properties so as to bind the other members of the *illom* and does not relate to the power of a member of the *illom* to alienate his own interest. Nor does S. 23 have any bearing on the point under consideration, as it provides for partition of such properties subject to certain conditions. I am unable to spell out of these provisions any restriction on the right of the Official Assignee to bring the interest of an insolvent member of an *illom* to sale on behalf of his creditors.

The application is dismissed.

K. C. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

C. Raghava Menon .. *Accused.**

Raghava Menon, *In re.*

Indian Penal Code (XLV of 1860), S. 403—Mere retention of moneys by clerk—No proof of using the moneys—No offence under S. 403.

Where a clerk received certain sums on various dates but entered them in the accounts on each occasion some days after and it was found that the clerk was not in difficulties and that he did not use the amounts, the mere retention by the clerk of the money for some days would not warrant a conviction under S. 403 of the Indian Penal Code.

Case referred for the orders of the High Court, under S. 438 of the Code of Criminal Procedure by the District Magistrate of Malabar in his letter, dated the 14th day of June, 1940, No. C. C. 61/40.

P. Govinda Menon for Accused.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

The Court made the following

ORDER.—The accused was the clerk of the Official Receiver of Calicut and three sums of Rs. 35 were received by him during the absence of the Official Receiver on 3rd October, 1939, 2nd November, 1939 and 2nd December, 1939. They were entered in the accounts on 7th October, 21st November and

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* Criminal Revision Case No. 427 of 1940. 6th September, 1940.
(Case Referred No. 15 of 1940.)

Raghava Menon, In re.

8th December and on the complaint of the Official Receiver the olice filed a charge sheet against the accused for an offence inder S. 409 of the Indian Penal Code. The facts alleged id not warrant a charge under S. 409 of the Indian Penal Code and the Sub-Divisional Magistrate framed a charge under S. 403 of the Indian Penal Code for temporary misappropriaion of the amount. The accused denied the offence and pleaded hat the delay in making the entries and paying the amount ver to the Official Receiver was due to oversight due to heavy vork but the plea was not accepted and the accused was convictd and sentenced to pay a fine of Rs. 17 on each count.

The case has been referred by the District Magistrate for nhancement of sentence, but the evidence does not justify the onviction. The accused was not in difficulties and as found y the Sub-Divisional Magistrate there was no evidence that he sed the amount. It has been repeatedly held that mere retenon of money would not warrant a conviction under S. 403 f the Indian Penal Code and the accused was subsequently einstated as the result of a departmental enquiry. The convicon is therefore set aside and the fine if levied will be refunded.

S.V.V. *Conviction set aside.*

N THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE ATANJALI SASTRI.

.yipuzha Parvathi Amma .. *Petitioner* (Petitioner-2nd Defendant)*

v.

ubramanian Pattar .. *Respondent (Respondent-Decree-holder).*

Parvathi Amma v. Subramanian Pattar.

Madras Agriculturists Relief Act (IV of 1938), S. 23—Donee from mortgor of one of the items of mortgaged property—Sale in execution of ortgage decree of all the items of mortgaged property in one lot—Right of e donee to re-open and scale down debt.

Out of eight items mortgaged, the mortgagor gifted away one item to s daughter (the petitioner) and sold the other items to a stranger who ecuted a release deed in respect of those items in favour of the daughter nceding that they were purchased by him benami for her. The mortgagor d his daughter were impleaded in the mortgage suit and a preliminary cree was followed by a final decree for sale on 17th August, 1937, and in

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* C. R. P. No. 1600 of 1938. 28th August, 1940.

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Parvathi Amma v. Subramanian Pattar.

Patanjali Sastri, J.

release all his rights in items 1, 2 and 4 to 8 in favour of the petitioner. The respondent instituted O. S. No. 2 of 1936 in the lower Court to enforce his mortgage of 1931 impleading Krishnan Nambi the mortgagor as the first defendant, the petitioner as the second defendant and certain others claiming interest in some of the mortgaged items, and obtained a preliminary decree on 22nd December, 1936 and a final decree for sale on 17th August, 1937, for Rs. 3,083 as stated already. In execution of this decree, the mortgaged properties were sold in one lot on 10th March, 1938. With a view to have the decree scaled down under the Madras Agriculturists Relief Act which came into force soon after, the petitioner applied to the Court below on 9th April, 1938, for setting aside the auction sale. The learned Subordinate Judge in dismissing the application held (1) that having regard to the terms of the preliminary and final decrees in the suit, the petitioner was not a judgment-debtor and therefore was not entitled to apply under S. 23 of the Act; (2) that the petitioner failed to prove that she had any interest in the hypotheca except item 3 which she obtained under the gift deed of her father; and (3) that the petitioner was excluded from the benefits of the Act by reason of S. 10 (2) (*ii*) so far as items 1 and 2 comprised in the sale deed Ex. B were concerned as the purchase money due in respect of that sale which the vendee was directed to pay to the respondent in discharge of the mortgage remained unpaid and there was a charge for that liability under S. 55 (4) (*b*) of the Transfer of Property Act. All these conclusions were canvassed before us in this revision petition.

On the first point, we are clearly of opinion that the petitioner is entitled to apply under S. 23 of the Act. According to the decision in *Perianna* v. *Sellappa*[1], the liability of the petitioner as a subsequent alienee of part of the hypotheca to discharge the mortgage is a 'debt' liable to be scaled down under the provisions of the Act. The respondent's learned counsel however urged that the petitioner was not a 'judgment-debtor' within the meaning of S. 23 as neither the preliminary nor the final decree contained any direction that the second defendant should pay the amount due to the respondent. It is true that para. 2 (1) of the preliminary decree directs only the first defendant the mortgagor to pay into Court on or

1. (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218.

Parvathi Amma v. Subramanian Pattar.

Patanjali Sastri, J.

before the date fixed the sum decreed to the respondent, but para. 4, after providing that the money realised by sale of the hypotheca less the expenses of the sale, should be applied in payment of the amount decreed to the respondent directs that the balance, if any, shall be paid to the first defendant 'or other persons entitled to receive the same', and para. 5 provides that the parties shall have 'liberty to apply to the Court from time to time as they may have occasion and on such application or otherwise the Court may give such directions as it thinks fit.' Again, the final decree recites that the payment directed by the preliminary decree was not made by the first defendant or any person on his behalf or 'any other person entitled to redeem the mortgage,' and contains a provision in para. 2 that the balance, if any, of the sale proceeds after the satisfaction of the plaintiff's debt be paid to the first defendant 'or other persons entitled to receive the same.' It cannot for a moment be disputed that the petitioner was a person entitled to redeem the respondent's mortgage under S. 91 of the Transfer of Property Act, and it is obvious that she was impleaded by the respondent in the mortgage suit with a view to bind her interest in the hypotheca by the decree. It was said that the respondent did not admit her right in the hypotheca but impleaded her and other alienees in the plaint as setting up "pretensions to certain rights in the property subsequent to the mortgage." The mortgagee was not interested in admitting or denying the rights of subsequent alienees in the mortgaged properties as such rights, whatever they might be, were all subject to the mortgage and, indeed, any dispute regarding such rights would be outside the scope of the mortgage suit. As a matter of fact, none of the defendants raised any dispute regarding the petitioner's right to the third item under the gift of her father. It was because of the interest she claimed in the hypotheca that she also raised a contest in the suit as to the amount payable to the respondent. In these circumstances, it is clear that her interest in the hypotheca, whatever its extent, was bound by the decree and she was a person entitled to redeem the respondent's mortgage or, if there was no redemption, to receive the balance, if any, of the sale proceeds after payment of the decree amount according to the extent of her interest in the hypotheca. We are therefore of opinion that the petitioner is a judgment-debtor as defined in S. 2 (10) of the Code of Civil Procedure,

Parvathi Amma v. Subramanian Pattar.

Patanjali Sastri, J.

assuming that the term, not having been otherwise defined, is to be understood in no wider sense in the Madras Act IV of 1938.

The question next arises whether the petitioner is entitled to have the sale not only of item 3 but of the other items in which she claims to be beneficially interested set aside. Learned counsel for the petitioner argued that by reason of the release deed executed by her father after the termination of her suit against her alleged benamidar, the petitioner's title to items 1, 2 and 4 to 8 also must be deemed to have been perfected, and that therefore she was entitled to have the sale of all the items set aside. It is unnecessary, however, to decide the question whether the release deed (Ex. G) would be sufficient to vest in the petitioner the title to these properties, as we are of opinion that even apart from her right to these items, she is entitled to have the sale of all the items set aside by reason of her interest in item 3 which was never in dispute. As already observed, all the eight items were sold in a single lot for a single price, and in the case of such sale, it is clear from the terms of Ss. 23 and 24 of the Act that the sale has to be set aside in its entirety and the purchase money repaid to the purchaser, even though the applicant may be interested in only one of the items comprised in the sale. It is also unnecessary in this view to consider whether the petitioner is disentitled to the benefits of the Act by reason of S. 10 (ii) as there can be no question of a charge under S. 55 (4) of the Transfer of Property Act in respect of item 3.

The Civil Revision Petition is therefore allowed and the application (E. A. No. 181 of 1938) is remitted to the lower Court for scaling down the debt in accordance with the provisions of the Act. The petitioner will have her costs here and in the Court below.

K. S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

A.R.L.S.V.L. Sevugan Chettiar .. *Appellant** (*2nd Claimant*)

v.

The Revenue Divisional Officer Devakottai .. *Respondent* (*Referring Officer*)

Sevugan Chettiar v. Revenue Divisional Officer, Devakottai.

Land Acquisition Act (I of 1894) S. 27 (1)—Scope—Order as to Costs—Trustee of Devasthanam—Order making trustee personally liable—Legality—Civil Procedure Code (V of 1908). S. 35.

* Appeal No. 216 of 1939. 8th August, 1940.

Revenue Divisional Officer, Devakottai.

Code, it is open to the Court in a proper c
by the trustee of a devasthanam personall
represented the devasthanam in the land a

Krishnayya v. *Ramayya*, A.I.R. 1928 1
narayanamurthi, A.I.R. 1929 Mad. 782 refe

Appeal against the decree of tl
Judge of Devakottai in O. P. No.

V. Ramaswami Ayyar for Ap

The Government Pleader (*B. S*

The Court delivered the follo

JUDGMENT:—This appeal ari
proceedings with regard to about 3
the Karaikudy Municipality for pu
The Collector awarded compensati
acre. The appellant, as the truste
before the learned Subordinate Juc
award ought to have been at the

It is argued for the appellant that by the word 'persons' can be understood only persons who are parties to the proceedings. I find myself unable to accept this argument. The language of S. 27 (1) is perfectly clear and very wide and it must on the face of it give power to the Court to order costs to be paid by any person whether he be a party or not. No doubt there are certain well known principles of law which prevent a Court from ordering costs to be paid by some one who is an utter stranger to the suit or proceedings. But such is not the state of facts with which I have to deal. The appellant was actually present before the Court although he had no personal interest in putting forward the claim. S. 53 of the Land Acquisition Act says:

> "Save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure shall apply to all proceedings before the Court under this Act."

The section of the Civil Procedure Code which deals with costs is S. 35. This section is also drafted in very comprehensive language and it has not been argued that S. 27 (1) in any way conflicts with or limits or restricts the provisions of S. 35.

There have been no direct cases cited before me dealing with the same facts as those found in the present appeal, but, it seems to me, on a consideration of Ss. 27 (1) and 53 of the Land Acquisition Act and S. 35 of the Code of Civil Procedure that I am entitled in disposing of this appeal to follow any decisions which have been given, not in land acquisition proceedings themselves, but in civil litigation generally, under the provisions of S. 35 of the Code of Civil Procedure.

Two such decisions have been cited by the learned Government Pleader, *Krishnayya* v. *Ramayya*[1] and *Yellamma* v. *Suryanarayanamurthi*.[2] These decisions, interpreting the language of S. 35 of the Code of Civil Procedure hold that, although a guardian-ad-litem is not personally a party to a suit, S. 35 authorizes the Court to order such a guardian to pay costs. It seems to me that the principles governing the relationship between a guardian-ad-litem and a minor and the relationship between a trustee and a religious institution like the one in the case before me are precisely analogous. The question which the Court has to decide in both sets of cases is whether the actual party himself should be called upon to pay

1. A.I.R. 1928 Mad. 590. 2. A.I.R. 1929 Mad. 782.

Sevugan Chettiar v. Revenue Divisional Officer, Devakottai.

the costs for an act done by his representative, or whether the act of the representative is so reckless or ill-advised that it would be unjust to call upon the real party to meet the burden of costs. It seems to me therefore that the Court must be deemed to have jurisdiction in cases like the present to say whether it shall be the Devasthanam or the trustee that should pay the costs. Such jurisdiction is given by the wide language of S. 35 of the Code of Civil Procedure and there is nothing in the Land Acquisition Act to modify S. 35 in any way, in a case like the present, where the Collector's award has been confirmed.

The question next arises whether the order calling upon the appellant to pay costs should be confirmed. It seems to me that no reason has been put forward for differing from the learned Subordinate Judge in this respect. The learned Judge has pointed out that the appellant actually claimed compensation at no less than sixty times the real value of the land. It is clear from the judgment that the land has always been used as a burial or burning ground and that this fact must have been well known to the appellant. In spite of that, he has claimed a most extravagant sum from the Government. There can be no excuse for such conduct and it is, I think, impossible to accept the appellant's argument that he acted *bona fide* in this matter. I accordingly see no reason at all to interfere with the order of the learned Subordinate Judge and dismiss the appeal with costs.

B. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

A. Raghupathi Aiyar .. *Petitioner* (Defendant)*

v.

Krishnamachariar and another .. *Respondents (Plaintiffs).*

Raghupathi Aiyar v. Krishnamachariar.

Madras Agriculturists' Relief Act (IV of 1938)—Explanation to S. 8—Prior promissory note in favour of A—Renewal of in favour of A's sons—Plea that A is benamidar for the sons—If open.

Where in discharge of a decree in a suit on a promissory note in favour of the mother, a mortgage was executed in favour of her sons, it is not open to the mortgagor (judgment-debtor) to raise the contention that the mother,

* C. R. P. No. 1077 of 1940. 26th August, 1940.

payee under the promissory note and the decree-holder in the suit on it, was really a benamidar for her sons, and to treat the two creditors as the *same* creditor so as to attract the operation of S. 8 of the Agriculturists' Relief Act.

Raghupathi Aiyar *v.* Krishnamachariar.

Petition under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court of Chingleput dated 1st April, 1940 and made in O. S. No. 63 of 1939.

S. V. Venugopalachari and A. C. S. Chari for Petitioner.

Ch. Raghava Rao and V. S. Ramaswami Ayyangar for Respondents.

The Judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—The petitioner was the defendant in a suit on a mortgage and he contended that he was entitled to let in evidence that the mortgage was a renewal of a previous promissory note debt which had ripened into a decree, so as to attract the operation of S. 8 of Madras Act IV of 1938. The Court below held that he was not entitled to adduce such evidence and it is against that decision the present revision petition is filed.

The suit mortgage was in favour of the two sons of Srinivasammal and one of the items of consideration for the mortgage was the discharge of a decree in a suit on a promissory note. The payee under the promissory note and the decree-holder in the promissory note suit was Srinivasammal, the mother of the two mortgagees. The question therefore is whether the decree based on the mortgage deed can be scaled down on the basis that it is in part a renewal of this promissory note debt. The contention was that Srinivasammal, the payee under the promissory note, was really a benamidar for her sons. In our opinion, it is not open to the judgment-debtor to raise such a contention for the purpose of S. 8 of Act IV of 1938. Unless the debt of which the suit debt is alleged to be a renewal is in favour of the same creditor, the explanation to S. 8 has no application. We have held in our decision in *Varadarajam Pillai* v. *Krishnamurthi Pillai*[1], that the creditor in respect of a promissory note debt is and can only be the payee and that the creditor in respect of a decree debt can only be the decree-holder or other persons specifically empowered to execute the decree; that is to say, whether we look at the promissory note itself or at the decree resulting therefrom, the creditor

1. (1940) 2 M.L.J. 664.

Raghupathi Aiyar v. Krishnamachariar.

Wadsworth, J.

must necessarily be Srinivasammal and not her sons even though the sons may have a beneficial interest in the debt.

It follows therefore that there can be no question of the mortgage debt being a renewal for the purpose of the Act of the previous promissory note debt and the decision of the lower Court is right. The revision petition is therefore dismissed with costs.

S. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Chittapragada Veerraju and another. *Petitioners** (*Petitioners-Defendants 1 and 6*)

v.

Muppala Rayanim Dora Garu and others. *Respondents* (*Respondents and Nil-Plaintiffs and 2nd Defendant*).

Veerraju v. Rayanim Dora Garu.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 9 and 12—Appropriations towards principal and interest in 1923 and 1924—Debt decreed in 1936—If can be reopened and reappropriated and under the Act—Interest on scaled down debt and costs.

A decree was passed on 26th September, 1936, on a mortgage debt of 1920 (which itself was in consolidation of previous debts on promissory notes) for which payments towards 'principal and interest' had been made in 1923 and 1924. In an application to scale down the decree,

Held, that as there was no specific appropriation the decree should be scaled down on the basis of the amounts advanced on the original promissory notes. Payments actually appropriated before 1st October, 1937, cannot be reopened. But payments not specifically appropriated (no fresh evidence being admissible) will be disregarded in calculating the amount of interest outstanding on 1st October, 1937, which will be treated as discharged and the balance of the debt will bear interest from 1st October, 1937, according to S. 12, namely, at 5 per cent. per annum. Interest on costs should be scaled down with regard to the provisions of S. 9, *i.e.*, interest will run at 5 per cent per annum up to 22nd March, 1938 and thereafter at 6 per cent.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Cocanada dated 25th August, 1938 and made in I. A. No. 531 of 1938 in O. S. No. 74 of 1935.

M. Appa Row for Petitioners.

V. Viyyanna and *K. Bhimasankaram* for Respondents.

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* C. R. P. No. 603 of 1939. 22nd August, 1940.

The judgment of the Court was delivered by

Wadsworth, J.—This petition arises out of an application under S. 19 of Madras Act IV of 1938. The applicants, who are the petitioners here, sought to scale down a decree dated 26th September, 1936, passed on a mortgage of 8th November, 1920. The mortgage was for a sum of Rs. 5,570, made up by the discharge of four earlier promissory notes, the principal of which totalled to Rs. 4,300, with interest thereon and a small fresh advance. Towards this mortgage there were three payments before suit. On 5th April, 1923, a sum Rs. 1200 was paid and appropriated for interest and on 6th June, 1923 a sum of Rs. 400 was paid and of this sum Rs. 211-14-0 were appropriated for interest and the balance for principal. On 4th October, 1924, a payment of Rs. 3,367 was made and the endorsement is that it was made towards principal and interest of the debt; that is to say, there was apparently no specific appropriation towards either principal or interest. On the basis of our previous decisions, the decree has clearly to be scaled down in the following way. The principal will be Rs. 4,300, the principal of the original notes renewed in the mortgage. The payments actually appropriated before 1st October, 1937, will stand appropriated. The payment made on 4th October, 1924, which has not been specifically appropriated will be disregarded in calculating the amount of interest outstanding on 1st October, 1937, unless it can be established that there has been a specific appropriation before 1st October, 1937, no fresh evidence being admissible. After calculating the amount of interest outstanding on 1st October, 1937, and treating it as discharged, the balance of the debt will be scaled down on the basis that the principal remaining bears interest at the rate laid down in S. 12 from 1st October, 1937, and the interest on costs will be scaled down with regard to the provisions of S. 9; that is to say, interest will run at 5 per cent. per annum up to 22nd March, 1938, and thereafter at the decree rate of six per cent.

The petitioner is entitled to his costs in revision from respondents 1 and 2. The application is remitted to the lower Court for disposal in the light of this judgment.

K. S. *Petition allowed.*

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P. Govinda Menon for Petitioners.

K. Kuttikrishna Menon for Respondent.

The judgment of the Court was delivered by

Patanjali Sastri, J.—This is a petition to revise an order of the Subordinate Judge of South Kanara dismissing an application by the petitioners (judgment-debtors) to scale down the decree for Rs. 34,291-10-9 in O. S. No. 70 of 1932 on the file of the lower Court. The suit was brought by the respondent on foot of a mortgage bond (Ex. B) dated 5th June, 1925, whereby the judgment-debtors purported to mortgage the properties usufructuarily to the respondent's assignor for Rs. 21,000, out of which only Rs. 20,300 was advanced and a *marupat* (Ex. C) of the same date under which the mortgaged properties were leased back to them at an annual '*purappad*' of 10,150 seers of paddy. The mortgage contained only a covenant to repay the principal but no stipulation for payment of any interest as the profits were to be enjoyed in lieu of interest. It is common ground that the usufructuary mortgage and the lease back were parts of the same transaction and the respondent himself in suing for the amount due under both these instruments described the amount due under Ex. C as 'interest' payable on the amount advanced under Ex. B. The decree was in the form of an ordinary mortgage decree providing for the payment of Rs 20,300 as principal and the balance as interest and did not mention any rent as payable thereunder, while the judgment referred to the respondent's claim under Ex. C as 'rent or interest' without making any distinction between the two. It is thus clear that at the time when the suit was filed or the decree was passed, it was really immaterial whether the respondent's claim under Ex. C was regarded as one for interest or for rent but after the passing of the Madras Act IV of 1938 the question as to the true nature and incidents of the transaction represented by Exs. B and C has become one of considerable importance to the parties and has accordingly been the subject of keen debate in these proceedings. In support of their application to scale down the decree the petitioners contend that Exs. B and C together amounted in substance to a simple mortgage providing for interest at the rate of half seer of paddy per rupee per year and that accordingly the interest payable under the decree should be scaled down, while the respondent invokes the exception in S. 10 (2) (i) of the Act,

clear that the mortgage and the *marupat* were intended to be parts of one and the same transaction and the mortgage itself recites that "for the necessities of our tavazhi tarwad we ourselves have, as per *marupat* of this day taken back the properties delivered to you under this document as detailed above." Both the documents must therefore be read together to ascertain the nature and incidents of the transaction and the

1. A.I.R. 1917 Cal. 737.

2. A.I.R. 1918 Cal. 334

Abdul Khadir *v.* Subramanya Pattar.

Patanjali Sastri, J.

respective rights and liabilities of the parties thereunder. This indeed has been conceded by the respondent, but the question remains whether the *marupat* operates to obliterate the possessory character of the mortgage and convert it into a simple mortgage, contrary to its tenor. We are of opinion that it cannot have that effect. It is no doubt permissible, as a matter of construction to look behind the form of a transaction to ascertain its substance and give effect to it according to the intention of the parties but it is a different thing to ignore the form in which the parties have deliberately cast their bargain, when such form is intended to govern their mutual rights and obligations.

Learned counsel for the petitioners cited numerous decisions in support of his contention but none of them can, in our opinion, be said to be an authority on the point now under consideration. On the other hand, we have been shown several authoritative rulings—some of them by the Privy Council—which lend support to the contention of the respondent. In *Abdullah Khan* v. *Basharat Hussain*[1], there was a usufructuary mortgage with a lease back of the properties mortgaged to the mortgagor. The mortgage provided that the profits of the property mortgaged should be enjoyed by the mortgagee in lieu of interest on the mortgage money but the rent reserved under the lease was equivalent to interest at six per cent. per annum on the mortgage money and was less than the annual yield of the properties. As provided in the lease, the mortgagee entered into possession of the properties mortgaged on the mortgagor's default in paying the rent reserved by the lease. In a subsequent suit for redemption, the question arose whether the mortgagee was accountable for the rents and profits received by him from the mortgaged properties in excess of the rent reserved under the lease. The High Court of Allahabad held that he was, on the ground that the mortgage was usufructuary only in form and that the security was intended to be a simple mortgage carrying interest at the rate of 6 per cent. per annum. On appeal to the Privy Council, this decision was reversed and the mortgagee was held not accountable for receipts over and above the rent reserved in the lease. Lord Macnaghten who delivered the judgment of the Board observed:

" Their Lordships agree with the High Court in thinking that the mort-

1. (1912) 25 M.L.J. 91 : L.R. 40 I.A. 31 : I.L.R. 35 All. 48 (P.C).

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is no inconsistency between the two instruments. Nor would there have been any inconsistency if the mortgage itself had contained a provision for granting a lease on the terms upon which the lease was actually granted."

This, in our opinion, is clear authority for the view that though the mortgage and the lease back can and must, in a case of this kind, be taken to form part of the same transaction, effect must be given to each according to its terms and the Court cannot, by reading the two together, spell out a transaction totally different in character and incidents.

To the same effect more or less is the decision of the Privy Council in *Feroz Shah* v. *Sohbat Khan*[1]. There was a usufructuary mortgage for a term of ten years accompanied by a lease of the mortgaged property to the mortgagor for the same period at a rent which represented interest at a certain rate per cent. on the mortgage debt. On the expiry of the term, the mortgagee sued for possession of the mortgaged property, the mortgage not having been redeemed. The Courts in India refused a decree for possession holding that the transaction was in reality a simple mortgage of the land. Their Lordships reversed the decision holding that there was no reason to construe the mortgage as other than a possessory mortgage as it purported to be. They observed:

"The mortgagee may well have preferred to leave the cultivation of the land in the hands of the mortgagor, being entitled to take possession at any time if the provisions of the lease were not adhered to. Assuming this to have been one of the conditions upon which the mortgage was agreed to, the mere absence of formal handing over of the land to the mortgagee, and a handing back by him to the mortgagor in the character of lessee, is, they think, of little significance."

The principle of these decisions has also been applied in cases under the Income-tax Act relating to the assessability of the income received by the mortgagee-lessor who is a money-lender from the mortgagor-lessee. The contention of the Income-tax authorities was that the so-called 'rent' was, having regard to the substance of such transactions, really interest received in the course of money-lending and assessable to tax as such. This contention was disallowed by a Special Bench of five Judges (Jackson, J., dissenting) in *Ibrahimsa Rowther* v. *Commissioner of Income-tax, Madras*[2] and by their Lordships of the Privy Council in *Commissioner of Income-tax, Bihar and Orissa* v.

1. (1933) 65 M.L.J 150: L.R. 60 I.A. 273: I L.R. 14 Lah. 466 (P.C.).
2. (1928) 54 M.L.J. 524: I.L.R. 51 Mad. 455 (S.B.).

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Maharajadhiraj of Darbhanga[1], the Court refusing in each case to regard the amount paid by the mortgagor-lessee as other than rent covered by the exemption relating to agricultural income.

Learned counsel for the respondent placed great reliance upon the decision of the Privy Council in *Ramarayanimgar* v. *Maharaja of Venkatagiri*[2]. The mortgage in that case was a combination of a simple and a usufructuary mortgage and was accompanied as to part of the mortgaged property by a lease back to the mortgagor. The lease provided that upon default in payment of the rent reserved, the arrears should be charged upon the property included in the mortgage deed. The rent had been allowed to fall into arrears, and the question arose in a suit for redemption and possession whether the arrears of rent should also be paid before redemption could be decreed. Their Lordships held that S. 62 of the Transfer of Property Act did not apply as the mortgage was not purely and simply usufructuary and that S. 61 of the Act by implication entitled the mortgagee to insist on the payment of arrears of rent also charged on the property as a condition of redemption. The passage relied on for the respondent is as follows:—

"It is contended before this Board on behalf of the defendant appellant that the two deeds, Exs. A and I, should be read together as they form parts of one transaction, the lease being in the nature of machinery for the purpose of realising the interest due on the mortgage . . . . Their Lordships are of opinion that these contentions on behalf of the appellant must prevail." (Page 190.)

We are unable to agree that this passage involves the proposition that a possessory mortgage and a lease back should together be taken to be a simple mortgage carrying interest. As observed by their Lordships in *Abdullah Khan* v. *Basharat Hussain*[3] referred to already, that the mortgage and the lease should be viewed as forming parts of one and the same transaction is by no means inconsistent with effect being given to each according to its terms, and the reference to the lease as 'being in the nature of machinery for the purpose of realising the interest due on the mortgage' does no more than emphasise the idea of the lease being a component part of the mortgage transaction.

1. (1935) 69 M.L J. 474: L.R. 62 I.A. 215: I.L.R. 14 Pat. 623 (P.C).
2. (1926) 52 M.L.J. 338: L.R. 54 I.A. 68: I L.R. 50 Mad. 180 (P.C).
3. (1912) 25 M.L.J. 91: L.R. 40 I.A. 31: I.L.R. 35 All. 48 (P.C).

"In an ordinary case, there being no rent reserved, the tenant at will did not pay any rent, and was not liable to pay any, but you might superadd to that legal relationship an express agreement for a tenancy, as was done in the present case, in which a monthly tenancy was created at a monthly rent."

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1. (1924) 47 M.L.J. 798.
2. (1939) 50 L.W, 677.
3. (1932) 63 M.L.J. 672.
4. A.I.R. 1921 Lah. 225.
5. A.I.R. 1926 Lah. 559.
6. (1915) 2 L.W. 853.
7. (1903) I.L.R. 26 Mad. 662 (F.B.).
8. (1882) 22 Ch. 384.

Abdul Khadir v. Subramanya Pattar.

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All these decisions relied on by the petitioners' learned counsel have no direct bearing on the issue before us, and any general observations therein tending to favour the view that a usufructuary mortgage accompanied by a lease back should be regarded as a simple mortgage cannot prevail against the definite pronouncements to the contrary in the decisions cited for the respondent. The Civil Revision Petition therefore fails and is dismissed with costs.

B. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE LAKSHMANA RAO.

Vettukkattu Pachayanna Goundan.. *Prisoner** (*Accused-Appellant*).

Pachayanna Goundan, *In re.*

Criminal Procedure Code (V of 1898), S. 288—Evidence given before committing magistrate—Witness changing before the Sessions Judge—Deposition before committing magistrate admissible as substantive evidence—Accused absconding for several years—Arrest after 6 years and trial thereafter—If delay ground for reducing sentence.

Where witnesses depose to a certain fact before the committing magistrate but before the Sessions Judge change their testimony and state that they have no personal knowledge of the occurrence, it is open to the Sessions Judge to admit under S. 288 of the Criminal Procedure Code the deposition given before the committing magistrate and treat it as substantive evidence.

Where an accused absconded and could not be found for several years, and in that way the trial of the case was delayed, such delay is not by itself a ground for reducing the sentence.

R. T. No. 141 of 1929 distinguished.

Trial referred by the Court of Session of the Salem Division for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 42 of 1940 on the 17th of July, 1940 and appeal by the said prisoner against the said sentence of death passed upon him in the said case on the 17th of July, 1940.

P. Basi Reddi for Accused.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The judgment of the Court was delivered by

Burn, J.

Burn, J.—The case against the appellant was that at about sunset on the 18th of June, 1934, near the village of Mandaga-

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* R. T. No. 114 of 1940.
Cr. A. No. 486 of 1940.

16th September, 1940.

Pachayanna Goundan, *In re.*

Burn, J.

palayam, he stabbed two women with a spear inflicting fatal injuries upon them, The two women were named Pappayi and Palani. The appellant had been on terms of illicit intimacy with Palani and it is said that Pappayi had persuaded Palani to give him up. This was the supposed motive for the attack by the appellant upon the two women.

Pappayi and Palani were both taken to the hospital at Tiruchengode the same evening and as they were in a dangerous condition, the Sub-Magistrate (P. W. 13) was sent for and both of them made dying declarations. Ex. D is the dying declaration of Palani but the learned Sessions Judge has not relied on this because it contains internal evidence that Palani was not fully conscious when she was making her statement. Ex. E is the dying declaration of Pappayi who was fully conscious while her statement was being recorded. Besides the evidence contained in the dying declaration of Pappayi, there were the depositions in the Magistrate's Court of no less then seven eye-witnesses, the women (P. Ws. 3 to 9) who were accompanying Palani and Pappayi on their way back from their field. All these witnesses in the Magistrate's Court gave evidence against the appellant in accordance with the statement made by Pappayi in her dying declaration. But when they came to the Sessions Court, five of them (P. Ws. 3, 4, 5, 6 and 8) alleged that they had no personal knowledge of the occurrence. One (P. W. 9) said that she had only seen the stabbing of Pappayi and only one (P. W. 7) had adhered to the testimony which she gave before the Committing Magistrate. In these circumstances the learned Sessions Judge admitted as evidence under S. 288 of the Code of Criminal Procedure the depositions of P. Ws. 3, 4, 5, 6 and 8 in the Magistrate's Court. It is quite clear that he was fully justified in so doing and in treating those depositions as substantive evidence.

The appellant absconded and was not arrested until the 27th of March, 1940, when P. W. 15, a member of the Vigilance Committee found him on the street, and, having some recollection in his mind of a Gazette Notification, arrested him and took him to the Sub-Magistrate of Tiruchengode. That is the reason why this case did not come on for trial until July, 1940.

Learned counsel for the appellant has quite rightly made no attempt to show that the evidence against the appellant cannot be accepted. He has urged only the question of sentence.

Quoting the judgment in R. T. No. 141 of 1929, learned counsel has urged that since the offence took place more than six years ago, the appellant might be let off with a sentence of transportation for life. We see that in the case referred to, the only reason for reducing the sentence of death which had been passed by the learned Sessions Judge to a sentence of transportation for life was that ten years had elapsed between the crime and the punishment. With due respect we do not think that that alone is any ground for imposing a lesser sentence. On the contrary we think it would be a dangerous proposition to state that if a murderer succeeds in making himself scarce for a number of years, he may then hope to escape the extreme penalty of the law in a case in which the extreme penalty is clearly called for. There are no extenuating circumstances in this case. The appellant deliberately committed two murders, without any excuse.

We confirm the conviction of the appellant for the two offences of murder and the sentence of death and dismiss his appeal.

S. V. V. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—LORD THANKERTON, SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

Jagat Singh and others .. *Appellants**

v.

Sangat Singh and others .. *Respondents.*

P.C. — Jagat Singh *v* Sangat Singh.

Compromise decree—Registration not necessary—Property outside the plaint covered by the decree—Effect—Compromise not recited textually in the body of the decree or in a schedule thereto—If sufficient compliance with Civil Procedure Code (1882), S. 375 (O. 23, r. 3, 1908)—Decree if can be treated as nullity without having it set aside.

One Ishar Singh died childless on 6th October, 1905, leaving him surviving a widow *B* and a brother's son *S*. On 19th September, 1905, Ishar Singh made a will by which he declared himself to be the absolute and exclusive owner of the properties other than his share in the family house. The testator totally cut off *S* under his will and left the movable and immovable properties to *B* providing that neither *B* nor the sons of *S* were to sell the immovable property. Probate of the will was granted to *B* on 3rd November, 1906 and on 13th March, 1907, mutation of the lands of the testator at Lyallpur was obtained in *B's* name. On 12th November, 1906, *S* sued in the District Court of Peshawar for a declaration that the will was not

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* P. C. Appeal No. 54 of 1937. 26th February, 1940.

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advice; (2) that the compromise could r
registration; and (3) that the Court at P
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Held, (1) under the Registration Act
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(2) The mere fact that the plaint w
with S. 375 of the Code of Civil Procedur
the reversionary interest in the Lyallpur l
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(3) The compromise of 1907 as a co
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(4) S. 375 of the Civil Procedure C
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Sir George Rankin.

belonged to one Ishar Singh who died childless on the 6th October, 1905, leaving him surviving a widow Bishan Devi, also a brother's son Sundar Singh who died on 10th January, 1922. On the 7th February, 1929, the widow purported to make a gift of one portion of the land to Sangat Singh (respondent No. 1) and of another portion to a certain Gurdwara (respondent No. 2). The present suit was brought on the 7th August, 1933, by the appellants, who are three of the four sons of Sundar Singh. The fourth son was made a defendant and is now respondent No. 3. The claim of the plaint is for a declaration that the gifts of land to Sangat Singh and to the Gurdwara have no validity or effect beyond the life of Bishan Devi.

Ishar Singh on 19th September, 1905, made a will of which probate was granted to Bishan Devi by the District Judge of Peshawar on 3rd November, 1906. Apart from an interest in the family house at Rawalpindi, Ishar Singh by his will declared himself to be the absolute and exclusive owner of the property which he disposed of thereby. He declared that Sundar Singh, his nephew, was disobedient and of bad character and was to be totally disinherited. He made the following dispositions in favour of his wife:—

"4. My wife is Musammat Bishan Devi. She has greatly served me. She has all along been faithful to me. I make this will in her favour that she shall be exclusive (*illegible*) owner of the following properties after my death:—

(*a*) Entire cash including pronotes for Rs. 13,000 and other items.
(*b*) Liquor, Charas, Opium, etc., of all kinds.
(*c*) Land, situate in Nathe.
(*d*) Lands, situate in Lyallpur.
(*e*) Three-quarter share in Nowshahra property.
(*f*) All ornaments.

Sundar Singh or any other person shall have no connection therewith, nor shall they interfere in the management thereof. My wife, Musammat Bishan Devi, may manage the said property in whatever way she likes. She shall have all kinds of powers to deal with the property aforesaid. She shall be considered full owner. So long as Malik Arjan Singh is alive, he will manage the land in Lyallpur.

7. After the death of my wife, Musammat Bishan Devi, whatever property remains shall be owned by the sons of Sundar Singh. Sundar Singh shall have no connection or concern therewith. Besides my wife, Musammat Bishan Devi, shall not be entitled to sell immovable property. The sons of Sundar Singh shall also have no such right.

8. The remaining movable or immovable property of mine shall be exclusively owned by my wife, Musammat Bishan Devi".

Mutation of the lands at Lyallpur into the name of Bishan Devi was obtained from the Colonisation Officer on 13th

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March, 1907, but the entry was restricted by the condition "so long as she is alive and does not remarry." This was in accord with the customary law of the parties independently of her husband's will. On the 12th November, 1906, Sundar Singh filed a plaint in the Court of the District Judge, Peshawar, against Bishan Devi and other defendants. By this plaint as amended he claimed a declaration that the will of Ishar Singh was not valid or binding on him as regards (*inter alia*) the immovables at Mahal Nathe and Nowshahra, or the stock of liquor and opium, etc., at Peshawar or the Government Promissory Notes for Rs. 13,000 in deposit at the Treasury, Peshawar. The sole relief claimed was a declaration and the suit was brought upon a court-fee of Rs. 10 only, though valued for purposes of jurisdiction at over Rs. 26,000. The case made was that the business of dealers in intoxicants, etc., under excise licences was not the separate business of Ishar Singh but a joint family business which had been carried on by him jointly with his brothers and after their deaths with the plaintiff Sundar Singh, and that all the properties had been acquired out of the joint funds of the business. Sundar Singh claimed to be the sole heir to and possessor of the property above mentioned and sued for a declaration " that the will is unlawful and null and void and has no effect upon the rights of the plaintiff who holds proprietary possession over the property in question. " The plaint stated that "a separate suit will be brought for recovery of the ornaments, valued at Rs. 15,000, other movable property and lands situate at Lyallpur which are in possession of the defendants."

This suit was compromised in June, 1907, and as the validity and effect of the compromise is now in question it becomes necessary to notice it in detail. On the 9th June, a petition to the Court of the District Judge was signed by Bishan Devi and by Sundar Singh. It set forth that the parties had made the settlement therein expressed and it concluded "hence this application by way of a compromise is submitted with the prayer that it may be accepted and the case decided in terms thereof." The main terms were that the lands at Mahal Nathe and at Lyallpur should belong to Bishan Devi for her life and on her death to Sundar Singh and his male descendants. An iron safe, a cow and a calf were to belong to Bishan Devi. Sundar Singh was to pay her Rs. 8,150 in cash. Government

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Promissory Notes to the value of Rs. 13,000 deposited in the Treasury were to be entered in the names of the sons of Sundar Singh. Bishan Devi was to be absolute owner of all ornaments, clothes and other movables in her possession. Sundar Singh was to get the book-debts, stock-in-trade and other trade movables and to be liable to pay any debts of Ishar Singh. The petition of compromise was signed at Rawalpindi and was handed over to one Mohan Singh, an honorary magistrate, who sent it by post to the District Judge. On 11th June the case came on before the District Judge and Bishan Devi was represented by her agent Jagat Singh and by a pleader. Sundar Singh was present in person. As appears by the note of the District Judge, Jagat Singh stated to the Court:—

"Musammat Bishan Devi signed the compromise in my presence but she subsequently stated that she only accepted it if the Rs. 8,150 was paid at once and if the Rs. 13,000 was invested in a bank. She signed of her own free will knowing the contents of the deed."

By his decree the District Judge "ordered that a decree be and the same is hereby passed on the terms and under the conditions embodied in the deed of compromise dated 9th June, 1907, as a whole with this reservation that the sum of Rs. 8,150 shall be paid into Court within fifteen days from to-day, in case of failure defendant No. 1 (Bishan Devi) to be entitled to recover that amount by execution."

On some date between 26th June and 15th July, 1907, an application for execution was filed by Jagat Singh on behalf of Bishan Devi against Sundar Singh asking that a sum of Rs. 7,535 lying in the Treasury on account of Ishar Singh be paid to Bishan Devi on account of the sum of Rs. 8,150 due to her under the compromise. This application was successful and on 15th July a receipt was given by Jagat Singh on the lady's behalf for Rs. 7,535 received through Court. Other instances of action taken under the compromise are in evidence but need not here be referred to.

The gifts made on 7th February, 1929, by Bishan Devi to the first and second respondents of the lands at Lyallpur are contrary to the terms of the compromise of June 1907, whereby these lands were to belong to her for her lifetime only and she was not to be competent to alienate them. Hence the present suit brought by sons of Sundar Singh on 7th August, 1933. The defence of Bishan Devi (original defendant No. 1)

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the absolute gift to Bishan Devi. Cl. 8 is a residuary clause which does not affect the land at Lyallpur.

It is therefore necessary for the plaintiffs-appellants to rely upon the compromise of June, 1907. The learned Subordinate Judge held that the deed was admissible in evidence; that the compromise was entered intó by Bishan Devi with knowledge of its contents and voluntarily; and that the case of coercion and undue influence was untrue. The learned Judges of the High Court have held that the deed is inadmissible for want of registration and that it has not been established that it was read over to her or that she signed it after fully understanding its meaning or effect. They do not appear to hold that coercion or undue influence has been proved. At the root of their judgment is an opinion formed by them to the effect that by not including in the suit of 1906 a claim to recover possession of the Lyallpur lands Sundar Singh had forfeited all right therein by virtue of O. 2, r. 2, C. P. Code (S. 43 of the Code of 1882). They are mistaken in supposing that the claim to Rs. 13,000 Government Promissory Notes and to the land at Nowshara was not included in the suit. The plaint was on the footing that Sundar Singh was in possession of these and other items and required only a declaration to clear his title; whereas the land at Lyallpur and the ornaments were in Bishan Devi's possession and the claim to them must necessarily be put as a claim to recover possession. In these circumstances their Lordships cannot agree with the High Court in regarding the compromise as bad by reason that Bishan Devi was not advised that she could safely treat the claim of Sundar Singh to the Lyallpur lands as barred. On the contrary, such advice had it been given, would in their Lordships' view have been rash rather than sound. The lands at Lyallpur being situate in the Punjab, outside the district of Peshawar, a claim to relief in respect of them could have been entertained by the District Judge under S. 19 of the Code of 1882. The High Court would seem to have assumed that S. 19 was not merely permissive: also that the claim to recover possession of the Lyallpur lands and the claim to a declaration as regards the other lands were claims in respect of the same cause of action (cf. *Payana* v. *Pana Lana*[1].) Their Lordships think that both assumptions are highly debatable. But in any case the claim

1. (1913) L.R. 41 I.A. 142 (P.C.).

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of the present appellants as reversioners of Ishar Singh would not have been barred so far as regards the question whether Ishar Singh's will gave to his widow an absolute interest or an interest for her life. Moreover, so long as the suit of 1906 was undisposed of, it was always possible that the Court, if it thought that there was anything in the point as to O. 2, r. 2, would give leave to the plaintiff to amend by including a claim to recover possession of the ornaments and Lyallpur lands. It does not appear that the lawyers advising Bishan Devi thought anything of the point now taken by the High Court and with all respect to the learned Judges their Lordships cannot regard it as a good one.

By the decree of 11th June, 1907, the District Judge had purported to direct that the terms of the compromise should be carried out as a whole. He had not in terms excluded the Lyallpur land from the operative part of the decree and he had not recited the contents of the deed. Though it is clear that his decree was made upon the petition and that both documents would become part of the same record, he had neither marked and exhibited the deed nor scheduled it or a copy of it to the decree. He had referred to the deed by date and in a manner which has given rise to no doubt or difficulty. No proceedings were taken at any time during the next 20 years for having the decree set aside whether on the ground of some defect in the agreement of compromise or some error or irregularity in the decree itself. On the contrary the decree was enforced as to one of the terms of the compromise by execution proceedings taken on behalf of Bishan Devi: and it may well be a question whether after taking this advantage under the decree she would have been entitled in equity to have the decree set aside. Under the Registration Act (III of 1877) no question of registration arises as regards decrees [S. 17 (i)]. In these circumstances their Lordships agree with the argument of Sir Hari Singh Gour on behalf of the appellants that the first question is one of jurisdiction in the strict sense of the term. Had the learned District Judge at Peshawar jurisdiction to pass this decree as regards the lands at Lyallpur or is his decree so far as regards these lands a nullity which Bishan Devi was entitled to disregard without taking any proceedings to have it set aside or varied? As the learned Judges of the High Court thought that the claim to the Lyallpur lands came within O. 2,

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r. 2, they must have considered that this claim was within the jurisdiction of the District Judge. In any case when it was agreed that Bishan Devi should have the Lyallpur lands for her life, there was no doubt or difficulty as to the jurisdiction of the District Judge of Peshawar to include these lands within the declaration made as to the other lands and assets. It was no longer a question of a decree for possession but merely of a judicial determination as to the reversionary rights of Sundar Singh or his descendants. Whether the District Judge acted irregularly and failed to comply strictly with S. 375 of the Civil Procedure Code of 1882 matters nothing. He acted by consent and within his jurisdiction: his decree was enforced in execution by Bishan Devi and no proceedings have at any time been taken to have it set aside. He might have acted more strictly in compliance with the terms of S. 375 had he first amended the plaint by including the reversionary interest in the Lyallpur lands within the declaration sought, but the mere fact that he could have done so shows that he was not devoid of jurisdiction.

In these circumstances it is clear that in 1928 Bishan Devi was not entitled to treat as a nullity this judicial determination to the effect that she had only a life interest in the lands at Lyallpur.

Their Lordships, considering the compromise of 1907 (as the Courts in India have considered it) as a contract, are further of opinion that it was valid and binding upon Bishan Devi. The learned Judges of the High Court held that the District Judge had not acted correctly under O. 23, r. 3, Civil Procedure Code (meaning S. 375 of the Code of 1882) and had not ordered the compromise to be recorded. Their Lordships have already noticed that the decree directs effect to be given to the whole compromise and have dealt with the position so created. But in any view the decree in their Lordships' opinion recorded the compromise though the compromise was not recited textually either in the body of the decree or in a schedule thereto. In *Hemanta Kumari* v. *Midnapur Zemindary Co., Ltd.*[1], the Board was careful to avoid laying down any method of compliance with S. 375 of the Code of 1882 as the only method. Lord Buckmaster was at pains to say that "their Lordships are not aware of the exact system by which docu-

1. (1919) 37 M.L.J. 525: L.R. 46 I.A. 240: I.L.R. 47 Cal. 485 (P.C.).

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Jagat Singh v. Sangat Singh.
Sir George Rankin.

ments are recorded in the Courts in India," and it was not intended by pointing out one "perfectly proper and effectual method" to alter or nullify the rights of parties which for many years past had depended on the previous Indian practice being treated as valid. That S. 375 was sufficiently complied with by a reference to the compromise being made in the decree appears from the judgment delivered by Lord Watson on behalf of the Board in *Pranal Annee* v. *Lakshmi Annee*[1], where it was said that "the order of the learned Judge if it had referred to or narrated these terms of compromise would have been judicial evidence available to the appellant that the respondents had agreed to transfer to her the moiety of the land now in dispute." (See also *Hemanta Kumari's case* supra at p. 247 of the report.)

The only remaining question is whether Bishan Devi entered into the compromise voluntarily and with understanding of its effect. It does not appear that she was *purdanashin* in the strictest sense, and her evidence is that of an intelligent woman. She took the benefit of the compromise and acted on it for many years before repudiating it. As she not only got rid of the claim of Sundar Singh to be sole owner of her husband's lands and other assets, but enforced one of the terms of the compromise against him, there is more than sufficient *prima facie* evidence that she understood the transaction. It is satisfactorily proved that the tems of the compromise were settled after much haggling in the course of which Jagat Singh conveyed her instructions to the retired District Judge, Bhagat Narain Das, who was acting as conciliator between the parties and who witnessed her signature to the petition of compromise.

The case that she signed a blank paper is, in their Lordships' opinion, disproved. They reject as worthless the evidence of Jagat Singh on this point and also the evidence to the effect that she was brought to agree by his threat to cease acting for her in the suit. The allegation that undue pressure was brought upon her by certain members of the *baradri* (brotherhood) is the only matter which requires serious consideration upon this part of the case. It is said that she was told that certain members of the family would not take part in the marriage

1. (1899) 9 M.L.J. 147: L.R. 26 I.A. 101 at 106: I.L.R. 22 Mad. 508 (P.C.).
2. (1919) 37 M.L.J. 525: L.R. 46 I.A. 240: I.L.R. 47 Cal. 485 (P.C.).

:monies of her sisters's son, Nidhan Singh (brother of Jagat gh), unless she compromised with Sundar Singh. But as Subordinate Judge noticed there is no reason to think that ; threat if made would have greatly troubled Bishan Devi. r own evidence is that she said at the time that she did not e and that "if they would not let the marriage take place let n do so." The learned Judges of the High Court do not ear to find that undue influence was used but proceed upon view that Bishan Devi is not proved to have understood the ipromise or to have voluntarily entered into it. After 20 rs and more, when Bhagat Narain Das is dead, direct oral lence of the explanation of the petition can hardly be ected. The High Court, largely because of the argument as the effect of O. 2, r. 2, on the lands at Lyallpur, thought : the compromise was one-sided. Also they mistakenly ight that the sum of Rs. 8,150 was to be paid to Bishan i out of the Rs. 13,000 (which is not the case of either y). The Rs. 13,000 consisted of Government Promissory es which were to be put in the name of the sons of Sundar gh, and the sum of Rs. 7,535 realised in execution was a :rent matter. Their Lordships agree with the trial Judge olding that Bishan Devi entered into the compromise ntarily. She appears to have been surrounded with legal sers and in Bhagat Narain Das, admittedly a man of high ding and good reputation, had a family friend specially petent to give her sound and practical advice.

Their Lordships will humbly advise His Majesty that this al should be allowed, that the decree of the High Court ld be set aside and the decree of the Subordinate Judge ›red. The first and second respondents will pay the llant's costs in the High Court and of this appeal.

Solicitors for Appellants: *Hy. S. L. Polak & Co.*

Solicitors for Respondents: *T. L. Wilson & Co.*

K. S. *Appeal allowed.*

UDGMENT.—The Attavar Panchayat Court tried the suit which we are concerned on 12th January, 1937, in the ice of both parties and adjourned it to 14th January, 1937 irther evidence. The plaintiff was then absent; but instead missing the suit for default, as it should have done under , it purported to dispose of the suit on the merits. The

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:. R. P. No. 1670 of 1937. 23rd August, 1940.

Kutinha v. Nathalal Pinto Bai.

plaintiff later filed a petition before the Kadiri Panchayat Court, which had succeeded to the jurisdiction of the Attavar Panchayat Court, to set aside the decree of the Attavar Panchayat Court passed in default. In an elaborate judgment the Kadiri Panchayat Court held that the plaintiff had had good cause for non-appearance and set aside the decree and restored the suit. The defendants thereupon filed an application before the Principal District Munsif of Mangalore to have this order quashed as being without jurisdiction. The learned Munsif held that the order restoring the suit was without jurisdiction and therefore acted under S. 73 of the Village Courts Act and quashed the order. The plaintiff has come to this Court in revision.

In *Nasir Khan* v. *Itwari*[1], a somewhat similar question presented itself. In the absence of the appellant and his pleader, an appellate Court purported to dispose of the appeal on its merits; and the question that arose in the High Court was whether a second appeal would lie. If the appeal had been dismissed for default, no appeal would have laid; but if it was dismissed on the merits, a second appeal did lie, and the learned Judges held that they had to consider not what the Court below ought to have done but what it actually did. It held that the lower appellate Court had in fact disposed of the appeal before it on the merits, even though it had no jurisdiction to do so. As it was disposed of on the merits, a second appeal lay. That decision was followed by a single Judge of the same High Court—who was also a party to that decision—in *Madho Dass v. Maharajah of Benares*[2]. In *Phul Kuar* v. *Hashmatullah Khan*[3], which has been referred to for another purpose by the learned Advocate for the petitioner, it seems to have been agreed by both sides that although the lower Court should have disposed of the proceedings before it in default of appearance, it did not in fact do so; and the disposal was treated in the High Court as being on the merits. So there is no doubt that the learned District Munsif was right in holding that the disposal of the Attavar Panchayat Court was a disposal on the merits and that the remedy of the respondent lay by way of an application to the District Munsif to quash the order that was passed without jurisdiction.

1. (1923) I.L.R. 44 All. 669. 2. (1924) 84 I.C. 521.
3. (1915) I.L.R. 37 All. 460.

Kutinha
v.
Nathalal
Pinto Bai.

It is argued that even though the order of the Kadiri Panchayat Court is one setting aside a decree passed in default, it is valid as a review of the previous judgment. In *Phul Kuar* v. *Hashmatullah Khan*[1] such a remedy was allowed; but there was no difficulty there because the learned Judges were dealing with an ordinary civil suit in which a petition for review lies. The Village Courts Act however makes no provision for reviews; and it has been made clear in many decisions (*Anantaraju Shetty* v. *Appavu Hegade*[2] is one of them) that unless a statute provides a remedy by way of review, the Court cannot review its own judgment except in very exceptional circumstances, such as for example, where it passed an order inadvertently or on account of some false representation by the officers of the Court. One cannot therefore take the order of the Kadiri Panchayat Court as a lawful order passed in review of the order of the Attavar Panchayat Court.

Finally, it has been urged that the learned Munsif ought not to have interfered with an order that was obviously just, and that he might well have himself quashed the order of the Attavar Panchayat Court and restored the suit in the way the Kadiri Panchayat Court did. It does not however appear either that an application had been made by the defendants to the Court asking it to do that or that such an application would have been in time. It is pointed out that it is still open to the petitioner to apply to the District Munsif's Court under S. 73; because S. 73 gives a discretion to the Court to entertain an application even after the expiry of sixty days. However, we are not concerned in this Revision Petition with an application which has not yet been made.

In the result the petition fails and is dismissed with costs.

K. C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW.

C. Gopalachariar .. *Petitioner** (*Defendant*)

v.

Deepchand Sowcar .. *Respondent* (*Plaintiff*).

Gopala-
chariar
v.
Deepchand
Sowcar.

Pensions Act (*XXIII of 1871*). *Ss. 10 and 11—"Commuted portion of pension"—Exemption from attachment—Civil Pensions* (*Commutation*) *Rules*,

1. (1915) I.L.R. 37 All. 460. 2. (1919) 37 M.L.J. 162.

*C. R. Ps. Nos. 751, 752, 753 and 771 of 1940. 25th September, 1940.

r. 6—"Money due on account of pension"—Commuted portion of pension whether falls under. Gopalachariar v. Deepchan Sowcar.

The intention behind the provisions of S. 11 of the Pensions Act is applicable equally to the commuted portion as well as to the uncommuted portion of a pension, and such commuted portion will be "money due or to become due on account of pension". Consequently the commuted portion of the pension due to a retired Government servant is not liable to attachment at the instance of his creditors.

The Municipal Council, Salem v. *Gururaja Rao,* (1934) 68 M L.J. 118: I.L.R. 58 Mad' 469. considered.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the District Court of Chingleput dated 23rd February, 1940 and made in A. S. No. 160 of 1939 (E. P. No. 479 of 1939 on the file of the Court of the District Munsif of Conjeevaram in S. C. S. No. 279 of 1937, Sub-Court, Chingleput), etc.

M. E. Rajagopalachari and *C. Krishnamachari* for Petitioner.

K. Bhashyam Aiyangar and *T. R. Srinivasan* for Respondent.

The Court delivered the following

JUDGMENT.—In these connected Civil Revision Petitions from the orders of the District Judge of Chingleput in appeals which were heard together, only one point arises for determination, namely, whether the commuted portion of the pension due to the petitioner by the Government is liable to attachment at the instance of creditors of his in view of S. 11 of the Pensions Act (XXIII of 1871). The petitioner is a retired postal official and a portion of his pension was commuted sometime in March, 1939, or thereabouts and the commuted portion of the pension amounted to Rs. 3,500 and odd, and a payment order for this amount was forwarded to the postmaster, Conjeevaram, for delivery to the petitioner. As the learned District Judge observes, the only act remaining to be done by the petitioner is to take delivery of the payment order and to cash it at the local treasury. Before he could do so attachments were made at the instance of certain money-lenders. On objection by the petitioner that the attachments were illegal in view of the provisions of S. 11 of the Pensions Act, the Courts below have held that his contention is not well founded and have confirmed the attachments.

There is no doubt that in view of the Bench decision in *The Municipal Council, Salem* v. *Gururaja Rao*[1], when a pension is commuted or a portion thereof, it ceases to be pension and becomes a capital sum. This decision is binding on me and I have to proceed on the basis that the commuted portion of the pension cannot be treated as pension after the commutation. It has been brought to my notice that a certain passage which was quoted and relied upon in *Municipal Council, Salem* v. *Gururaja Rao*[1] from *Crowe* v. *Price*[2] is to be found no doubt in the Law Journal Reports (*Crowe* v. *Price*[3]) but is not to be found in the report of the same case in *Crowe* v. *Price*[2]. It would seem indeed that the latter report gives a revised version of the judgment of Lord Coleridge, C.J. Nothing, however, turns on this, because apart from this passage which is relied on in *The Municipal Council, Salem* v. *Gururaja Rao*[1], the Bench has clearly laid down that after commutation the portion of the pension that was commuted ceases to be pension.

The point for determination is however not concluded by the decision in *The Municipal Council, Salem* v. *Gururaja Rao*[1], for, that was a case in which the question was whether the commuted portion of the pension was 'income' for the purpose of assessing profession-tax in a municipality. In the present cases it was urged in the Courts below, and the same contention is repeated in this Court, that the commuted portion of the pension is not attachable by reason of the provisions of S. 11 of the Pensions Act which runs as follows:

"No pension granted or continued by Government on political considerations, or on account of past services or present infirmities or as a compassionate allowance, and no money due or to become due on account of any such pension or allowance, shall be liable to seizure, attachment or sequestration by process of any Court in British India, at the instance of a creditor, for any demand against the pensioner, or in satisfaction of a decree or order of any such Court."

Reliance is specially placed on the clause "and no money due or to become due *on account of* any such pension or allowance," because in view of the Bench decision in *The Municipal Council, Salem* v. *Gururaja Rao*[1], it is not really possible for the petitioner to contend successfully that that the commuted portion of the pension is still pension so as to bring these cases under the first portion of the section. The question therefore is whether the commuted portion of the pension—I

1. (1934) 68 M.L.J. 118: 58 Mad. 469.
2. (1889) 22 Q.B.D. 429. 3. (1889) 58 L.J.R.Q.B.D. 215.

Gopalachariar v. Deepchand Sowcar.

ım using these words: "commuted portion of the pension" as :hey are the words employed in the rule relating to this subject which defines the legal effect of an order of commutation; ıamely, r. 6 (2) of Civil Pensions (Commutation) Rules—is money due or to become due on account of pension.' The point is not covered by any authority; in any case no authority bearing on it has been quoted before me and no judicial interpretation of the words 'on account of' has been brought to my notice. The phrase is a phrase used in ordinary parlance and it is certainly not a term of art which has acquired a definite or precise meaning in law. The ordinary dictionary meaning of the phrase has to be ascertained and applied to the facts of the present cases. The meaning given in the New English Dictionary as well as in Webster's Dictionary is "for the sake of", "by reason of" or "because of." Now can it be said that the commuted portion of the pension is not money due on account of the pension? Though the pension has been commuted, still can it be said that money due because of, or by reason of such commutation is not money due on account of the pension? It is brought to my notice by the learned advocate for the petitioner that S. 10 which relates to commutation of pension is part of Chapter III which is headed 'Mode of payment'. In other words, the commutation of pension is regarded as a mode of payment of pension. If so, can it be reasonably urged that payment of the commutation amount is not payment on account of the pension, though not of the pension itself, because after commutation it ceases to be pension? I see no good reason why it should be deemed to be otherwise. No doubt money is due immediately under the commutation order, but the commutation order itself is on account of a pension which was commuted or a portion of the pension which was commuted. The intention behind the provisions of S. 11 of the Pensions Act is applicable to the commuted portion as well as to the uncommuted portion of the pension and the language of S. 11 does not appear to exclude from its protection the money that is due under a commutation order commuting a part of the pension. I am therefore of opinion that in these cases the attachments were contrary to the provisions of S. 11 of the Pensions Act, and it follows therefore that these petitions must be allowed and the attachments must be set aside with costs in all the Courts.

B. V. V. ——— *Petitions allowed.*

delivered by

ioner obtained a decree
nembers of their undivid-
5 on the file of the District
. 2,567-4-0 on a promissory
by the respondents Nos. 1

28th August, 1940.

under the explanation to S. 8, the renewal of a debt or its inclusion in a fresh document must be by the same debtor, and we have further held in *Doraikannu Odayar* v. *Veerasami Padayachi*[3] that when a member of a joint Hindu family executes a fresh document for a pre-existing liability binding on the family but incurred on its behalf by another member, such previous debt can be regarded as renewed or included in a fresh document within the meaning of the explanation to S. 8 of the Act, as the debtor in each case is the same person, namely, the joint family [*see* S. 3 (1) of the Act]. If, therefore, the promissory note of 1929 executed by the father of the fourth respondent jointly with two strangers was for a debt binding on the family, the case would fall under the explanation to S. 8 and the decree would have to be scaled down with reference to the principal advanced under the earlier note of 1929. This question, however, has been left undetermined by the Court below as it held that it was not necessary for the purpose of the explanation to S. 8 that the debtor should be the same, a view which we have held to be untenable. If, on the other hand, it were found that the earlier note was not executed for a debt binding on the family, the question

1. (1940) 2 M.L.J. 517.
2. (1939) 2 M.L.J. 609.
3. (1940) 2 M.L.J. 651.

Appaji Naidu.

Patanjali Sastri, J.

father who died during the pendency of the suit having been a party to both promissory notes. We consider that it is not necessary for the application of S. 8 that the parties to the earlier and the later debts should be absolutely identical. As observed by us in *Doraikannu Odayar* v. *Veerasami Padayachi*[1] there may be cases in which a debt due jointly and severally from *A* and *B* is included in a fresh document executed by *A* alone or cases in which a debt solely due by *A* is included in a fresh document executed by *A* and *B*. There is no obvious reason why the explanation to S. 8 should not be applied to cases of that sort when the application for scaling down the debt is made by the person who is a debtor under both the instruments. Even if the later transaction in such cases cannot be deemed to be a 'renewal' in the strict sense of the term, it would amount to an inclusion of the pre-existing liability of the common debtor in the later document. The fourth respondent will thus be entitled in any case to the benefit of the explanation in scaling down the decree under S. 8.

The order of the Court below is set aside and the application under S. 19 is remitted to the lower Court for disposal in the light of this judgment. The costs of this revision petition will abide the result.

Petition allowed.

K. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Kolathoor Soolapani Moopil Variar v. Vayanakare Thekke Veettil Veloor.

Kolathoor Soolapani Moopil Variar . . *Petitioner* (Respondent-Plaintiff)*

v.

Vayanakare Thekke Veettil Veloor *alias* Amminikat Mele Veettil *alias* Etachole Kunhihileshmi *alias* Kunhimalu Amma. *Respondent (Petitioner-9th Defendant).*

Madras Agriculturists' Relief Act (*IV of* 1938), *S.* 3 (*ii*), *Proviso D and S. 15*—Kanom—*Suit for redemption*—Kanom *held by tarwad which was a*

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1. (1940) 2 M.L.J. 651.

*C.R.P. No. 611 of 1939. 3rd September, 1940.

Kolathoor Soolapani Moopil Variar *v.* Vayanakare Thekke Veettil Veloor.

jenmi paying more than Rs. 500 as land revenue at the time of suit—Subsequent partition assigning kanom *right to one* tavazhi *which paid less than Rs. 500 as land revenue—Such* tavazhi *entitled to benefit of S. 15 of Act IV of 1938—Effect of scaling down under S. 15 on application under Ss. 22-24 of the Malabar Tenancy Act.*

After a suit for redemption of a *kanom* held by a *tarwad* which was a jenmi paying more than Rs. 500 as land revenue there was a partition by which the *kanom* was allotted to one *tavashi* which paid less than Rs. 500 as land revenue. In an application for scaling down by the *tavashi*,

Held, the *tavashi* was under a liability to pay the rent such as would entitle it to claim the benefits of S. 15 of Act IV of 1938.

Perianna v. *Sellappa*, (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218 followed.

Cheeru v. *Chathu Nambiar*, (1940) 2 M L.J 451, referred to.

On payment of the arrears of rent as scaled down the *tavashi* is entitled to the benefits under Ss. 22 to 24 of the Malabar Tenancy Act.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Walluvanad, dated 27th October, 1938 and made in I.A. No. 993 of 1938 in O. S. No. 212 of 1934.

P. Govinda Menon for Petitioner.

A. P. Kuttisankara Menon for Respondent.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—The petitioner here was the plaintiff in a suit to redeem a Malabar *kanom*. An application was filed in that suit by the ninth defendant for relief under S. 15 of Madras Act IV of 1938. That application was granted and it is this order that the plaintiff-petitioner seeks to revise.

The *kanom* in question was executed on 23rd March, 1915, and it contained a provision that in case of default of payment of rent to the jenmi, the latter could adjust the arrears of rent due with interest thereon to the *kanom* amount. There was a default and on 10th September, 1934, the plaintiff filed a suit for redemption appropriating the arrears towards the amount which was due under the *kanom* and claiming to redeem the *kanom* on payment of the balance Rs. 715 and odd. At the time of this suit, the *kanom* right was held by the *tarwad* of the defendants which admittedly paid more than Rs. 500 as land revenue and was therefore not an agriculturist, having regard to the Proviso D to S. 3 (*ii*) of Act IV of 1938. On 5th July, 1935, there was a partition in the defendant's *tarwad* and at this partition the *kanom* right in question was assigned to the *tavashi* represented by the ninth defendant. This smaller group pays less than Rs. 500 as

reasoning in the decision in

view is taken by King, J., in *Cheeru* v. *Chath*
in a case arising under S. 15 of Act IV of 1938.

A further contention relates to the effect of S
Malabar Tenancy Act which provides that the
obtain a renewal on deposit of all arrears with int
at the contract rate, if any, up to the date of the
suggestion is that to apply the provisions of S. 15 c
1938 would amount to a repeal of the provisions
the Malabar Tenancy Act. We are unable to accep
tion. By applying the provisions of S. 15 of Madra
1938 to this case, the amount of the arrears d
tenant becomes liquidated by a deposit in accorda
terms of that section. When the Court has to d
application under Ss. 22 to 24 of the Malabar Ten
has to look to the arrears due at the time of its oı
deposit of those arrears it will order renewal in fa
tenant. When ascertaining the amount of the arrea

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE KRISHNASWAMI AIYANGAR.

Madhavi Amma and others .. *Appellants** (*Appellants-Defendants 1 to 3*)

v.

Kongot Patinhare Pathayapura tarwattil Chirudevi Amma's son Nagappan Nayar and others. *Respondents* (*Respondents-Plaintiff and Defendants 4 to 6*).

Madhavi Amma *v.* Nagappan Nayar.

Madras Marumakkattayam Act (XXII of 1933), Ss. 38 and 43—Suit by a tavashi under S. 38 for partition after application to Collector under S. 43 by some members for registration of tarwad *as impartible—Subsequent order for registration as impartible—Effect on suit—Doctrine of* lis pendens*—If applicable.*

Certain members of a *tarwad* applied to the Collector under S. 43 of the Marumakkattayam Act for registration of the *tarwad* as impartible. After notice of the application a *tavashi* filed a suit in the Civil Court under S. 38 for partition of the *tarwad*. Notwithstanding the suit for partition, the Collector proceeded with the application and ordered the registration of the *tarwad* as impartible. As to the effect of the registration on the suit,

Held, (1) that the pendency of the application under S. 43 did not preclude a *tavashi* from filing the suit under S. 38; (2) that the filing of the suit put an end to the right of the other members of the *tarwad* to apply under S. 43 and the Collector had no power to order the registration; and (3) that the doctrine of *lis pendens* has no application to the case.

Appeal under cl. 15 of the Letters Patent against the judgment of the High Court, dated 7th October, 1938 in A. A. O. No. 435 of 1936, preferred to the High Court against the order of the District Court of South Malabar, dated 8th July, 1936 and made in A. S. No. 55 of 1935 (O. S. No. 409 of 1933, District Munsif's Court, Alatur).

B. Sitarama Rao for Appellants.

Ch. Raghava Rao and *M. Chinnappan Nair* for Respondents.

The judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—The parties are members of a Marumakkattayam *tavashi*. On the 15th of August, 1933, certain members of the *tarwad*, representing a two-thirds majority, applied to the Collector for the registration of the *tarwad* as impartible under S. 43 of the Marumakkattayam Act, XXII of 1933. As required by the statute, notice of the application was served upon the first respondent, who on the 23rd of October,

*L. P. A. No. 94 of 1938. 11th December, 1939.

Madhavi Amma v. Nagappan Nayar.

Leach, C.J.

1933, filed a suit in the Court of the District Munsif of Alatur for partition of the *tarwad* under the provisions of S. 38 of the Act. Notwithstanding the suit, the registration application was proceeded with and resulted in the Collector passing an order on the 15th January, 1934, for the registration of the *tarwad* as impartible. The District Munsif held that the registration of the *tarwad* had the effect of defeating the suit and accordingly he dismissed it. The respondent then appealed to the District Court of South Malabar. The District Judge held that the registration of the *tarwad* did not affect the respondent's right to bring the suit and he remanded it to the trial Court to be dealt with on the merits. The defendants then appealed to this Court. This appeal was heard by King, J., who concurred in the decision of the District Judge. The present appeal is from the judgment of King, J.

S. 38 of the Act states that any *tavashi* represented by the majority of its major members may claim to take its share of all the properties of the *tarwad* over which it has power of disposal, and separate from the *tarwad*, provided that no *tavashi* shall claim to be divided from the *tarwad* during the lifetime of an ancestress common to the *tavashi* and to any other *tavashi* or *tavashis*, of the *tarwad*, except with the consent of the ancestress, if she is a member of the *tarwad*. There is an explanation to the section which says that for the purposes of Chap. VI (which deals with the right of partition) a male member of a *tarwad* or a female member without any living child or descendant in the female line, shall be deemed to be a *tavashi* if he or she has no living female ascendant who is a member of the *tarwad*. The respondent has no living female ascendant and he himself constitutes a *tavashi*. Therefore he had the right to institute the suit for the partition of the *tarwad*.

Sub-S. (1) of S. 43 allows two-thirds of the major members of a *tarwad* to present a petition to the Collector for the registration of the *tarwad* as impartible. Sub-S. (3) states that if after giving notice to all the major members of the *tarwad* and making such enquiry as he deems fit, the Collector is satisfied that not less than two-thirds of the major members of the *tarwad* have signed the petition with their free consent and desire the registration of the *tarwad* as impartible, he shall register the *tarwad* as impartible. S. 43 is embodied in Chap. VII which deals exclusively with impartible *tarwads*. Chaps. VI

and VII stand apart and there is nothing in any of the sections of these two Chapters which suggests that a *tavashi* is precluded from filing a suit for partition because there happens to be pending an application for registration under Chap. VII.

If the ordinary rule of Hindu Law that the filing of a partition suit involves the automatic severance of the joint status applies, it is clear that there would be no power in the Collector to register a *tarwad* as impartible once a suit for partition has been filed. It is not contested that the ordinary rule of Hindu Law does apply. In fact it was so held in *Kunchi Amma* v. *Minakshi Amma*[1]. This being the position, the filing of the suit on the 23rd of October, 1933, put an end to the right of the other members of the *tarwad* to apply for registration under S. 43, and the Collector had no power to order registration. His order of the 15th of January, 1934, must be regarded as being null and void.

Mr. Sitarama Rao has suggested that the doctrine of *lis pendens* applies and that, inasmuch as the application under S. 43 was filed first, the suit was incompetent. The doctrine of *lis pendens* obviously can have no application here. There is a right to partition given in Chap. VI and there is nothing in Chap. VII which prevents that right being exercised while the tarwad remains unregistered.

We consider that the decision under appeal is correct. The appeal will be dismissed with costs in favour of the first respondent.

K. S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HORWILL.

Devidoss & Co. v. Abboyee Chetty & Co.

Messrs. Devidoss & Co., a Firm of cloth merchants, carrying on business in Commercial Street, Bangalore — *Appellants (Plaintiffs)*

v.

Alathur Abboyee Chetty & Co., a Firm of piece-goods merchants, carrying on business at 34 Godown street, George Town, Madras. — *Respondents (Defendants).*

Trade marks and trade names—Infringement—Acquiescence of plaintiffs—Effect—Costs—Successful defendants' right to.

1. (1935) 70 M.L.J. 114 : I.L.R. 59 Mad. 693.

* O. S. A. No. 5 of 1939 13th September 1940.

the exercise of the Ordinary Original Civil Jurisdiction ‹
High Court in C. S. No. 206 of 1935.

Nugent Grant and C. Srinivasa Chari for Appellants

V. Radhakrishnayya for Respondents.

The Court delivered the following

JUDGMENTS: *The Chief Justice.*—The suit out of whi
appeal arises was instituted by the appellants on the origin
of this Court for a declaration that they were entitled excl
to the use of a certain trade mark and for a per
injunction restraining the respondents from using a s
mark. The defence was threefold. In the first place i
said that the respondents had the right to use the
complained by reason of concurrent user. In the seconc
it was said that the appellants had in any event lost the ri
exclusive user by reason of their acquiescence in the respo
using the marks now complained of. The third ple
that the appellants had abandoned any rights they might
had in the mark. The learned trial Judge (Gentle, J.
that the use by the respondents of the mark complained c
an infringement of the rights of the appellants, b
appellants had acquiesced in the course of conduct pursu
the respondents and therefore they were not entitled to
On this ground he dismissed the suit but without cost
appellants challenge the finding of the learned Judge th
acquiesced in the use of the mark by the respondents ar
respondents support the judgment on the grounds advan
them at the trial. They further contend that the l
Judge should have allowed them their costs.

The appellants are piecegoods merchants carryi
business in Bangalore and the respondents are piecegood
chants carrying on business in Madras. The parties
however, confine their businesses to these places. The ap

deal in longcloth, shirtings and twill of Indian manufacture. Except for one shipment of goods in 1930 they have never dealt in piecegoods manufactured in England. The respondents do not deal in piecegoods of Indian manufacture, but import from England longcloth shirtings, twill and similar goods. The goods dealt in by the respondents are admittedly of superior quality to those dealt in by the appellants and command considerably higher prices. The learned Judge found as a fact that the business of the respondents caused no financial loss to the appellants and it is manifest that anybody who applied to the respondents for cloth would not get an inferior, but a superior article.

The mark of which the appellants claim the exclusive right of user consists of a figure of a baby sitting on four pieces of cloth and holding a rattle in the right hand. Above the figure is the word 'baby' in English, and at the sides the same word in Nagiri, Urdu, Kanarese and Tamil. The mark complained of consists of the figure of a baby kneeling with its hands upon a single piece of cloth, partly unrolled, and underneath are the words ' Baby Brand ' in English, and the word 'Baby' in Nagiri, Urdu, Telugu and Tamil. It is conceded by the respondents, as it must be, that if the appellants are entitled to the exclusive use of their mark, the mark adopted by the respondent will constitute an infringement of the appellants' right. According to the plaint the appellants adopted their mark in the year 1927, but this has not been proved. Despite the allegations of acquiescence and abandonment advanced by the respondents no one from the appellants' firm has ventured to go into the witness box. Therefore it has not been proved that the appellants adopted the mark in 1927, but the respondents have admitted that the appellants used it in 1929 and for the purpose of this case it may be taken that it was adopted by the appellants in that year. The respondents decided to use the mark which they now claim as theirs in the early part of 1930 and they used it on goods imported into this country in August of that year. It was conceded by the appellants in the course of the hearing of the appeal that in instructing their suppliers in England to mark their goods with the mark complained of the respondents acted in good faith and in entire ignorance that the appellants had already adopted the mark of a baby. Further, it was accepted that the respondents have never used their mark on piecegoods of

to goods manufactured in and imported from England.

In the course of his judgment the learned Judge has observed that it would appear at one time that piecegoods merchants in India were under the impression that if a trade mark were registered in England this would result in protection in India. That there was this impression is shown from the conduct of the parties in this case. On the 25th September, 1930 the respondents wrote to their suppliers in Manchester asking them to obtain the registration of the mark in suit as their own trade mark. The suppliers took steps to carry out their instructions, but it was discovered that other merchants were using a 'Baby' trade mark and that the appellants had themselves applied for registration in England of their mark. It was also ascertained that the appellants' application had not been granted and the mark claimed by them had been placed on the 'Refused list'. In a letter dated 5th February, 1931, the suppliers wrote to the respondents stating that by allowing their mark to go on the 'Refused list' no one could obtain registration of a similar mark and if they continued to use it for two or three years they might make an application for it to be put on the registered trade mark list, this privilege being given as the result of user of the mark. There was lengthy correspondence between the respondents and their suppliers with regard to registration in England and letters also passed between the respondents and a firm of trade mark agents from whom the respondents sought and obtained advice at the suggestion of their suppliers. The result of the advice was that the respondents decided not to proceed with their application for registration in England and not to expend money in advertising their claim to the mark in India, but to continue to use the mark on the goods imported by them. The appellants were confining the use of their mark to goods of Indian manufacture and in following the course which they did I am of the opinion that the respondents considered that they were acting within their rights.

On the 18th April 1931 the appellants' legal adviser wrote to the respondents complaining of the infringement of their trade mark. The respondents were called upon to refrain from using the mark, to withdraw all goods bearing the mark from the market and to pay Rs. 5,000/- by way of damages. On the 28th April, 1931, the legal adviser of the respondents replied

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to this letter and denied that the mark had in the minds of the public become associated with the appellants' goods. It was asserted that the respondents were merely using the mark on English goods and that if a suit were filed it would be defended. The appellants took no further steps in the matter and the business of the respondents in the goods bearing the mark complained of continued to increase greatly year by year. From 14th August, 1930 to 31st December, 1935, the total value of the goods imported by the respondents bearing this mark amounted to nearly Rs. 17,000,00, or over £127,000. In addition to the capital which the respondents had to provide for the shipments they expended Rs. 20,000 in advertising and in other ways in popularising their goods. That the appellants knew of this cannot be doubted for a moment and they were content to allow the respondents to use the mark on the imported goods until the 27th July, 1935, when they filed the present suit. For the purpose of stamping the goods which the appellants imported from England in 1930 they sent a block to their suppliers. On the 30th March, 1931, a few months after they had imported their one and only lot of English manufactured goods, they wrote to the suppliers to return to them the block, which clearly indicated their intention not to deal any more in goods of this class made in England.

At this stage it will be convenient to inquire how the doctrine of acquiescence has been applied in trade mark cases. For the appellants it has been contended that before this doctrine can be applied all the conditions stated by Fry, J., in *Willmott* v. *Barber*[1], must be complied with. That case did not relate to a trade mark, but to an agreement for the lease of land. After stating that a man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights, Fry, J., stated in the following words the elements or requisites necessary to constitute fraud of this description:

" In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is

1. (1880) 15 Ch. D. 96 at p. 105.

C.J. money or in the other acts which he has done, either directly or b abstaining from asserting his legal right. Where all these elements exis there is fraud of such a nature as will entitle the Court to restrain th possessor of the legal right from exercising it, but, in my judgment, nothin short of this will do."

These observations relate to a situation in which the plain

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Rip Van Winkle policy of going to sleep and not watching what their rivals and competitors in the same line of business were doing. I accept the evidence of any gentleman who comes into the box and gives his evidence in a way which satisfies me that he is speaking the truth when he says that he individually did not know of the existence of a particular element or a particular factor in the goods marketed by his opponents. But the question is a wider question than that: Ought not he to have known: is he entitled to shut his eyes to everything that is going on around him, and then when his rivals have perhaps built a very important trade by the user of *indicia* which he might have prevented their using had he moved in time, come to the Court and say: 'Now stop them from doing it further, because a moment of time has arrived when I have awakened to the fact that this is calculated to infringe my rights'. Certainly not. He is bound, like everybody else who wishes to stop that which he says is an invasion of his rights, to adopt a position of aggression at once, and to insist, as soon as the matter is brought to his attention, or as soon as, in the opinion of the Court, it ought to have come to his attention, to take steps to prevent its continuance; it would be an insufferable injustice were the Court to allow a man to lie by while his competitors are building up an important industry and then to come forward, so soon as the importance of the industry has been brought home to his mind, and endeavour to take from them that of which they had legitimately made use; every day which they used it satisfying them more and more that there was no one who either could or would complain of their so doing. The position might be altogether altered had the user of the factor or the element in question been of a secretive or surreptitious nature; but when a man is openly using, as part of his business, names and phrases, or other elements, which persons in the same trade would be entitled, if they took steps, to stop him from using, he gets in time a right to sue them which prevents those who could have stopped him at one time from asserting at a later stage their right to an injunction."

In *McCaw Stevenson & Orr, Ltd.* v. *Lee Bros.*[1], acquiescence for four years was held to be sufficient to preclude the plaintiff from succeeding. In 1897 the plaintiffs in that case registered the word 'Glacier' as a trade mark in respect of transparent paper as a substitute for stained glass. As the result of user the word had become identified with the plaintiffs' goods. In 1900 the defendants commenced to sell similar goods under the name 'Glazine'. In 1905 the plaintiffs commenced an action for infringement. The defendants denied that the use of the word 'Glazine' was calculated to deceive and also pleaded acquiescence. A director of the plaintiff company admitted that he had known of the use of the word 'Glazine' by the defendants for four years—he would not say it was not five years. It was held that the plaintiffs failed on the merits and by reason of their delay in bringing the action.

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1. 23 R.P.C. 1.

ment of a trade mark, but the decisions to which I have referred to clearly indicate that where a trader allows a rival trader to expend money over a considerable period in the building up of a business with the aid of a mark similar to his own he will not be allowed to stop his rival's business. If he were permitted to do so great loss would be caused not only to the rival trader but to those who depend on his business for their livelihood. A village may develop into a large town as the result of the building up of a business and most of the inhabitants may be dependent on the business. No hard and fast rule can be laid down for deciding when a person has, as the result of inaction, lost the right of stopping another using his mark As pointed out in *Rowland* v. *Michell*[1], each case must depend on its own circumstances, but obviously a person cannot be allowed to stand by indefinitely without suffering the consequence.

I consider that in this case there is ample material to support the finding that the appellants have lost their right of action against the respondents by reason of their acquiescence in the respondents' use of the mark complained of. During a period of four years the respondents built up a very large business and it has not been suggested, indeed it would be idle to do so, that the appellants did not know of all that was going on. In addition to the capital sunk in their business the respondents spent during this period Rs. 20,000 in popularizing the mark. There is no question of the respondents having the intention to steal the appellants' trade. They were dealing in a better class of goods and as I have already stated it was admitted by the appellants in this Court that the respondents adopted the 'Baby' mark in ignorance of the fact that the appellants were using it.

On the 27th August, 1934, a Madras piecegoods merchant named K. R. Narayana Ayyar wrote to the appellants stating that he desired to use the 'Baby' mark on piecegoods and asked whether they had any objection to this course. It was pointed out to the appellants that the respondents were using this mark on their goods and it was suggested that he should be allowed the same privilege. The letter concluded,

1. 14 R.P.C. 37 at 43.

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"If, however, you have any objection to my using 'Baby' brand on my goods, kindly let me know of same immediately on receipt of this letter and also let me know as to the reason for your having allowed Messrs. Alathur Abboy Chetty and Company, Madras, to use 'Baby' brand. I have addressed this letter to you because I understand that you are the prior user of 'Baby' brand and not Messrs. Alathur Abboy Chetty and Company."

On the 4th September, 1934, the appellants replied as follows:

"You should know that we have long registered our 'Baby' trade mark and running in all the markets. Any colourable imitation of our marks will make you liable under law for penalty for 'infringement of trade marks', which kindly note."

No reference was made in this letter to the fact that the respondents had been using the mark. K. R. Narayana Aiyar wrote again the next day to the appellants as no reference was made to the position of the respondents in the appellants' reply. In this letter he said:

"As stated in my letter of the 27th ultimo Messrs. Alathur Abboy Chetty and Company, Madras, have been using 'Baby' brand and I am very much surprised to see that since you say that you have long registered your 'Baby' trade mark, they, the said Messrs. Alathur Abboy Chetty and Company, Madras also should be using 'Baby' brand. How is this? I am advised that any trade mark used by more than one is a common property, to say plainly, it is not the exclusive property of any one, and can therefore be used by others also. Having regard to the fact, that 'Baby' brand is being used by you and also by Messrs. Alathur Abboy Chetty and Company, Madras, I have no hesitation in saying that the said 'Baby' brand is a common property and can therefore be used by me and others also. If you alone had been using 'Baby' brand and not anybody else, then it is different matter altogether, but now there is also another person using the 'Baby' brand."

The reply to this letter was sent on the 13th September, 1934 and consisted of these words:

"In reply to your letter dated the 10th instant, we wish to refer you to our letter No. 1973, dated the 4th September, 1934."

There is here a deliberate evasion of K. R. Narayana Aiyar's pointed question with regard to the respondents' user of the mark and the next day he wrote to the appellants a letter in which he said:

"Unless you give me a satisfactory reply to the points raised in my letter of the 5th September, 1934, I am advised that you are not the exclusive owner of the 'Baby' brand, because it is also being used by another party, Messrs. Alathur Abboy Chetty and Company, and you have therefore no right to prevent me or anybody else from using 'Baby' brand on piecegoods."

To this letter no reply at all was sent and the present suit was not launched till some ten months later. Obviously the appellants were unable to give an effective reply to these pointed

in the use of the mark by the respondents I agree with the learned Judge that it is unnecessary to decide whether the respondents' pleas of abandonment and user are well founded.

With regard to the memorandum of cross-objections I consider that the respondents should have their costs in the Court below. That they adopted the mark in ignorance of the fact that it was being used by the appellants is not disputed, and in answer to a question put by the Court, Mr. Nugent Grant, on behalf of the appellants, made it clear that the appellants were not suggesting that the respondents had continued to use this mark in order to steal the appellants' business. Where a plea of acquiescence or abandonment succeeds, especially where the defendant has taken the trade mark of another in ignorance and has used it in the mistaken belief, but sincerely entertained, that he is acting within the law it would be wrong to deprive him of his costs. I would dismiss the appeal with costs and allow the cross-objections with costs. There will be a certificate for two counsel in both Courts.

Horwill, J.—I agree.

K. S. *Appeal dismissed and memorandum of cross-objections allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE HORWILL.

R. M. S. Firm consisting of partners Raman Chettiar and others .. *Appellants** (*Plaintiffs*)

v.

S. L. M. Muthuswami Odayar .. *Respondent* (*Defendant*).

R. M. S. Firm *v* Muthuswami Odayar.

Transfer of Property Act (IV of 1882), S. 18—Dedication of lands for religious purpose—Public mainly to be benefited by dedication—Whether dedication valid.

One '*M*', a Roman Catholic Christian, executed an agreement whereby he relinquished all his rights in his properties in favour of his sons and directed them to pay off his debts. He set apart 47 acres of nanja and punja lands for a charity called 'Chinnayya Odayar Samadhi Dharmam' for defraying the expenses of Pooja, etc., at the tomb of his father Chinnayya Odayar and of feeding pilgrims during the annual festival at Velanganni and for supplying oil to 1,000 persons during that time. A creditor of '*M*' attached the dedicated properties and *M's* claim that the attachment could not be made as the lands were dedicated properties was allowed and the creditor sued for a declaration, that the charity was illusory and otherwise invalid. The lower Court upheld the charity, though it was of the view that that part of the dedication namely, for Pooja at the tomb of Chinnayya Odayar was bad as being one for superstitious uses.

Held, that the entire trust was valid, that the dedication was mainly for the benefit of the public and hence will be saved by S. 18 of the Transfer of Property Act.

Most Reverend Joseph Colgan v. *Administrator-General of Madras*, (1892) I.L.R. 15 Mad. 424, may not be good law after *Bourne* v. *Keane*, (1919) A.C. 815.

Kayastha Patasala, Allahabad v. *Mt. Baghwathi Devi*, (1937) 1 M.L.J. 166: L.R. 64 I.A. 5: I.L.R. (1937) All. 3 (P.C.), referred to.

Appeal against the decree of the Court of the Subordinate Judge of Tiruvarur in O. S. No. 39 of 1935.

V. Ramaswami Aiyar for Appellants.

K. Bashyam Aiyangar and *T. R. Srinivasan* for Respondent.

The judgment of the Court was delivered by

Pandrang Row, J.

Pandrang Row, J.—This is an appeal from the decree of the Subordinate Judge of Tiruvarur dated 24th August, 1936, in O. S. No. 39 of 1935 on his file, a suit to set aside the order made on a claim petition on the 11th October, 1933, in favour of the defendant. The subject-matter of the dispute is about 47 acres of land situated in two villages which were under Ex. I dated June 25th, 1927, dedicated for certain purposes connected

* Appeal No. 7 of 1937. 8th February, 1940.

The principal facts of the case are that the defendant is the head of a family which possessed considerable landed property and also engaged in trade on a fairly large scale in several places. The landed property of the family was as much as 200 *velies*, a *veli* being equal to about 6¼ acres. The defendant was assisted in the business by his three sons and the defendant and his sons executed Ex. I which is styled a partition deed on 25th June, 1927. The partners are however Christians and the phrase "partition deed" is perhaps not the correct description to be applied to the document. It is this document that was put forward as a shield by the defendant when the properties in question which had been dedicated for the purposes mentioned above were attached in execution of a decree obtained by the plaintiffs who are Nattukottai Chettis against the defendant. The claim put forward by the defendant on the strength of Ex. I was allowed and the attachment was cancelled and the present suit was instituted by the plaintiffs to set aside the order on the claim petition and to declare that the properties covered by Ex. I are liable to be attached and sold in execution of the decree obtained by them against the defendant. The main contest in the Court below centred round the question whether the dedication made by Ex. I was valid. The finding was in favour of the defendant, that is to say, in the affirmative and the suit was dismissed with costs. The plaintiffs are the appellants and the same point which arose for decision in the Court below is the point for determination in this appeal. The truth of the document, that is to say, its execution or registration, is not denied and the only attack made on it is in respect of its validity. This attack is based on more than one ground and it will be convenient to deal with each separately. In the first place it was contended that the dedication was not real but only sham or illusory; in other words, that there was no intention whatever to make a dedication or create a trust, but the document was executed merely for the purpose of screening the properties in question from creditors. So far as this ground of attack is concerned very little need be said in support of the finding of the Court below, for this part of the case has been very fully dealt with in the judgment appealed from and the attack on this part of the judgment was never very serious. It is not as if

the properties concerned formed any considerable portion of the properties of the executants. As mentioned already, the landed properties of the family were very considerable in extent, being about 1300 acres and what was dedicated by Ex. I was less than 50 acres of land; a very small fraction, indeed, of the total property. It cannot be said that if the idea was to screen the properties from the creditors the executants would have thought of screening only a very small fraction of their total property from the creditors. Secondly, there is no doubt that actually the purposes mentioned in Ex. I for which the dedication was made were being carried out though much better evidence could have been perhaps adduced. There is very little reason to doubt the actual fact that the charities mentioned in Ex. I were being performed both before the document was executed and afterwards, and the dedication in Ex. I was merely to give permanency to what was being done for several years in commemoration of the deceased father of the defendant who had died about 30 years before. As pointed out by the learned Subordinate Judge, action was taken after Ex. I as if it was a genuine dedication because a *patta* was taken out for the lands in the name of the charity, and receipts were being granted in the name of the charity. Lease deeds were also taken in the name of the charity and account books were maintained showing the extent of the income of these lands for the charity. It is also found that Ex. I was mentioned in all subsequent important transactions with the creditors, and it is obvious that but for Ex. I there could not have been these transactions. The main object of Ex. I, as a perusal of Ex. I will show, was to make arrangements for the satisfaction of the creditors of the family treating all the debts incurred by whichever member of the family as debts binding on the family and making all the properties belonging to the family liable in respect of such debts. The arrangement was that the father, that is, the defendant, was to divest himself of all his rights in the properties which, as mentioned already, were very considerable except for a small house worth about Rs. 2,000 and all the properties of the family, that is, the entire 200 *velis* of land and the outstandings due to the family with the exception of the property reserved for the charity were placed in the hands of the sons for the express purpose of paying off all the debts, one of the conditions being that the sons were not to alienate any

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of the properties or to make any partition as between themselves of the properties till all the debts were paid. It is thus clear that the main object of Ex. I was to make an efficient arrangement for the payment of all the creditors and incidentally to make a small provision for a religious or charitable purpose. It is found that there was an endowment in respect of the tomb of the defendant's grandfather which was being administered for a long time and it was nothing out of the way therefore for the defendant and his sons to agree to create a similar endowment for the tomb of the defendant's father. It is really unnecessary to say more on this topic, for it is futile to contend that the dedication was not real or was only illusory. That the intention was to make a real dedication is clear not only from the document itself but also from the surrounding circumstances and the subsequent conduct of the persons connected with the document. The attack therefore on the document on the ground that it did not make a real dedication of the properties for any religious or charitable purpose must fail.

The real attack on the document is on the ground that it was in fraud of creditors and it is this aspect of the case that has taken most of the time during the argument before us. In deciding this question regard must be had to the state of affairs at the time Ex. I was executed, that is, June 1927. In other words, we have to ascertain what was the actual financial condition of the defendant and his sons in June, 1927, when this dedication was made. This evidence has been analysed by learned counsel and the gist of the evidence is as follows. The assets of the family were a house worth Rs. 2,000 and 200 *velis* of land and certain outstandings. What exactly the outstandings were it is not possible to say and the appellants' advocate has valued the lands at a flat rate of Rs. 300 an acre, proceeding on the basis of the price paid for the lands now in dispute under Ex. III. The valuation therefore on behalf of the plaintiffs of the assets is Rs. 3,92,000 and it omits all mention of outstandings and is based on a mere estimate of the value of the lands and not on the actual values fetched subsequently. It is not denied that the price of land fell after 1927 and the evidence shows that 536 acres were sold in discharge of debts during the period 1930-34 for Rs. 2,64,000, making an average of nearly Rs. 500 an acre; and it is seen that another

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540 acres still remained subject to incumbrances to the extent of about Rs. 2,10,000. Making allowance for the fall in the price of lands after 1927, it would not be wrong to say that the value of the lands in 1927 must have been at least Rs. 600 an acre. Even allowing only Rs. 500 an acre, the value of the lands, namely, 200 *velis* or 13,000 acres would be Rs. 6¼ lakhs. This figure, may, in our opinion, be taken as a conservative estimate of the value of the lands in June 1927. As regards the liabilities the statement furnished to us by the appellants' advocate shows only Rs. 4,22,870 as the total amount of the debts. Out of this amount it is obvious that at least Rs. 40,000 should be deducted because this amount of Rs. 40,000 is included in the larger amount of Rs. 1,09,370 shown as the amount due to the Hongkong and Shanghai Bank. A reference to the document relating to this debt at page 78 of the printed record shows that this debt of Rs. 40,000 was incurred on a promissory note executed on 26th July, 1927. It is thus clear that this debt of Rs. 40,000 was not in existence on the date of Ex. I. The finding of the learned Subordinate Judge is as follows:—

"Upon a review of the evidence of the parties as well as the transactions of the debts and discharge it appears to me to be safe to infer that the properties were worth Rs. 5 lakhs and the debts did not exceed that figure."

He also points out that there are no sufficiently strong circumstances which indicate that there was any intention to defeat or delay creditors and that no creditor thought of challenging Ex. I from 1927 onwards till the attachment was made by the plaintiff in 1933, though all the creditors would have been aware of the document very soon after it was executed. The third plaintiff in his evidence admitted that the value of the assets was Rs. 4½ lakhs, on the then basis, that is to say, on the basis of the value in 1927. He said so even in his examination-in-chief and repeated it in cross-examination. It is therefore clear that even according to his own statement the assets are worth more than the amount of the liabilities, because, according to the statement furnished to us by the appellants' advocate, the liabilities were then only Rs. 4,22,870. This value is certainly less than the then value of the assets according to the third plaintiff himself. In this connection some allowance has to be made also for the natural propensity of mankind to take a rosy view of things and to value one's own property at a little higher figure than would perhaps be fetched in the market.

could not be regarded as valid in view of S. 14 of the Transfer of Property Act. There is really no substance in this contention. It is clear from S. 18 of the Transfer of Property Act that the restrictions in Ss. 14, 16 and 17 do not apply in the case of transfers of property for the benefit of the public in the advancement of religion, etc. In this case there can be no doubt that the purpose was a religious one, that is to say, for the advancement of religion and there is nothing to show that it was not for the benefit of the public. If it had been intended

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to attack the validity of the dedication in Ex. I, on the ground that there was no benefit to the public thereby, it should have been pleaded in so many words, for the question whether a particular charity was for the benefit of the public or not is a question of fact on which evidence can be led. For instance, whether the offering of prayers at the tomb or the performance of other ceremonies there, are for the benefit of the public is a question that cannot be answered as a question of law; for the answer must depend on the beliefs entertained by the class or community to which the dedicators belonged. Even otherwise it seems to us that really the purpose of the dedication was not private. The main purpose was obviously for the benefit of the public. By far the more important purpose was the feeding of the poor pilgrims twice a day on ten days during the festival of Arogyamatha Swami at Velanganni without distinction of caste or religion and the distribution to them, the number not being less than 1,000 of oil on Wednesdays and Saturdays and also 1,000 mud vessels. It is clear that it was a purpose that must necessarily consume by far the greater part of the income derived from the land set apart for this charity. No doubt it is added at the end later on that *Arathanai* and *Japams* should be daily performed at the grave with lights, flowers, incense, etc., according to the custom of the family. It does not follow that the introduction of this clause about the performance of *japams* etc., at the grave makes any difference. Even the feeding of the pilgrims and the distribution of oil among them is to be done in the name of the tomb charity or the *Samadhidharmam* as described in the document. The learned Subordinate Judge has stated with reference to the clause in Ex. I regarding the offering of prayers, *japams*, etc., at the tomb that the dedication for such a purpose is not valid, relying on *Most Reverend Joseph Colgan* v. *Administrator-General of Madras*[1] which held, following the older English cases, that a dedication for perpetual masses for the benefit of the soul of the departed was void as being one for superstitious uses. It may be necessary that the ruling in *Most Reverend Joseph Colgan* v. *Administrator-General of Madras*[1], which relies on those old cases which were subsequently overruled by the House of Lords in *Bourne* v. *Keane*[2] may have to be considered if anything really turned on this aspect of the case. Our attention has been

1. (1892) I.L.R. 15 Mad. 424.
2. (1919) A.C. 815.

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drawn to the recent case—*Kayastha Patasala, Allahabad* v. *Mt. Baghwathi Devi*[1] decided by the Privy Council in 1936. Though that was a case in which the trust deed had not been attacked on the ground of being an attempt to defraud creditors, nevertheless in dealing with the question whether the trust itself is valid because the dedication was partly for purposes which were not for the public benefit can be raised in a suit of this kind has been decided by their Lordships of the Privy Council against the present contention of the appellants. In other words, even where questions may arise under Ss. 14, 16 or 17 of the Transfer of Property Act in connection with certain dispositions in favour of private persons, nevertheless an attack on the trust deed on such grounds cannot be made except in a suit for administration of the trust or the assets belonging to the person who made the dedication or created the trust. It is, however, not necessary to rely on this aspect because in this case there is no foundation laid for the attack on Ex. I on this ground, namely, that any of the purposes for which the dedication was made were purely for private benefit and not for the public benefit. It cannot be said that *ex necessitate rei* the offering of prayers, *japams*, etc., at the grave can never be for the public benefit or for the benefit of any section of the public. In any case, this purpose appears to be obviously subordinate to the main purpose of the dedication which was to feed poor pilgrims and distribute oil among them during the ten days of a well-known festival in the neighbourhood. Such a dedication is obviously for the benefit of the public and it certainly advances religion according to the notions of the community to which the executants of Ex. I belong; in other words the feeding of poor pilgrims does advance religion according to the tenets of Roman Catholics, and it cannot be said therefore that the dedication was not "for the benefit of the public" within the meaning of these words which are found in S. 18 of the Transfer of Property Act. This attack on Ex. I on the ground that it offends against the provisions of S. 14 of the Transfer of Property Act is one of which no hint is given in the plaint.

For the reasons given above we see no reason to interfere with the finding of the lower Court on the only question

1. (1937) 1 M.L.J. 166: L.R. 64 I.A. 5: I.L.R. (1937) All. 3 (P.C.).

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which arises in this litigation, namely, the validity of Ex. I. Once Ex. I is found to be valid, it is obvious the suit must fail, and the suit must therefore be deemed to have been rightly dismissed. The appeal is accordingly dismissed with costs of the defendant-respondent.

K. S. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of North-West Frontier Province.]

PRESENT:—VISCOUNT MAUGHAM, LORD WRIGHT AND SIR GEORGE RANKIN.

Mirza Akbar .. *Appellant**

v.

King-Emperor .. *Respondent.*

P.C. — Mirza Akbar v. King-Emperor.

Evidence Act (I of 1872), S. 10—Statements made by one of the conspirators after the conspiracy had ended—Admissibility.

Communications between conspirators while the conspiracy was going on with reference to the carrying out of the conspiracy are relevant as evidence of the common intention but statements made after arrest or after the conspiracy had ended by way of description of events then past, are not admissible against the other parties.

Emperor v. *Ganesh Raghunath*, (1931) I.L.R. 55 Bom. 839 and *Emperor* v. *Abani*, (1910) I.L.R. 38 Cal. 169 (S.B.), approved.

But where after excluding such statements, there was evidence sufficient to justify the conviction it is impossible to say that there was a failure of justice and the Judicial Committee will not interfere with the conviction.

Appeal from the judgment of the Court of the Judicial Commissioner, North-West Frontier Province, dated 10th July, 1939, which confirmed the conviction and sentence of death passed on the appellant by the Sessions Judge, Peshawar Division, on 8th May, 1939.

H. D. Cornish and *G. Greenwood* for Appellant.

G. D. Roberts, K.C. and *W. Wallach* for Respondent.

28th May, 1940. Their Lordships' judgment was delivered by

Lord Wright.

LORD WRIGHT.—This is an appeal *in forma pauperis* by special leave from a judgment and order of the Court of the Judicial Commissioner, North-West Frontier Province, dated 10th July, 1939. The Judicial Commissioner dismissed the

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* P. C. Appeal No. 15 of 1940. 28th May, 1940.

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his hand, the barrel of which smelt as if freshly discharged. There was an empty cartridge jammed in the barrel. When the appellant came up from the field in which he had been working about half-a-mile away from the scene of the murder, he asserted that Umar Sher was innocent and should be released, but the others present refused to do so. Umar Sher's main defence seems to have been absence of motive. This fact, however, was relied upon by the prosecution as showing that he was a hired assassin bribed to commit the murder by the appellant and Mst. Mehr Taja, who were co-conspirators in that regard. This was found by the Court to have been the fact. The principal evidence of the conspiracy between these two prisoners consisted of three letters, two from the female prisoner to the appellant and one from the appellant to the female prisoner. The authenticity of the letters as being what they purport to be and the handwriting have not, and could not have, been contested before their Lordships.

It will be convenient to set out the relevant portions of the three letters. The first is in the handwriting of Mst. Mehr Taja:

"Greetings to thee, O my sweetheart. Mind not in the least if I have been hard on thee at times—pray forgive me for the same. In fact I feel offended when ill is spoken of thee. Khan Khela who had visited my house when Amir Jan was suffering from pain had a lot of talk against thee, but beware and lend not thy ears to these. They are archdevils. Partake not of anything from their hands. Now I shall sell myself and do this act if only I have thee at my back. What a blissful hour it would be when with Amir Jan wailing over Ali Askar we contract our Nikah and enjoy ourselves. Be not angry, my darling, for thy sorrow makes me sad. However hard on thee I have been in the past, that is all past. Henceforth I solemnly promise to desist. I do fervently cherish the hope that God will make thee mine. Try and send Mir Aftab often to me so that I may talk to him. I have found out money for thee but thou must unhesitatingly find out the man. My heart is bursting for thee and I long for thee immensely. In the end accept my greetings."

The second letter is also in Mst. Mehr Taja's handwriting:

"Letter to the sweetheart. Peace be on you. The fact, my darling, is that I am in great distress: otherwise I would not have conveyed thee such harsh things. I say these to thee for I am extremely distressed. Whom but thee have I as my own in this land of the Lord?........I have a lot to tell you but I am helpless. For God's sake spare not a moment or thou wilt ever repent my loss. They are all one against me. It would be better if aught thou couldst do. Accept greetings."

The third letter is in the handwriting of the appellant:

"My sweetheart and the bearer of my burden. If thou tauntest me in regard to my mother, what do I care for her? I look to my God and to thee

P.C.
Mirza Akbar v. King-Emperor.
Lord Wright.

only for reliance. I cannot wait any more. For the sake of God and his Prophet, do try, or I will die. You must find out the money or I would die. Is it of my choice to be roaming about and thou be enjoying with him? But what shall I do? If I had my own way I would not have left you to remain with him. I am burning, and have pity on me, for God's sake. To me, the passing of each day is like months and years. Once place thyself in my charge and satiate me with the honey of thy red lips. Even if thou cuttest my head off my neck, I would still yearn for thy white breast. This is my last word if only thou wouldst attend to it. I have vowed for thy sake at many a shrine. The house of the torturer will be rendered desolate. Mirza Akbar's limbs have grown sapless after thee."

The judges in the Court below have found in these letters, their authenticity being established, evidence justifying the conviction of the appellant and Mst. Mehr Taja. The Judicial Commissioner, in dismissing these prisoners' appeals, thus summed up the position, with special reference to the letters:

"There is a reference to Mirza Akbar by name in the letter in the handwriting of the appellant, and the name clearly refers to the writer of the document. Furthermore, the three documents taken as a whole show that the two writers of the documents desired to get rid of Ali Askar so that they should marry each other, and there was a question of finding money for a hired assassin to get rid of him. Subsequently, we find that Ali Askar was shot by a man who had no motive to shoot him. In addition to this, there was the strange conduct of Mirza Akbar when Umar Sher was arrested. There is no reason for doubting the statement of the witnesses that he did request that Umar Sher should be released. It is true that in their earlier statements the witnesses did not mention this fact, but the obvious reason is that they did not attach any importance to it at the time, because they had no conception as to what was the motive for the commission of the offence.

In my opinion there is no doubt whatsoever that these two appellants Mirza Akbar and Mst. Mehr Taja did enter into conspiracy to murder Ali Askar and that they hired Umar Sher to commit the actual murder, which he did."

The appellant's contention, however, was that this conclusion was vitiated by the admission as against him of a statement made by Mst. Mehr Taja before the examining magistrate after she had been arrested on the charge of conspiracy. That statement, which was made in the appellant's absence, was admitted in evidence both by the trial Judge and by the Judicial Commissioner on appeal as relevant against the appellant under S. 10 of the Evidence Act. The Judicial Commissioner said that it had been argued that S. 10 did not apply to any statement made by conspirators if the offence to commit which they conspired had actually been committed. He rejected that argument, and refused to hold that S. 10 had that limited meaning, though he held that the evidence of the statement could not have great weight as against the appellant,

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since he had not had any opportunity of cross-examining Mst. Mehr Taja upon it. In their Lordships' judgment, the Judicial Commissioner misconstrued the effect of S. 10.

The English rule on this matter is in general well-settled. It is a common law rule, not based on, or limited by, express statutory words. The leading case of *R.* v. *Blake*[1] illustrates the two aspects of it, because that authority shows both what is admissible and what is inadmissible. What in that case was held to be admissible against the conspirator was the evidence of entries made by his fellow-conspirator contained in various documents actually used for carrying out the fraud. However, a document not created in the course of carrying out the transaction, but made by one of the conspirators after the fraud was completed, was held to be inadmissible against the other. No doubt what was contained in it amounted to a statement evidencing what had been done and also the common intent with which at the time it had been done, but it had nothing to do with carrying the conspiracy into effect. Lord Denman, C.J., said that the evidence must be rejected (p. 138):

"......on the principle that a mere statement, made by one conspirator to a third party or any act not done in pursuance of the conspiracy, is not evidence for or against another conspirator."

Later, Patteson, J., described it (p. 139) as 'a statement made after the conspiracy was effected'. Williams, J., said that it merely related 'to a conspiracy at that time completed'. Coleridge, J., said that it 'did not relate to the furtherance of the common object.' The words relied upon in S. 10 of the Evidence Act are 'in reference to their common intention'. These words may have been chosen as having the same significance as the word 'related' used by Williams and Coleridge, JJ. Where the evidence is admissible, it is admissible, in their Lordships' judgment, on the principle that the thing done, written or spoken was something done in carrying out the conspiracy, and was receivable as a step in the proof of the conspiracy: *per* Patteson, J., at page 139. The words written or spoken may be a declaration accompanying an act and indicating the quality of the act as being an act in the course of the conspiracy, or the words written or spoken may in themselves be acts done in the course of the conspiracy. This being the principle, their Lordships think that the words of

1. (1844) 6 Q.B. 126.

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THE HIGH COURT OF JUDICATURE AT MAD

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JU
TANJALI SASTRI.

joo *alias* Doraisami Goundar *Petitioners** (*Petitio*
und others. *Defendants 3 to 5*)

v.

laniyappa Chettiar and others. *Respondents* (*Respond*
Plaintiffs).

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (ii), Provis essment of debtor to income tax in 1936-37 in respect of inco vious year—Applicability of Proviso A to S. 3 (ii)—Debtor joint nager—Assessment of—Effect on qualification of other members iculturists.

Where on an application under S. 19 by the sons of a debtor, to n the decrees on promissory notes passed against their father, the c was raised that the applicants were not agriculturists by reason of er having been assessed to income-tax in 1936-37, though in respe income of the previous year,

Held. Proviso A disqualifies persons who have been assesse

Rajoo v. Palaniyappa Chettiar.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Periakulam dated 19th August, 1938 and passed in M. P. No. 734 of 1938 in E. P. No. 648 of 1937 in O. S. No. 15 of 1937, etc.

C. A. Seshagiri Sastri for Petitioners.

T. P. Gopalakrishna Aiyar for Respondents.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—These revision petitions all arise out of applications by sons of the late Bommayya Goundan under S. 19 of Act IV of 1938, to scale down decrees on promissory notes passed against their father.

It is conceded that Bommayya Goundan was the manager of a joint family consisting of himself and his sons and that the debts in respect of which the decrees were passed were joint family debts. The learned District Munsif has found that the sons were not entitled to the benefits of the Act, because Bommayya Goundan was in the year 1936-37 assessed to income-tax at the time when he was the manager of the joint family. The main contention urged in these petitions was that Proviso A to S. 3 (*ii*) of the Act did not apply in a case in which the assessment was made in the year 1936-37 but in respect of the income of the previous year. This contention cannot succeed having regard to the words of the proviso which are not identical with but substantially the same as those in Proviso B in respect of which we have held in C. R. P. No. 1020 of 1939 that the criterion is not the period in respect of which the assessment is made but the date of the assessment. Proviso A only disqualifies persons who have been assessed to income-tax in either of the two financial years ending 31st March, 1938, and it does not lay down any restrictions regarding the period in respect of which that assessment might have been made.

A further contention relates to the question whether Bommayya Goundan was assessed in his individual capacity or as manager of the joint family. No doubt, if he was assessed expressly as manager of the joint family, all the members of that family would be disqualified from claiming to be agriculturists. The Collector's certificate Ex. 1 does not state that he was assessed in his capacity as manager of the joint family. The actual order of assessment was not produced in the trial

Rajoo v. Palaniyappa Chettiar.

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Court but we are informed that it shows Bommayya Goundan to have been assessed in his individual capacity. The learned District Munsif does not appear to have applied his mind to the distinction between the assessment of a person in his individual capacity and the assessment of that person as manager of a joint family. He seems to have assumed that, because Bommayya Goundan was in fact the manager of a joint family at the time when he was assessed to income-tax, the assessment was necessarily in respect of joint family income. It seems to us that this is a question which should be elucidated by the production of the actual order of assessment, and in view of the way in which the learned District Munsif has regarded the question, we do not think it improper to allow the petitioners an opportunity to produce the order of assessment at this stage. We may point out that the revision petitions are filed only on behalf of three of the sons, the other son being disqualified from claiming as an agriculturist on personal grounds. We therefore allow the three revision petitions and remit the applications so far as these petitioners are concerned to the lower Court for fresh disposal after allowing both parties to adduce evidence on the question whether Bommayya Goundan's assessment was in his individual capacity or in his capacity as manager of the joint family. The petitioners having failed on their main contention we think it proper that each party should bear his own costs in revision.

K. S. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Arunachala Mudali and others .. *Petitioners** (*Accused*).

Arunachala Mudali, *In re.*

Indian Police Act (V of 1861), Ss. 30, cl. (2) and 32—Violation of conditions of licence—Person violating need not be the licensee.

The person violating any of the conditions of a licence issued under S. 30 (2) of the Indian Police Act for taking a procession, need not be the licensee. Others also in the procession who being aware of the conditions of the licence violated any of them will be guilty under S. 32 of the Act.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the judgment of the Court of the Joint Magistrate of Tirupattur dated 6th January, 1940 and passed in C.A. No. 47

* Crl. R. C. No. 85 of 1940. (Crl. R. P. No. 82 of 1940.) 4th September, 1940.

District Superintendent of Police und
Indian Police Act for taking a proc
conditions of the licence was that music
be stopped within a distance of 50 ya
mosque. This condition was violated b
the first petitioner the licensee would
under S. 32 of the Indian Police A
whether the other petitioners would
section and as urged by the Public P
that every person violating the conditio
by the District Superintendent of Poli
shall be liable to a fine. The person vio
not be the licensee and the finding is

Itteeri Nambudiri *v.* Sankunni Nair.

An alienee of the whole of a tenant's interest in a portion of his holding is a person who is liable to pay rent in respect of that portion and provided he is an agriculturist he is entitled to deposit the arrears of the holding for faslis 1346 and 1347 and obtain the benefits of S. 15 of Act IV of 1938. A deposit under S. 15 must include any arrears of Government revenue payable by the *kanomdar* in respect of those faslis.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsiff of Walluvanad dated 22nd June, 1939 and made in O. P. No. 116 of 1938.

K. P. Ramakrishna Aiyar and *D. H. Nambudripad* for Petitioner.

P. Govinda Menon for Respondents.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This revision petition raises questions under Ss. 15 and 16 of Madras Act IV of 1938. The petitioner here is the *jenmi*. The application filed in the lower Court was made by a number of persons claiming to represent the whole of the interest in the *kanom* right. The original *kanom* demise was made on 10th June, 1919, under Ex. A to the *tarwad* of which some of the present applicants were then members. There was a partition in the *tarwad* of the *kanomdars* and various *tavashis* became entitled to portions of the *kanom* right. Some of these *tavashis* alienated their rights and the present application under S. 15 was made by all the persons interested in the *kanom* right whether as representing the *tavashis* of the original *kanomdars' tarwad* or as alienees from such *tavashis*. The trial Court held that the application was valid and reduced the rent payable in accordance with the terms of S. 15.

Two contentions were argued on behalf of the *jenmi* before us. Firstly, it was contended that the application was bad in that it was a joint application made by a number of persons some of whom were alienees of portions of the land from the original *kanomdars*, while others were interested in the *kanom* right as a result of the partition. We have had to deal with a similar question in disposing of C. R. P. No. 854 of 1939 in which judgment is to be pronounced shortly and we are of opinion that an alienee of the whole of the tenant's interest in a portion of his holding is a person who is liable to pay rent in respect of that portion and provided that he is an agriculturist, is entitled to deposit the arrears of the

Itteeri Nambudiri v. Sankunni Nair.

Wadsworth, J.

holding for faslis 1346 and 1347 and obtain the benefits of S. 15.

A further contention raised was based on the provisions of S. 16 on the strength of which it was argued that the deposit to be made under S. 15 should include not only the rent for the two faslis named but also any arrears of land revenue paid by the landholder which the tenant was bound to pay by reason of contract. It seems to us that this contention, in the way in which it was put, has no merits. S. 16 saves the landholder's right to recover from his tenant anything which the landholder has paid which should have been paid by the tenant. But it does not make these sums part of the deposit contemplated in S. 15. All that it does is to safeguard the landholder's right to recover these sums in addition to that which is recoverable under S. 15. It does not provide a machinery for the recovery but it leaves the landholder to his ordinary right of suit.

In the course of arguments, however, it was suggested that though S. 15 relates only to that which is payable as rent and requires a deposit only of the rent for faslis 1346 and 1347, having regard to the definitions in Madras Act IV of 1938 and the Malabar Tenancy Act, the rent payable by a *kanomdar* includes the land revenue which the *kanomdar* has undertaken to pay on behalf of the *jenmi*. The arguments may be put in this way. By S. 3 (*iv*) of Madras Act IV of 1938 'rent' means, among other things, rent or *michavaram* as defined by the Malabar Tenancy Act, 1929. '*Michavaram*' is defined in S. 3 (*q*) of the Malabar Tenancy Act as "whatever is agreed by a *kanomdar* in a *kanom* deed to be paid periodically, in money or in kind, or in both, to or on behalf of the *jenmi*." By the terms of Ex. A the *kanom* deed in the present suit, it is clear that the *kanomdar* is required to pay the land revenue on behalf of the *jenmi* and that the amount of this land revenue is deducted in arriving at the balance payable to the *jenmi* who is given a right to charge the *kanomdar's* interest for arrears of sircar kist recovered from the *jenmi* himself. It does not appear that we are concerned with a case of the kind contemplated in Ss. 14 and 15 of the Malabar Land Registration Act under which the *kanomdar* may be registered as a joint pattadar and be given a direct liability to pay the rent to Government. We will assume that the rent in this case has

Itteeri Nambudiri
v.
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Wadsworth, J.

been calculated on the basis that the landlord is liable for the land revenue but that this is to be paid on behalf of the landlord by the tenant out of the produce of the land and a deduction is made on this account from the rent actually paid in kind to the landlord. It seems to follow that the *michavaram* payable by the *kanomdar* includes the land revenue which he has undertaken in the *kanom* deed to pay on behalf of his *jenmi*.

It has been argued by Mr. Govinda Menon for the respondent that the definition of '*michavaram*' must be taken to exclude payments of land revenue made on behalf of the *jenmi* by the *kanomdar*. The argument is based mainly on the terms of S. 17 of the Malabar Tenancy Act which provides for a calculation of the renewal fee on the basis of deductions (1) of the revenue payable by the *kanomdar* under the deed, (2) of the interest, and (3) of the *michavaram*. The argument is that in this section, '*michavaram*' is clearly used as excluding the revenue and that from this fact, we must read into the definition in S. 3 (*q*) the words 'except land revenue'. This seems to us rather a drastic way of dealing with the statute particularly as the definition S. 3 begins with the words 'unless there is something repugnant in the subject or context'. The repugnancy in the context can be clearly seen in S. 17 of that Act and it seems to us quite unnecessary to make an interpolation in the definition section as the saving clause at the beginning of the definition section is sufficiently effective to deal with the apparent discrepancy. It does appear from the definition in the Malabar Tenancy Act that '*michavaram*' would include a payment of Government revenue agreed by the *kanomdar* in the *kanom* deed to be made on behalf of the *jenmi* and it would therefore seem that the deposit which is to be made under S. 15 of the Agriculturists' Relief Act must be a deposit of arrears of rent for the specified faslis including any arrears of Government revenue payable by the *kanomdar* in respect of those faslis.

It remains to consider whether the application has to be rejected on the ground that a deposit has not been made on the terms of S. 15, when this result is reached by means of an interpretation of the Act which was only suggested in the course of arguments on this revision petition. The counter-affidavit filed by the *jenmi* in the lower Court states in para. 10:

Itteeri Nambudiri v. Sankunni Nair.

Wadsworth, J.

"Government revenue of the properties is in arrears for a long time. Failure to deposit the same is not proper. The said arrears have also to be deposited."

It seems to us quite clear from the arguments addressed to us here and from the wording of this paragraph, that it was intended to cover a plea that by reason of S. 16 of the Act, the deposit under that section must include the whole of the arrears of revenue payable by the tenant on behalf of the landlord. That is quite a different contention from the contention that the rent payable by the tenant which has to be deposited under S. 15 includes any arrears of revenue payable by the tenant under the terms of his agreement in respect of the particular faslis mentioned in that section. We must, we think, take it that the point now under consideration was not raised in the Court below nor was it raised here until the arguments had progressed some way. The result of permitting the *jenmi* to succeed on this contention would be that the application would have to be rejected, unless r. 1 (*a*) of the rules framed under the Act can be taken to authorise an extension of time owing to the failure of the agriculturist to pay the full rent by reason of a mistaken comprehension of the law as to what was the rent. It is extremely doubtful whether under r. 1 (*a*) such an extension of time could be granted. Assuming that it could not, the effect of allowing the petitioner to succeed in revision on this belated contention would be to deprive the respondent of a remedy which would have been available to him had the contention been taken at the proper time in the Court below. The Court below disposed of this matter on the 22nd of June, 1939. If it had then been decided that the applicants had to deposit not only the rent payable in cash to the *jenmi* for fasli 1347 but also any arrears of land revenue payable by them in respect of that fasli as a condition precedent to receiving the benefits of this section, there would have been time for the applicants to make good the deficiency before the statutory date 30th September, 1939. That is no longer the position and it seems to us very undesirable in revision to give effect to a contention which would now result in the complete defeat of the application, a result which would not have been achieved had the contention been taken at the proper time in the trial Court.

In this view, we dismiss the petition with costs.

K. S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Ramadoss Reddiar .. *Petitioner** (*Petitioner-Defendant*)

v.

Munuswami Reddiar .. *Respondent* (*Respondent-Plaintiff*).

Ramadoss Reddiar v. Munuswami Reddiar.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 9, 15 and 19—Decree on promissory note executed for arrears of rent—Whether decree for rent or for a debt.

Where a decree is passed on a promissory note executed for arrears of rent, the decree is a decree for a debt and not for rent. The decree will not fall under S. 15 but under Ss. 9 and 19 of Act IV of 1938.

Commissioner of Income-tax, Madras v. *Zamindar of Kirlampudi*, (1931) 63 M.L.J. 20: I.L.R. 55 Mad. 830 (S.B.), applied.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Chingleput, dated 5th April, 1939 and made in M. P. No. 415 of 1938 in S. C. S. No. 672 of 1937.

V. V. Ramadurai for Petitioner.

T. R. Srinivasan for Respondent.

The Court delivered the following

Wadsworth, J.

JUDGMENTS: *Wadsworth, J.*—This petition raises the question whether the provisions of S. 15 of Act IV of 1938 can be applied so as to discharge a decree obtained by the endorsee of a promissory note executed for arrears of rent. On 11th February, 1936, the petitioner executed a promissory note for the arrears of rent due for fasli 1345 and previous faslis. The promisee under the note was one of the two zamindars of the village. He endorsed the note in favour of his co-zamindar, who filed a suit on the note and got a decree on 28th September, 1937. On 5th November, 1938, the petitioner applied under S. 19 of the Act to amend the decree after declaring that the plaintiff was entitled to nothing thereunder except the amount of costs, inasmuch as the entire subject-matter of the suit comprising arrears had been discharged by paying in the Collector's office the arrears for faslis 1346 and 1347. The application was rejected and it is this order of which revision is sought.

S. 19, under which the application was made, in terms applies only to decrees for the repayment of debts. But

*C.R.P. No. 1454 of 1939. 13th September, 1940.

Ramadoss Reddiar v. Munuswami Reddiar.

Wadsworth, J.

there can be no doubt that a similar procedure can be invoked under S. 15 for the discharge of a decree for rent, having regard to the terms of the first clause of that section. By that clause it is provided that (subject to the payments contemplated in the proviso) all rent for fasli 1345 and prior years which is outstanding on the date of the commencement of the Act shall be deemed to be discharged, "whether the rent be due as such or whether a decree has been obtained therefor." Now the Court which passed the decree on the promissory note is not concerned with the arrears of rent on the petitioner's holding, unless this decree can be deemed to be a decree for rent, a fact which the applicant seems to recognise by making his deposit with the Collector and filing his application for amending the decree as one under S. 19. We are not therefore concerned with the discharge of rent 'due as such', but with the discharge of rent where 'a decree has been obtained therefor' and even though the arrears of rent covered by the promissory note might be deemed to be still outstanding—or in suspense, as some decisions have put it—the petitioner can claim no relief under this application unless the decree on the promissory note is a decree for arrears of rent.

On the question whether the decree on the promissory note can be regarded as a decree for rent, it seems to us that we are bound by the decision of the Special Bench in *Commissioner of Income-tax, Madras* v. *Zamindar of Kirlampudi*[1]. The question in that case was whether interest due to a zamindar under promissory notes taken from his ryots for arrears of rent was agricultural income and it was held that it was not, the reasoning being that by the fresh contract between the zamindar and the ryots, the actual character of the liability had been changed into a loan and had ceased to be rent. It follows from this decision that the decree on the promissory note is not a decree for rent. We are not really concerned in this case with the question whether in circumstances such as these, a suit on the original liability for rent would lie. Assuming that it would and that there is therefore rent still outstanding, the petitioner cannot, by the process provided under S. 15 of the Act, get rid of the decree on the promissory note unless that decree be a decree for rent, which it is not in form and which, on the authority of the decision just cited, it must be held not to be in substance.

1. (1931) 63 M.L.J. 20: I.L.R. 55 Mad. 830 (S.B.).

The decree being, as it purports to be, a decree for a debt, it will fall not under S. 15, but under Ss. 9 and 19 of the Act, as has been held by the lower Court.

In the view we take it is unnecessary to go into the further question of the effect of the endorsement of the note to the plaintiff a co-zamindar, by the original payee. The petition is dismissed with costs.

Patanjali Sastri, J.—I agree and would only add that, if the matter was not covered by authority, I would be inclined to the view that a promissory note taken for arrears of rent merely provided a new remedy with certain legal incidents, and I should have found some difficulty in subscribing to the proposition that, in such circumstances, the character of the liability is so changed that what remains payable is no longer 'rent' but only a 'debt'. But, as pointed out in the judgment of my learned brother, a Special Bench of three Judges has made that proposition the basis of their decision, and I feel bound to follow it.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

K. G. Lakshmana Aiyar and another. *Petitioners* (Respondents-Plaintiffs)*

v.

Ramaswami Naicker and others. *Respondents (Petitioners-Defendants 1 and 3 to 6).*

Madras Agriculturists' Relief Act (IV of 1938), S. 10 (2) (ii)—Mortgage by vendee for purchase price—Other property along with property purchased mortgaged—If contract to contrary excluding charge under Transfer of Property Act, S. 55 (iv) (b).

The vendees of some property executed a mortgage in favour of the vendors for the full amount of the sale price giving as security not only the property sold but also some other property. The principal was repayable after five years but was to carry interest from the date of the bond. In an application to scale down the decree passed in a suit on the mortgage,

Held, the terms of the mortgage do not constitute a contract to the contrary so as to exclude the statutory charge under S. 55 (4) (*b*) of the Transfer of Property Act, and by reason of S. 10 (2) (*ii*) of Act IV of 1938, the debt is excluded from the scaling down provisions.

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* C. R. P. No. 1194 of 1939. 10th September, 1940.

Lakshmana Aiyar v. Ramaswami Naicker.

Webb v. *Macpherson*, (1903) 13 M.L.J. 389: L.R. 30 I.A. 238: I.L.R. 31 Cal. 57 (P.C.), followed.

Krishnaswami Aiyangar v. *Subramania Ganapatigal*, (1917) 35 M.L.J. 304 referred to.

Petition under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Coimbatore, dated 8th December, 1938 and passed in I. A. No. 1280 of 1938 in O.S. No. 100 of 1936.

A. C. Sampath Aiyangar for Petitioners.

N. Somasundaram for Respondents.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—The petitioners obtained a decree in a mortgage suit and they seek to revise the order of the Subordinate Judge scaling down that decree under Ss. 8 and 19 of the Madras Agriculturists' Relief Act at the instance of defendants 1 and 3 to 5. The main ground on which the lower Court's order is attacked, is that the liability under the mortgage is one for which a charge is provided under S. 55 (4) (*b*) of the Transfer of Property Act, so that by the provisions of S. 10(2) (*ii*) of Act IV of 1938 the liability cannot be scaled down. Now we have held in *Varadaraja Perumal Pillai* v. *Palanimuthu Goundan*[1], that S. 10 (2) (*ii*) must be interpreted as excluding all liabilities falling within the category therein described, whether or not the charge actually subsists at the time of suit. We have therefore to consider whether at its inception the liability covered by this mortgage was one of the class in respect of which S. 55 (4) (*b*) of the Transfer of Property Act provides a charge.

It is common ground that the liability covered by the mortgage originated on 22nd January, 1920, as part of a transaction whereby property was sold to the second defendant and the father of the other defendants, the vendees executing a mortgage for the full amount of the sale price and giving as security not only the property sold but also some other property. The mortgage deed provided that the principal amount should be payable after five years but should carry interest from the date of the bond. On these facts, the lower Court, quoting the case of *Krishnaswami Aiyangar* v. *Subramania Ganapatigal*[2], held that there was a substitution of a better security and that the

1. (1940) 2 M.L.J. 838.
2. (1917) 35 M.L.J. 304.

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vendor's statutory lien was displaced. Now the decision on which the lower Court relies does not purport to lay down any principle other than those set forth in the leading case of *Webb* v. *Macpherson*[1], where their Lordships of the Privy Council consider the nature of the vendor's lien under S. 55 of the Transfer of Property Act and the circumstances in which it does or does not operate. In considering the question of the existence of a 'contract to the contrary', their Lordships observe 'There is no ground whatever for saying that that charge is excluded by a mere personal contract to defer payment of a portion of the purchase-money, or to take the purchase-money by instalments, nor is it, in their Lordships' opinion, excluded by any contract, covenant or agreement with respect to the purchase-money which is not inconsistent with the continuance of the charge.' Applying this rule, we find it difficult to hold that the terms of the suit mortgage constitute a 'contract to the contrary' so as to exclude the statutory charge. It is true that the mortgage provides additional security and gives five years for payment. But we are not prepared to hold that these terms are necessarily inconsistent with the continuance of the charge.

Their Lordships in the same decision go on to deal with the distinction between a sale in consideration for money which the purchaser covenants to pay and a sale in consideration for a mere covenant to pay, in which there would be no purchase price and therefore no statutory charge. We have given careful consideration to the form of the sale deed and the recitals of the contemporaneous mortgage deed in the present case and have come to the conclusion that the sale was for a price and that the mortgage merely provided the way in which that price was to be paid and secured. The form of the sale deed, which recites the amount of the purchase price and the receipt of that price by the execution of the mortgage deed, is the ordinary form commonly used in a conveyance for a price which is not paid in cash. There is nothing to show clearly that the sale was regarded as a sale for a mortgage and not as a sale for a price in respect of which a mortgage was executed. Moreover the provision in the mortgage deed that the amount should bear interest from the date of the deed and not from the date fixed for payment, is itself an indication that the principal amount

1. (1903) 13 M.L.J. 389: L.R. 30 I.A. 238: I.L.R. 31 Cal 57 (P.C.).

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was regarded as the purchase price due on the sale, the payment of which was, by agreement, deferred.

We are therefore of opinion that this liability was one in respect of which a charge is provided under S. 55 (4) (*b*) of the Transfer of Property Act and that by reason of S. 10 (2) (*ii*) of Act IV of 1938 the lower Court had no jurisdiction to scale down that liability. On this finding there is no necessity to go into the further question raised regarding the status of defendants 3 to 5 as agriculturists. The Civil Revision Petition is therefore allowed and the application under S. 19 is dismissed with costs here and in the Court below.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Ramanuja Aiyangar .. *Petitioner* (Accused).*

Ramanuja Aiyangar, *In re.*

Defence of India Rules, rr. 34 (6) (e) and (k) and 38 (1) (a)—Offence which might amount to sedition—Complaint not made by order or under authority of the Provincial Government—Competency of Court to take cognisance of—Code of Criminal Procedure (V of 1898)—If affects the procedure under the rules.

Where a person is charged under r. 38 (1) (*a*) of the Defence of India Rules for doing a 'prejudicial act' within the meaning of r. 34 (6) (*e*) and (*k*), which might amount to sedition, the Court is competent to take cognizance of the offence even if the complaint is not made by order of or under the authority of the Provincial Government as required by S. 196 of the Criminal Procedure Code.

The rules made under the Defence of India Act, for the arrest and trial of persons contravening any of the rules thereunder are not affected by the Criminal Procedure Code.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Sub-Divisional Magistrate of Devakottah, dated 17th September, 1940 and made in C. C. No. 102 of 1940.

V. T. Rangaswami Aiyangar and *K. Umamaheswaran* for Petitioner.

The Public Prosecutor (V. L. Ethiraj) for the Crown.

The Court made the following

ORDER.—The petitioner has been charged under r. 38 (1) (*a*) of the Defence of India Rules for doing a prejudicial act

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* Crl. R. C. No. 828 of 1940. (Crl. R. P. No. 782 of 1940). 17th October, 1940.

within the meaning of r. 34 (6) (*e*) and (*k*) and a report in writing of the facts has been made by a public servant as required by r. 130 (1). S. 3 of the Defence of India Act enacts that rules made for the arrest and trial of persons contravening any of the rules shall have effect notwithstanding anything inconsistent therewith contained in any other enactment and S. 1, cl. (2) of the Code of Criminal Procedure provides that nothing therein shall affect any special form of procedure prescribed by any other law for the time being in force. That the prejudicial act might amount to sedition which according to S. 196 of the Code of Criminal Procedure cannot be taken cognizance of by any Court unless upon the complaint made by order of or under the authority of the Provincial Government has therefore no bearing and the objection to the competency of the Sub-Divisional Magistrate to take cognizance of the offence under r. 38 (1) (*a*) of the Defence of India Rules is untenable. The revision petition therefore fails and is dismissed.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Dharmapuram Mutt represented by Sri La Sri Shunmuga Desika Gnana Sambanda Pandara Sannadhi Avergal. *Appellant** (*Petitioner*)

v.

Muhamad Usman Sahib and others .. *Respondents* (*Respondents*).

Surety—Bond of—Terms—No provision in case of contingency of a second appeal—Extension of liability of surety not permitted—Limitation whether runs—Art. 182, Limitation Act (IX of 1908).

A bond was executed by a surety in the District Court as security for permitting the withdrawal of the amount deposited in Court, in execution of a decree of the Sub-Court which was then under appeal. The bond contained the words, "If in this number the decision of the lower Court is altered in favour of the appellant and to the detriment of the respondent and if the respondent has to pay the whole or a portion thereof, for that amount I shall be liable . . . . ." The decree was set aside *in toto* by the High Court on second appeal, and the successful appellant applied to recover from the surety the full sum drawn out by the decree-holder. On a construction of the bond,

Held, that the terms should be strictly construed and if the parties had failed to make a provision for the contingency of a second appeal, that was a misfortune which the Court could not correct.

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*C. M. S. A. No. 36 of 1939. 2nd September, 1940.

Dharma-puram Mutt v. Muhamad Usman Sahib.

Paramasivam Pillai v. *Ramaswami Chettiar*, (1939) 1 M.L.J. 557: I.L.R. (1939) Mad. 290, followed.

The liability of the surety extended only to the amount by which the decree of the first Court was reduced in appeal by the District Court.

Held, further, that though under ordinary circumstances limitation would run from the date of the decree or order, where there was an appeal it was not that date but the date of the final decree or order of the appellate Court that was the starting point.

Appeal against the order of the District Court of West Tanjore, dated the 24th August, 1938 and made in A. S. No. 131 of 1937 (E. P. No. 8 of 1936 in O. S. No. 4 of 1927, Sub-Court, Tanjore).

S. Nagaraja Aiyar for Appellant.

K. S. Desikan for Respondents.

The Court delivered the following

JUDGMENT.—One Dawood Sahib obtained a decree in O. S. No. 4 of 1927 in the Additional Sub-Court, Tanjore. In execution of the decree, a deposit of Rs. 2,745 was made. Of this sum, deducting what was attached by the creditors of Dawood Sahib, a sum of Rs. 1,569-13-3 was available to be paid to him, and he was permitted to withdraw that amount on furnishing security. Security was offered by one Kadir Bivi Ammal who executed a deed of security on 17th October, 1928. This bond was executed in the District Court and is headed A. S. No. 60 of 1928. That appeal resulted in part in favour of the appellant and the amount payable by the judgment-debtors to Dawood was reduced by Rs. 550. This decision was given in April, 1929. There was then a second appeal to the High Court and also a Memorandum of Cross-objections. On 20th March, 1934, the High Court gave judgment dismissing Dawood Sahib's suit *in toto*. In October, 1935, the successful appellant in the High Court applied to execute the surety bond and to recover from the surety the full sum of Rs. 1,569-13-3 which had been paid out to Dawood Sahib in 1928. Both the Courts have dismissed this execution application on a construction of the terms of the bond, and the lower appellate Court has also held that in so far as the bond might have been otherwise enforced, in regard to the decree of the first Court in A. S. No. 60 of 1928, it is barred by limitation.

I think there can be no doubt that on a construction of the bond, the Courts below are right. The important clause is this:

"If in this 'number' the decision of the lower Court is altered in favour of the appellant and to the detriment of the respondent and if the respondent

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has to pay the whole or a portion thereof, for that amount I . . . . . shall be liable."

It is argued in this appeal that the word 'number', which is an English word transliterated into Tamil can be used to mean the whole course of litigation and its use can therefore in this instance be taken as representing the intentions of the parties that if at any time before this litigation came to an end, there was a decree in favour of the appellant, the surety's liability should become due.

I am unable to agree with this argument. It seems to me obvious that the extended meaning of the word 'number' in Tamil to cover a suit must have originated from the well-known fact that suits are given a 'number' when they are filed in Court. It is clear that when any person refers to a 'number' he will be referring to an individual suit or individual appeal or some individual proceeding which has a separate number of its own. The Tamil Lexicon, under the word 'number' gives two meanings one, the English 'number' and the second, a suit in a Court of law. It affords no support whatever to the contention of the appellant that 'number' is equivalent to such an abstract term as litigation. It is clear therefore that in the execution of this document, it was contemplated by the parties that if in the decision of the particular appeal numbered as A. S. No. 60 of 1928 the decision of the lower Court should be altered in favour of the appellant, the liability of the surety should ensue. The parties have made no provision, as pointed out by the Courts below, for the possible contingency that the appeal in the District Court would be followed by a second appeal in the High Court. This case seems to me to be almost precisely similar to the one which was recently decided in this Court and reported in *Paramasivam Pillai* v. *Ramaswami Chettiar*[1]. The terms of a bond must be strictly construed and if the parties have failed to make a provision for the contingency of a second appeal, that is a misfortune which the Court cannot correct. The liability of the surety in this case can therefore possibly extend only to the amount for which the decree of the first Court was reduced in appeal by the District Court in A. S. No. 60 of 1928. That amount, as already stated, is Rs. 550.

Next arises the question of limitation. The learned District Judge holds that the right to apply in execution of this

1. (1939) 1 M.L.J. 557: I.L.R. (1939) Mad. 290.

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bond accrued to the appellant on 12th April, 1929 and that the application filed more than six years later was barred. It is clear that the article applicable to this application is Art. 182. The third column of that article gives the time from which the period begins to run. The date of the decree or order will be the time in ordinary cases, but where there has been an appeal, it is not that date but the date of the final decree or order of the appellate Court. There has been in this case an appeal by both parties and therefore the decision of the lower appellate Court in A. S. No. 60 of 1928 was in peril while the appeal in the High Court was pending. A memorandum of cross-objections had been filed, which, if successful, would have meant that the decree of the first Court would have been restored. The limitation in this case therefore began to run from 20th March, 1934 and this application was in time.

In the result, the order of the lower appellate Court is set aside and the execution application restored to file. The learned Subordinate Judge will enforce the bond to the extent of Rs. 550 with interest at six per cent. per annum from the date of the bond. Proportionate costs will be given and taken by the parties throughout.

Leave to appeal refused.

K. C. *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE PATANJALI SASTRI.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

A. V. P. MR. M. Lakshmanan Chettiar, late of Karaikudi, Ramnad District (deceased). *Respondent.*

F.B.

Commissioner of Income-tax, Madras v. Lakshmanan Chettiar.

Income-tax Act (XI of 1922)—Hindu with step-mother owning ancestral property—Assessment—Basis—Hindu Women's Rights to Property Act (XVIII of 1937)—Effect.

The effect of S. 3 of the Hindu Women's Rights to Property Act is that a widow obtains an interest in the joint family property and where the only members of the family were a widow and her step-son the income of such

* O. P. No. 68 of 1940. 24th September, 1940.

property must be regarded as income of the joint family and assessed accordingly.

F.B.

Commissioner of Income-tax, Madras *v.* Lakshmanan Chettiar.

Reference under S. 66 (1) of the Indian Income-tax Act (XI of 1922) by the Commissioner of Income-tax, Madras, for a decision of this Court on the following question, namely:

"Whether on the facts stated the assessment should be made on the assessee as an individual or on the assessee and his step-mother as a Hindu undivided family or on the assessee and his step-mother as an association of individuals."

K. V. Sesha Aiyangar for Petitioner.

P. R. Srinivasan for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This reference, which the Commissioner of Income-tax has made *suo motu* under the provisions of S. 66 (1) of the Indian Income-tax Act, raises an interesting question of law. The assessee is a Nattukottai Chettiar and he was assessed to income-tax by the Income-tax Officer, Karaikudi, I Circle, on an income of Rs. 65,865 for the year 1938-39. If this assessment is to be regarded as being on the assessee as an individual he will be required to pay super-tax, but if the assessment is on him as the representative of a joint Hindu family super-tax will not be payable, because, in the case of an undivided Hindu family, super-tax is not leviable until the income exceeds Rs. 75,000. The assessee was joint with his father Murugappa Chettiar until the father's death on the 18th January, 1938. The only surviving members of the family are the assessee and his step-mother. The question referred is this:

"Whether on the facts stated the assessment should be made on the assessee as an individual or on the assessee and his step-mother as a Hindu undivided family or on the assessee and his step-mother as an association of individuals."

In the sense known to Hindu Law the assessee and his step-mother are members of an undivided family. This question was raised and settled by this Court in *Vedathanni* v. *Commissioner of Income-tax, Madras*[1]. There a family consisted of a single male member and the widows of deceased coparceners, and it was held that they constituted an undivided family. Sir George Rankin, in delivering the judgment of the Privy Council in *Kalyanji Vithaldas* v. *Commissioner of*

1. (1932) 63 M.L.J. 542: I.L.R. 56 Mad. 1 (S. B.).

F.B.

Commissioner of Income-tax, Madras v. Lakshmanan Chettiar.

Leach, C. J.

*Income-tax, Bengal*1, said:

"The phrase 'Hindu undivided family' is used in the statute"—"the Income-tax Act"—"with reference, not to one school only of Hindu Law, but to all schools; and their Lordships think it a mistake in method to begin by pasting over the wider phrase of the Act the words 'Hindu coparcenary'—all the more that it is not possible to say on the face of the Act that no female can be a member."

In this case the Judicial Committee held that under the Mitakshara Law the mere fact that a man has a wife and a daughter does not make ancestral property joint and income of such property assessable as income of an undivided Hindu family.

If we had not to look beyond that case, there would be no doubt that in the present case the assessment would have to be regarded as an assessment made on the assessee as an individual and not as representing a joint family. Since the Judicial Committee pronounced judgment in that case, the Hindu Women's Rights to Property Act, 1937, has however been placed upon the Statute Book. S. 3 (1) of that Act says that, when a Hindu governed by the Dayabhag School of Hindu Law dies intestate his property, and when a Hindu governed by any other school of Hindu Law or by customary law dies intestate leaving separate property that separate property, shall, subject to the provisions of sub-S. (3) devolve upon his widow along with his lineal descendants, if any, in like manner as it devolves upon a son. Sub-S. (2) says that, when a Hindu governed by any school of Hindu Law other than the Dayabhag School or by customary law dies intestate, having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-S. (3), have in the property the same interest as he himself had. Sub-S. (3) states that any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner. It is not necessary to decide whether the effect of this section is to make the widow a coparcener in the full sense of the word, but it is quite clear that she obtains an interest in the joint family property and, as she is a member of the joint family, the income of the property must be regarded as income of the family. This being the state of the law, the income here must be regarded as

1. (1937) 1 M.L.J. 312: L.R. 64 I.A. 28: I.L.R. (1937) 1 Cal. 653 (P.C.).

the income of a joint family composed of the assessee and his step-mother. This is the view which the Commissioner of Income-tax has himself expressed in making this reference, and we agree that it is the right view.

The answer to the reference is that the assessment should be made on the assessee and his step-mother as a Hindu undivided family. There will be no order as to costs.

K. S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Ediga Seshanna and another .. *Petitioners* (Petitioners-Defendants)*

v.

R. Venkataramana Rao .. *Respondent (Respondent-Plaintiff).*

Madras Agriculturists' Relief Act (IV of 1938), S. 8 Explanation—Vendee of mortgaged property executing a fresh mortgage to original mortgagee—Whether renewal of a pre-existing liability by himself.

A sale of a mortgaged property was in theory anterior to a new mortgage executed by the vendee to the original mortgagee, but in point of fact the sale and the subsequent mortgage were both part of a single transaction carried through on the same day and it was not in the contemplation of the parties that the subsequent mortgage should discharge any pre-existing liability of the vendee himself. In an application for scaling down,

Held, that it cannot be said that the subsequent mortgage was in fact a renewal of a previous debt due by the vendee himself.

Perianna v. *Sellappa*, (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218, referred to.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Kurnool dated 23rd June, 1938 and made in I. A. No. 363 of 1938 in O. S. No. 588 of 1936.

S. S. Bharadwaj for Petitioners.

J. V. Srinivasa Rao for Respondent.

The Court delivered the following

JUDGMENT.—Our decision in C. R. P. No. 113 of 1939 (since reported in *Neelappa Reddiar* v. *Solaimuthu Udayan*[1],) makes it clear that we approve the decision of Somayya, J., in

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* C. R. P. No. 223 of 1939. 21st August, 1940.

1. (1940) 2 M.L.J. 517.

Seshanna v. Venkataramana Rao.

In re Ramaswami Chettiar[1] and cannot agree that the petitioner is entitled under the explanation to S. 8 of Madras Act IV of 1938 to treat his mortgage as a renewal of his vendor's mortgage, which he has discharged. It has, however, been suggested on the reasoning in *Perianna* v. *Sellappa*[2], that at the moment when the sale to petitioner was completed there was created a liability in petitioner himself to discharge his vendor's mortgage and that this liability has been renewed or included in a fresh document by the execution of his own mortgage. We are of opinion that this theory of a discharge of a pre-existing liability of the petitioner himself scarcely accords with the facts. No doubt the sale was in theory anterior to the mortgage, but in point of fact they were both part of a single transaction carried through on the same day and it was not in the contemplation of the parties that the mortgage executed by the petitioner should discharge any pre-existing liability of the petitioner himself. It cannot therefore be said that the petitioner's mortgage was in fact a renewal of a previous debt due by him. The petition is therefore dismissed with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

M. Varadaraja Perumal Pillai and another .. *Petitioners* (Petitioners-Defendants)*

v.

Palanimuthu Goundan .. *Respondent (Respondent-Plaintiff).*

Varadaraja Perumal Pillai v. Palanimuthu Goundan.

Madras Agriculturists' Relief Act (IV of 1938), S. 10 (2) (ii)—Promissory note for balance of purchase price of land—Endorsee of promissory note—Liability to—If excluded by S. 10 (2) of the Act as one for which a charge is provided by S. 55 (iv) (b) of the Transfer of Property Act.

In February, 1923, a promissory note was executed for the balance of purchase price of certain lands. This promissory note was twice renewed and the renewed note of 1932 was assigned in 1936 to the plaintiff by endorsement. The plaintiff obtained a decree on the promissory note. In an application for scaling down this decree the question arose whether S. 10 (2) (*ii*) of Act IV of 1938 excluded the operation of the scaling down provisions to the liability as one in respect of which a charge was provided under S. 55 (*iv*) (*b*) of the Transfer of Property Act.

1. (1939) 2 M.L.J. 609.
2. (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218.

*C.R.P. No. 1679 of 1938 and A.A.A.O. No. 239 of 1938. 4th September, 1940.

Varadaraja Perumal Pillai v. Palanimuthu Goundan.

Assuming that the decision in *Elumalai Chetty* v. *Balakrishna Mudaliar*, (1921) 41 M.L.J. 297: I.L.R. 44 Mad. 965, is correct, though there is some conflict of authority,

Held, that the intention of the Legislature was to specify the classes of liabilities in respect of which the scaling down provisions of Act IV of 1938 were not to operate and that the exclusion of liabilities of these categories was not to depend on the actual subsistence of the charge but on the question whether in the beginning the liability was one in respect of which the Transfer of Property Act provided a charge. The applicability of S. 10 (2) (*ii*) of Act IV of 1938 is not affected by the assignment of this liability to a third party.

Petition under S. 115 of Act V of 1908 and S. 224 of the Government of India Act, 1935, praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Salem dated 12th August, 1938 and made in I. A. No. 641 of 1938 in O. S. No. 882 of 1936 and appeal against the order of the District Court of Salem dated 6th October, 1938 and made in the appeal of 1938 preferred against the order of the Court of the District Munsif of Salem dated 12th August, 1938 and made in I. A. No. 641 of 1938 in O. S. No. 882 of 1936.

V. Ganapathi Ayyah for Petitioners.

S. S. Ramachandra Aiyar for Respondent.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This revision petition arises out of an application by a judgment-debtor under S. 19 of Madras Act IV of 1938 and raises a question regarding the meaning of S. 10 (2) (*ii*) of that Act.

The essential facts are that the judgment-debtor purchased lands under a sale deed of February 1923 whereby the purchase price was to be paid by the discharge of two debts and the execution of a promissory note for the balance. This promissory note was twice renewed and the renewed note of 1932 was assigned in 1936 to the plaintiff by endorsement. The plaintiff got a decree on the promissory note and when the judgment-debtor applied to scale down the decree, the plaintiff pleaded that the liability was one in respect of which a charge was provided under S. 55 (*iv*) (*b*) of the Transfer of Property Act and that therefore the provisions of S. 8 of Madras Act IV of 1938 could not be applied.

For the purpose of deciding this case, we assume that the decision in *Elumalai Chetty* v. *Balakrishna Mudaliar*[1] is correct,

1. (1921) 41 M.L.J. 297: I.L.R. 44 Mad. 965.

Varadaraja Perumal Pillai *v.* Palani-muthu Goundan.

Wadsworth, J.

though there is some conflict of authority on the question whether a mere endorsement of a promissory note which represents unpaid purchase money carries with it the security in the shape of the vendor's lien. Assuming that there was in fact no charge which the plaintiff-assignee could work out against his debtor, is the plaintiff entitled to rely on the provisions of S. 10 (2) (*ii*) ? This provision may be read in two ways. It may be read as safeguarding any liability for which a charge under S. 55 (*iv*) (*b*) of the Transfer of Property Act subsists; or it may be read as protecting any liability of the category of liabilities in respect of which a charge is provided under S. 55 (*iv*) (*b*) of the Transfer of Property Act. We are of opinion that the latter interpretation is the correct interpretation and that the intention of the Legislature was to specify those classes of liabilities in respect of which the scaling down provisions of the Act were not to operate and that the exclusion of liabilities of these categories was not to depend on the actual subsistence of the charge but on the question whether in the beginning the liability was one belonging to that category in respect of which the Transfer of Property Act provided a charge.

Now, applying this criterion to the present case, undoubtedly the liability of the judgment-debtor to his vendor was one in respect of which a charge was created by the operation of S. 55 (*iv*) (*b*) of the Transfer of Property Act. It is, as we have suggested, doubtful whether that charge could be enforced by an endorsee of the promissory note in the absence of a registered conveyance. But the essential category into which the liability falls is not, in our opinion, affected by the assignment of this liability to a third party and we consider it is one which falls into the category referred to in S. 10 (2) (*ii*) of the Act. As we have more than once pointed out, this Act IV of 1938 is an expropriatory measure and if there is any doubt as to the meaning of its terms, that doubt should be resolved in favour of the person expropriated and not of the person who claims the right to expropriate. In this view, we agree with the decision of the trial Court and dismiss the petition and the connected appeal with costs in the civil revision petition.

K. S. *Petition and appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Pandiri Sarveswara Rao .. *Petitioner** (*Petitioner*)

v.

Maturi Umamaheswara Rao and others. *Respondents* (*Respondents*).

Sarveswara Rao *v.* Umamaheswara Rao.

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (ii), Provisos B and C—Assessment to profession-tax—Criterion for applying Proviso B—Date or period of assessment—Some properties assessed in name of husband and others in name of wife—Applicability of Proviso C to S. 3 (ii).

The assessment to profession-tax of a debtor was actually made on 15th January, 1938, but it was retrospective and covered the half year beginning 1st April, 1937. On the question as to the applicability of proviso B to S. 3 (*ii*) of Madras Act IV of 1938,

Held, that the criterion for exclusion under Proviso B to S. 3 (*ii*) of the Act was the time within which the assessment was made and not the actual period for which the tax was payable.

A husband and wife were co-mortgagors and the husband was assessed on properties having an annual rental value of Rs. 300 and the wife on properties with an annual rental value of Rs. 432. The mortgagee claimed that the husband was the real owner and excluded from benefits of Act IV of 1938 by reason of Proviso C to S. 3 (*ii*) of the Act.

Held, Proviso C to S. 3 (*ii*) of the Act clearly requires that in order to come within its scope an individual must have been actually assessed, and it is not sufficient that he is interested in property in respect of which somebody else has been assessed.

Swaminatha Odayar v. *Srinivasa Aiyar*, (1939) 2 M L.J. 495, followed.

Petition under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the District Court of East Godavari dated 14th February, 1939 and made in I.A. No. 363 of 1938 in O. S. No. 55 of 1933.

P. V. Rajamannar and *K. Subba Rao* for Petitioner.

K. Bhimasankaram for Respondents.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This petition raises the question of the precise effect of Provisos (B and C) of S. 3 (*ii*) of Madras Act IV of 1938. The petitioner was the judgment-debtor in a mortgage suit, being himself the mortgagor, and he sought the benefits of the Act under S. 19 in respect of the mortgage decree. He was held by the lower Court to be disentitled to those benefits on the ground that he was assessed to profession-

* C. R. P. No. 1020 of 1939. 13th September, 1940.

Sarveswara Rao v. Umamaheswara Rao.

Wadsworth, J.

tax in respect of the first half year of the financial year 1937-38. The lower Court also rejected the plea advanced on behalf of the creditor that the petitioner was also disqualified under Proviso (C). The petitioner was admittedly not assessed to profession-tax within the two years preceding the 1st October, 1937. His assessment was actually made on 15th January, 1938, but it was retrospective, so that it covers the half year beginning 1st April, 1937. The learned District Judge, applying S. 137-B of the Madras City Municipal Act, has held that a person who is assessed to profession-tax in respect of any portion of the two years immediately preceding the 1st October, 1937, comes within the mischief of Proviso (B) to S. 3 (*ii*) even though the assessment was not made within the two years immediately preceding the 1st of October, 1937. It is difficult to support the view taken by the learned District Judge, but an attempt has been made to support it by referring to the last words of S. 137-B of the City Municipal Act which are:

"The provisions of this Act and the rules made thereunder shall so far as may be apply as if the assessment was made in the half year or year to which the tax or fee relates."

It seems to us that this provision is obviously intended to make the machinery for the levy of the tax applicable to a retrospective assessment and to meet any possible objection which might be raised owing to the delay in making the assessment. The whole of S. 137-B was apparently drafted to meet the situation created by the decision in *Prince of Arcot* v. *Corporation of Madras*[1]. But it must be noted that, in the case of a retrospective assessment, it is not provided that the date of the assessment shall be deemed to fall within the period to which the assessment relates; and it would obviously be impracticable to read this provision as having that effect, for there are various matters in respect of which the date of the assessment will be of importance, with regard to which it must necessarily be the actual date of the assessment and not some vague point of time within the period, to which the assessment relates. For instance, with regard to the right to object to an assessment or the right of appeal it must be the actual date, and not any notional date, which will determine limitation: and with reference to the preparation of the electoral roll, the electoral roll must obviously be prepared with reference to the assess-

1. (1929) 57 M.L.J. 536: I.L.R. 52 Mad. 866.

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ments as they actually exist at the time when the electoral roll is prepared, and it could not be invalidated by any retrospective assessments made thereafter. Moreover, the words of Proviso (B) to S. 3 (*ii*) of Act IV of 1938 are perfectly plain and it is impossible to read them as if the criterion for the exclusion was the actual period for which the tax was payable and not the time within which the assessment was made.

An argument has been based on the form B prescribed under the Act for the certificate under S. 27, which form provides for details regarding the period for which an individual has been assessed to tax and does not provide for the entry of the date of the assessment. This may well be a defect in the drafting of the form but we cannot admit the proposition that the meaning of the Act is to be derived from the forms which have been prescribed by the Government under its rule-making powers. To us it is quite clear that the words "has within the two years immediately preceding the 1st October, 1937, been assessed" mean what they say and nothing else. We are therefore of opinion that the learned District Judge was wrong in holding that the petitioner was disqualified from claiming to be an agriculturist by reason of an assessment to profession-tax made after the 1st October, 1937, although relating to the period immediately before the 1st October, 1937.

A further contention advanced by the creditor rests on the fact that, though the petitioner was assessed to house-tax on properties having an annual rental of only Rs. 300, his wife has been similarly assessed on properties with a rental value of Rs. 432. Both the properties in the wife's name and the properties of the petitioner are covered by the suit mortgage executed by the petitioner. It is contended that both these properties belong to the petitioner and that the assessment which was made in respect of these properties must be regarded as the assessment of the petitioner. A similar contention was rejected by a Bench of this Court in the case of *Swaminatha Odayar* v. *Srinivasa Aiyar*[1]. It has been argued that the terms of r. 7 framed under the Act lend some support to the creditor's contention. By this rule a person who has been assessed to property-tax, which assessment would disqualify him under Proviso (C) to S. 3 (*ii*), is permitted to ged rid of the disqualification by proving that during the relevant period he was

1. (1939) 2 M.L.J. 495.

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not the owner of the property in respect of which the assessment was levied. Presumably the intention of this rule is to cover cases in which the Municipal assessment register was not up to date so that the assessment would stand in the name of some one who does not actually pay it. We are not concerned now with the validity of this rule, but it may well be argued that Proviso (C) contemplates not only the assessment of an individual but also the ownership by that individual of the property in respect of which he has been assessed. It could not however be argued that Proviso (C) contemplates only the ownership of the property by the individual concerned and does not contemplate his assessment in respect thereof. Proviso (C) clearly requires that, in order to come within its scope, the individual must have been actually assessed. It is not sufficient for him to show that he is interested in property in respect of which somebody has been assessed.

In the result, therefore, we must allow this Civil Revision Petition with costs and remit the application to the trial Court for disposal in the light of this judgment.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE HORWILL.

Kattuva Rowthan's son Moidin *alias* Saivu Rowthan .. *Petitioner** (*Petitioner*)

v.

Dakshayani Amma and another .. *Respondents* (*Respondents*)

Moidin v. Dakshayani Amma.

Civil Procedure Code (V of 1908), S. 73—Rateable distribution—Person merely attaching before judgment—If entitled to claim rateable distribution.

The Court can only divide the assets among such persons as may have made application to the Court for the execution of decrees. So where a creditor merely gets an attachment before judgment he is not entitled to claim rateable distribution of assets realised in execution before he took out execution proceedings.

Meyyappa Chettiar v. *Chidambaram Chettiar,* (1923) 46 M.L.J. 415: I.L.R. 47 Mad 483 (F B.), referred.

Petition under S. 25 of Act IX of 1887, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of South Malabar at Palghat dated 29th October, 1936 and made in M. P. No. 590 of 1936 to direct

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* C. R. P. No. 435 of 1937. 24th April, 1940.

the decree-holders in S. C. No. 440 of 1935 to redeposit the amount they have withdrawn from Court.

Moidin v. Dakshayani Amma.

K. P. Ramakrishna Aiyar and *P. Sridhara Rao* for Petitioner.

P. Govinda Menon for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner filed S. C. No. 460 of 1935 against a debtor and attached before judgment some money that was in the hands of a garnishee. Some time later, the petitioner obtained a decree—we do not know its exact date, but it is said that it was some time before 7th March, 1936. He did not take out execution of this decree. The respondents obtained a decree in S. C. No. 440 of 1935 against the same debtor, and in execution they also attached on 26th November, 1935, this same sum of money in the hands of the garnishee. That money was paid into Court on 3rd March, 1936 and upon an application by the respondents, the money was paid to them on 7th March, 1936. The petitioner thereupon filed M. P. No. 590 of 1936, praying that the Court should recall the sum of money paid over to the respondents and distribute it rateably between them. That petition was dismissed by the Subordinate Judge of Palghat, and hence this revision petition.

The petitioner's contention is that he was entitled to a share in the money that had been paid into Court by the garnishee and that the lower Court acted illegally in paying that money over to the respondents. He contends that the Court was bound to see that the money was properly distributed among those who had a claim to it. As proof that such a duty is cast upon the Court, he refers to Ss. 63 and 64 of the Civil Procedure Code. S. 63 only indicates that the Court should adjudicate upon questions of this nature, and S. 64 explains the effect of an attachment. Neither of these sections indicates that the Court should *suo motu* ascertain who are the various claimants to a particular sum of money and then to divide that money among the persons who are entitled to a share of it.

S. 73 runs:

"Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor......the assets......shall be rateably distributed among all such persons."

Moidin v. Dakshayani Amma.

So that it is clear that the Court can only divide the assets among such persons as may have made application to the Court for the execution of decrees. The present petitioner made no such application. He contends that his attachment before judgment becomes by some legal fiction an attachment in execution. He states as authority for this unusual proposition a decision of a Full Bench of this Court in *Meyyappa Chettiar* v. *Chidambaram Chettiar*[1]. What the Court there held was that "property attached in execution" in O. 21, r. 57, Civil Procedure Code, includes property attached before judgment when there has been a decree followed by an execution petition for the purpose of bringing the property attached to sale. This judgment does not say that proceedings taken before execution can be deemed to be proceedings taken after execution; but it only says that property attached before judgment may be considered to be property attached in execution when it is followed by an execution application for the purpose of bringing the attached property to sale. As the petitioner has put in no such application, the above decision has no application to this case.

This revision application could have been dismissed on the simple ground that the petitioner had a remedy by way of a suit afforded to him by S. 73 (2); but a decision on the point raised in the Court below has been given in order to avoid further litigation.

The revision petition is accordingly dismissed with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

N. Subramania Sastrulu of Kandukur and another .. *Appellants** (*Respondents*)

v.

The Official Receiver of Chittoor .. *Respondent* (*Respondent*).

Subramania Sastrulu v. Official Receiver of Chittoor.

Provincial Insolvency Act (V of 1920), S. 54—Mortgage to creditor for his simple debt—Creditor filing suit and obtaining attachment—Debtor bona-fide *imagining that her assets are worth more than her liabilities and enough to pay off the other creditors as well—Doctrine of natural and obvious consequences of acts—If applicable to infer fraudulent motive under S. 54.*

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1. (1923) 46 M.L.J. 415: I.L.R. 47 Mad. 483 (F.B.).

*A.A.A.O. Nos. 190 and 191 of 1938. 10th September, 1940.

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Where two creditors had filed suits for recovery of their dues and obtained attachment of the properties of the debtor and the debtor thereupon executed mortgages to the creditors for their debts and where it was found that the creditors were neither related to the debtor nor persons for whose preference any special reason existed, and that at the time of the execution of the mortgages, the debtor thought that the property was worth enough to deal with the other debts also in due course, there is no fraudulent preference within the meaning of S. 54 of the Provincial Insolvency Act. The question is not whether the assets were actually less than her liabilities but whether she honestly thought that they were more.

From the mere fact that a preference in favour of the creditors followed from the debtor's act, it cannot be inferred that it was a fraudulent preference. The legal maxim that intentions of parties must be judged by the natural consequences of their acts cannot be applied to determine the dominant intention in the mind of the debtor for purposes of S. 54 of the Provincial Insolvency Act.

Sharp (Official Receiver) v. *Jackson*, (1899) A. C. 419 and Ex parte *Taylor*: In re *Goldsmid*, (1886) 18 Q.B D. 295, followed.

Appeals respectively against the order of the District Court of Chittoor in C. M. A. Nos. 75 and 76 of 1937 preferred respectively against the order of the Court of the Subordinate Judge of Chittoor in M. P. Nos. 174 and 175 of 1935 in I. P. No. 43 of 1932.

S. V. Venugopalachari for Appellants.

T. K. Srinivasathathachariar and *T. T. Srinivasan* for Respondent.

The Court delivered the following

JUDGMENT.—The subject-matter of these two appeals is two mortgages executed on the 15th October, 1932 in favour of two of the creditors of Padmavati Ammal, against whom an insolvency petition was filed on 7th November, 1932 and who was finally adjudicated insolvent in 1934. The proceedings by the Official Receiver were, in the first instance, taken against three mortgages, all of which were executed on the same day. They were taken under Ss. 4, 53 and 54 of the Provincial Insolvency Act. The learned Subordinate Judge of Chittoor dismissed the Official Receiver's applications. The learned District Judge of Chittoor has set aside the learned Subordinate Judge's order and annulled all the three mortgages. These are appeals by two of the mortgagees against the learned District Judge's order. The annulment by the District Judge, it must be mentioned, has been based on S. 54 alone; he does not hold that the mortgages are not fully supported by consideration; but he holds that they were fraudulent preferences

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of some of the insolvent's creditors to the detriment of the others.

I think these appeals must be allowed. The learned District Judge has held that the insolvent has fraudulently preferred these appellants not so much upon the finding of any positive facts which constitute any intention on her behalf to defraud, but mainly for the reason that a preference in favour of the appellants inevitably followed from her action. The learned Judge says:

"Intentions of persons must be judged, as intentions can only be, by the obvious and natural consequences of their acts"

No doubt, this is a legal maxim which applies very often when the Court has to find what the intentions of a particular party are, but, with regard to S. 54 of the Provincial Insolvency Act where the burden of proof is upon the Official Receiver this method of discovering the intentions of a person who shortly afterwards becomes insolvent is not the correct method to adopt. The authorities in England are very clear in this matter: see *Sharp (Official Receiver)* v. *Jackson*[1] and Ex-parte *Taylor*: In re *Goldsmid*,[2] and this principle, that the dominant intention in the mind of the insolvent must be found to have been actually to prefer a creditor before his alienation could be set aside, has also been adopted in India—see *Buchayyagari Ranga Reddi* v. *Official Receiver, Anantapur*[3] and *Krishnan Chettiar* v. *Devarayan Chettiar*[4]. It is impossible therefore to support the learned District Judge's order, merely upon the fact that the appellants have actually received a preference in the disposal of the insolvent's estate.

I have been taken through the evidence with a view to examine whether on the evidence it is possible to hold that there was the dominant intention in the mind of the insolvent fraudulently to prefer the appellants. I am unable to hold that there is any material for any such finding. In the first place, it is conceded by the learned advocate for the Official Receiver that putting his case at the best, on the evidence available, the assets of the insolvent were, at the time these mortgages were executed, very nearly equal to her liabilities. The learned District Judge, it may be mentioned, refuses to consider any of

1. (1899) A.C. 419.
2. (1886) 18 Q.B.D. 295.
3. (1937) 2 M.L.J. 868.
4. (1940) 1 M.L.J. 786.

the statements of the witnesses with regard to the value of the insolvent's properties. He refers to them as vague surmises and says that the only important fact is that when the properties other than the mortgaged properties were sold by the Official Receiver, only Rs. 400 were realised, and also that the Official Receiver leased them on a rental of Rs. 35 a year. These are no doubt important facts if the task of the Court were to estimate the real value of the insolvent's estate. But I do not think that the statements made by those very creditors themselves who support the Official Receiver in this case can be ignored, and one of them,—the principal opponent of the appellants Bhaskararamayya, has actually given evidence in this very case that the property of the insolvent which was not mortgaged was worth Rs. 14,000. Even taking as true the contention of the learned advocate for the Official Receiver that the actual value of the estate was less than the liabilities at the time of the mortgages, as the learned District Judge has himself pointed out, it is a truism that landed property is always over-valued by the owner. It is therefore extremely probable that the insolvent here thought that her property was worth considerably more than what it was really worth. If that were so, it seems clear to me that she must at the time she executed these mortgages have entertained honestly the belief that she could also deal with the other creditors in due course by the same method. The question to be decided is not whether her assets were actually less than her liabilities but whether she honestly thought that they were more. I think there is enough evidence in this case to justify the finding that she may have honestly so thought. The learned Judge also refers in para. 5 of his judgment to the fact that the question at issue in insolvency is not whether the assets are sufficient to pay the liabilities but whether the liabilities can be met, as they arise, by money payment. That is no doubt quite correct when the Court has to decide whether a person who is said to be insolvent should be adjudicated insolvent or not, but, when the question is to decide the intention which is present in a person's mind, it seems to me that unless it is presumed that the person in question knows the law of insolvency and points such as these, it is impossible to say that anyone who believes that he is possessed of landed property which is worth more than his liabilities is aware that insolvency is imminent. I am not

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prepared to hold that on the 15th October, 1932, the insolvent had any reason to believe that within two or three weeks an insolvency petition would be filed against her.

There is another point which, I think, should be considered in connection with S. 54. The learned Judge in the 5th paragraph of his judgment says that

> "Where all a man's creditors are pressing for payment and he cannot pay them all with money, the honest thing, the truly voluntary thing, the thing which the law insists on, is that he should pay them all he can rateably."

There is no finding in this particular case that all the creditors of the insolvent were in fact pressing her for payment. Two of the principal creditors have given evidence, and they are not prepared to state distinctly and definitely that they exerted any pressure upon the insolvent or upon the insolvent's relative, Dhurvasa Rao. It is true that one of them, Bhaskararamayya, had filed a suit against the insolvent about three weeks before, but there is no proof that any intimation of that fact was given to the insolvent. The other creditor had not filed a suit at all, and there is no evidence that either of them had issued any kind of registered letter to her. On the other hand, both the appellants had not only filed suits, but had also applied for and obtained attachment. No doubt they also have not used any particular threatening language in any particular document sent to the insolvent, but it is clear that the actual attachment of the insolvent's properties amounts to such pressure as would reasonably lead the insolvent to take steps to deal with the debts owing to these creditors.

On a review of the whole evidence, I am of the opinion that there is no proof in this case that the dominant motive in the mind of the insolvent in executing these mortgages in favour of persons who were not related to her or for whose preference no special private reasons existed, was to prefer them fraudulently to the prejudice of her other creditors. The evidence seems to me to suggest rather that this was an honest attempt to deal with the more pressing claims upon her by mortgaging certain of her assets, and at the time she did so, she must have *bona fide* thought that she would be able to deal with the other debts in due course.

In the result, I set aside the order of the learned District Judge and restore the order of the learned Subordinate Judge,

dismissing the Official Receiver's applications with costs throughout.

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Leave to appeal is refused.

K. S. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD RUSSELL OF KILLOWEN, SIR LANCELOT SANDERSON AND MR. M. R. JAYAKAR.

Bank of Chettinad, Ltd. .. *Appellant**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

P.C.

Bank of Chettinad, Ltd. v Commissioner of Income-tax, Madras.

Income-tax Act (XI of 1922), Ss 2 and 43—Non-resident foreign company—Loan to British Indian company through its branch—If the borrower company can be treated as agent of foreign company under S. 43—Whether foreign company has "business connection" in British India and is liable to assessment—Taxing statute—Construction—Need for strict construction.

Two banking companies, one at Pudukottai (in a Native State) and another at Kanadukathan (in British India) were controlled by the same persons who owned almost all the shares in the two companies. The Pudukottai Bank had a branch at Kualalumpur in the Federated Malay States and the Kanadukathan Bank had twenty branches in Burma (in British India during the material period), one at Colombo and one at Bentong in the Federated Malay States. Between September, 1930 and February, 1933, loans of large sums were made by the Pudukottai Bank to the Kanadukathan Bank. The procedure adopted was as follows:—The Bentong branch of the Kanadukathan Bank received hundies from the Kualalumpur branch of the Pudukottai Bank and passed them on to the Rangoon Branch of the Kanadukathan Bank and the money was used in the business and earned profits. The Crown sought to tax the non-resident company treating the borrower company as its agent.

Held, (1) in revenue matters it is wrong to regard "the substance of the matter" as distinguished from the strict legal position; the real question will be whether in fact the non-resident company lent money to the British Indian company. The fact that the transactions were negotiated through the branches does not affect the question, as the business transacted was the business of the two Banks.

(2) the Pudukottai Bank had a business connection with the Kanadukathan Bank in British India during the year of assessment and the profits and gains forming the subject-matter of the assessment accrued to the Pudukottai Bank directly or indirectly through such business connection in British India. The Kanadukathan Bank can be treated as the agent of the Pudukottai Bank within the meaning of S. 43 for the purposes of the Act.

Appeal from a judgment of the High Court of Judicature at Madras (Sir Lionel Leach, Chief Justice, Madhavan Nair and Varadachariar, JJ.) dated 17th November, 1938, on a

* P. C. Appeal No. 85 of 1939. 2nd June, 1940.

P.C.

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reference of a question of law by the Commissioner of Income-tax under S. 66 (1) of the Income-tax Act (XI of 1922).

The facts and arguments appear sufficiently from the judgment of the Board.

A. T. Miller, Raymond Needham and *R. P. Hills* for Appellant.

J. Millard Tucker and *W. Wallach* for Respondent.

2nd June, 1940. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—This is an appeal from a judgment of the High Court of Madras dated 17th November, 1938, which was given upon a reference of a question of law made to the High Court by the Commissioner of Income-tax under S. 66 (2), Income-tax Act (XI of 1922). The question was as follows:

"Whether on the facts of this case the income-tax authorities were entitled to hold that the income from the first six items of loans referred to in para. 21 of the Income-tax Officer's assessment order accrued and arose to the Pudukottai Bank directly or indirectly through or from a business connection in British India within the meaning of S. 42 (1), Income-tax Act, between the Kanadukathan Bank and the Pudukottai Bank."

The Commissioner of Income-tax submitted that this question should be answered in the affirmative. The High Court (consisting of Sir Lionel Leach, C.J., Madhavan Nair and Varadachariar, JJ.) decided that the submission of the Commissioner was right and answered the question in the affirmative. From this decision the appellant, the Bank of Chettinad, Ltd., has appealed to His Majesty in Council. The reference arose out of the assessment of the Bank of Chettinad, Ltd., Kanadukathan (hereinafter for the sake of brevity referred to as the "Kanadukathan Bank") as agent of the Chettinad Bank, Ltd., Pudukottai (hereinafter referred to as the "Pudukottai Bank"), for the assessment year 1933-34. The assessment proceeded on the basis that certain profits or gains accrued to the Pudukottai Bank, resident out of British India, directly or indirectly through or from a business connexion in British India and that under S. 42 (1), Income-tax Act of 1922, such profits or gains were chargeable to income-tax in the name of the Kanadukathan Bank, resident in British India, which was treated as the agent of the Pudukottai Bank under S. 43 for all the purposes of the Act.

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The material facts may be stated as follows: Raja Sir Annamalai Chettiar of Chettinad with his three sons had a large money-lending business with many branches in Burma, Ceylon, the Federated Malay States and French Cochin China. In 1929 they formed the Kanadukathan Bank which has its headquarters at Kanadukathan in British India. Kanadukathan lies about two miles from the border of the State of Pudukottai and 18 miles from the town of Pudukottai, the capital of the State. In 1930 they formed the Pudukottai Bank and also registered in Pudukottai a company called the Chettinad Corporation, Ltd., both of which have their registered offices at Pudukottai. The businesses carried on by the Raja and his sons were wound up and all the assets and liabilities transferred to the three companies. The assets and liabilities of the branches in Burma (which until 1st April, 1937, was a part of British India), were transferred entirely to the Kanadukathan Bank. The assets and liabilities of the branches in the Federated Malay States were mostly transferred to the Pudukottai Bank. The assets and liabilities of the branches in Ceylon were transferred partly to the Colombo branch of the Kanadukathan Bank and partly to the branches of the Pudukottai Corporation, Ltd., in Ceylon. Part of the value of the excess over liabilities was adjusted against the paid-up capital of the three companies. The balance was apportioned and the sums treated as being deposits of the Raja and other members of his family with these companies.

The nominal capital of the Kanadukathan Bank is Rs. 3,00,00,000 and the paid-up capital Rs. 1,00,00,000, divided into 20,000 shares of Rs. 500 each. All the shares of the company are held by the Raja and members of his family. The directors are the Raja, his wife and two outsiders, neither of whom holds any shares: one is an employee and the other the agent of the Raja. The nominal capital of the Pudukottai Bank is Rs. 2,00,00,000, and its paid-up capital is Rs. 1,70,00,000, divided into 20,000 shares, of which 10,000 are Rs. 700 each paid-up and 10,000 of Rs. 1,000 each fully paid-up. All these shares, except three, are held by the Raja and the members of his family. The directors are the Raja, his wife and his son, and two outsiders, each of whom holds one share. There is no doubt that the two companies are controlled by the same people. The Kanadukathan Bank has 22 branches, 20 in Burma, of which one is at Rangoon, and one at Bentong, in the Federated Malay States.

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and one at Colombo. The Pudukottai Bank carries on no money-lending business at Pudukottai, but it has a branch at Kualalumpur, situated about 30 miles from Bentong in the Federated Malay States. It appears that between September, 1930 and February, 1933, loans amounting to Rs. 1,32,86,888 were made by the Pudukottai Bank to the Kanadukathan Bank. The loans were carried out through the Kualalumpur branch of the Pudukottai Bank and the Bentong branch of the Kanadukathan Bank. They fall under the following nine heads, as stated in the reference made by the Commissioner of Income-tax:

				Rs.
(1)	..	..	..	45,00,000
(2)	..	..	..	9,74,100 ($6,34,327)
(3)	..	..	..	5,24,191
(4)	..	..	..	2,35,000
(5)	..	..	..	19,38,505
(6)	..	..	..	4,40,000
(7)	..	..	..	5,15,092
(8)	..	..	..	34,60,000
(9)	..	..	..	7,00,000
Total	..	..	..	1,32,86,888

The Bentong branch of the Kanadukathan Bank did no money-lending business and the only duties of the officer in charge of that branch appear to have been to receive hundis from the Kualalumpur branch of the Pudukottai Bank and to pass them on to the Rangoon branch after making the relevant entries in the books. The first six of the above-mentioned items represent monies used in the Rangoon business of the Kanadukathan Bank in accordance with the procedure hereinbefore indicated. They are the six items mentioned in the reference to the High Court, and the income arising from the said loans is the subject-matter of the assessment, which is now in question. The Commissioner of Income-tax in his reference stated that

> "In substance these loans represent money lent by the Pudukottai Bank to the Kanadukathan Bank, but the transactions have been unnecessarily complicated by resorting to a series of entries which are as superfluous as they are confusing."

Their Lordships think it necessary once more to protest against the suggestion that in revenue cases "the substance of the matter" may be regarded as distinguished from the strict legal

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position. In *Inland Revenue Commissioners* v. *Duke of Westminster*[1], disapproval of this doctrine was expressed in the opinions of Lord Tomlin and Lord Russell of Killowen. A passage from the opinion of Lord Russell of Killowen at p. 24 may usefully be cited. It is as follows:

"I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if in accordance with a Court's view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statute. The subject is not taxable by inference or by analogy, but only by the plain words of a statute applicable to the facts and circumstances of his case. As Lord Cairns said many years ago in *Partington* v. *Attorney-General*[2]: 'As I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."

The question on this part of the case is not whether "in substance" the loans represented money lent by the Pudukottai Bank to the Kanadukathan Bank, but it is whether in fact the Pudukottai Bank lent the said money to the Kanadukathan Bank. Their Lordships have no doubt that on the facts of the case the said six items did represent loans made by the Pudukottai Bank to the Kanadukathan Bank, and that the money was used in the branch of the Kanadukathan Bank at Rangoon, which was then in British India. The fact that the transactions were negotiated through the branches of the banks does not affect this question: the branches were not separate entities, but were parts of the two respective banks, and it is obvious that the business so transacted by the two branches was the business of the two banks.

The questions to be considered are whether on the facts of this case the Pudukottai Bank had a business connection in British India and whether the profits in question accrued or arose to the Pudukottai Bank directly or indirectly through or from such business connection within the meaning of S. 42 (1) of the Act. It was argued on behalf of the appellant bank that in order to bring the case within the section it must be shown by the income-tax authorities that the Pudukottai Bank, non-resident in British India, had a business connexion in British

1. (1936) A.C. 1. 2. (1869) 4 H.L. 100 at 122.

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India in relation to actual transactions in question, that a business connexion arises out of business transactions and that the transactions in this case, namely, the above-mentioned loans, were made not in British India but in the Malay States and were to be repaid in the Malay States in the Malay States currency. Consequently, it was argued that although the profits of such transactions did accrue to the Pudukottai Bank, they did not accrue through a business connexion in British India. S. 42 (1) is as follows:

"In the case of any person residing out of British India, all profits or gains accruing or arising to such person, whether directly or indirectly, through or from any business connexion or property in British India, shall be deemed to be income accruing or arising within British India, and shall be chargeable to income-tax in the name of the agent of any such person, and such agent shall be deemed to be, for all the purposes of this Act, the assessee in respect of such income-tax."

The terms of the section are very wide, and their Lordships are not prepared to place upon them the limitation for which the appellant contends. The words are wide enough to cover profits or gains which can be said to accrue or arise to the Pudukottai Bank directly or indirectly through or from any business connexion which may exist between the Pudukottai Bank and the Kanadukathan Bank in British India. That the Pudukottai Bank had a business connexion with the Kanadukathan Bank in British India cannot on the facts be doubted, and the transactions in question could not have been carried out but for the existence of the Kanadukathan Bank which was in British India, and the business connexion between that bank and the Pudukottai Bank.

It has already been shown that the two banks are controlled by the same people, namely, the Raja and his family. It further appears that the main function of the Pudukottai Bank was to finance the Kanadukathan Bank, that the loans advanced by the Pudukottai Bank to the Kanadukathan Bank represented a large part of the capital of the Pudukottai Bank, that the flow of business between the two banks was secured by the complete control exercised by the Raja and his family over the business of both banks, so that the loans could be safely made without security and for indefinite periods. In view of these facts their Lordships are of opinion that the High Court was right in holding that the Pudukottai Bank had a business connexion with the Kanadukathan Bank in British India during the year of

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assessment and they are further of opinion that the profits and gains, the subject-matter of the assessment, accrued to the Pudukottai Bank directly or indirectly through such business connexion in British India.

There remains the question whether the Income-tax Commissioner was correct in treating the Kanadukathan Bank as the agent of the Pudukottai Bank within the meaning of S. 43 of the Act. It is to be noted that the agent contemplated by the section is so to speak an artificial creation, for it is provided that any person having a business connexion with a person residing out of British India, upon whom the Income-tax Officer has served a notice of his intention of treating him as agent of the non-resident person is to be deemed to be such agent. In view of the above-mentioned conclusions, it is clear that the Income-tax Officer was acting within the power conferred upon him by S. 43 in treating the Kanadukathan Bank as the agent of the Pudukottai Bank for the purposes of the Act. Several cases were cited to their Lordships, but, with one exception, they were not of much assistance, for the facts in the cited cases were different from those of the present appeal, and the decision in each case must of course depend upon its own facts. The exception is *Commissioner of Income-tax* v. *Remington Typewriter Co. (Bombay), Ltd.*[1] The headnote of that case is as follows:

"A company incorporated in the U. S. A. and hereinafter called 'the American company', carried on business in New York, and there manufactured and sold typewriter machines. The respondent company had been incorporated under the Indian Companies Act, 1913, and had purchased from the American company for shares the goodwill of that company in the Bombay Presidency and adjoining territory; the American company held all its shares except three issued to that company's nominees. Two other companies had been incorporated in India, each being in substance in the same position towards the American company as the Bombay company; their respective business territory covered the rest of India."

It was held that there was a business connexion within the meaning of S. 43 and S. 42, sub-S. 1, Income-tax Act, 1922, between the American company and each of the Indian companies, and consequently under S. 43 the respondent company could be deemed for the purposes of the Act to be the agent of the American company, and as its agent could be charged to tax under S. 42, sub-S. 1, in respect of profits made by the

1. (1930) 60 M.L.J. 609: L.R. 58 I.A. 42: I.L.R. 55 Bom. 243 (P.C.).

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American company upon machines exported to British India. The question whether the necessary business connexion existed was argued before the Board, although no appeal had been lodged by the respondents and their Lordships had no doubt that the necessary business connexion did exist. It was stated in the judgment that:

"The Bombay company was formed for the express purpose of acquiring from the American company and carrying on in a particular area the American company's business of selling the American company's manufactures. Although no contractual obligation exists by which the Bombay company is compelled to purchase any of the manufactures of the American company the flow of business between the two companies is secured by the fact that the ultimate and complete control of the Bombay company is vested in the American company, which owns all its shares."

It was further held that the profits and gains in question accrued or arose to the American company directly or indirectly through or from a business connexion in British India. This case is material, because in their Lordships' opinion, if the appellant's contention in this appeal were correct, namely, that the business connexion existed only in respect of actual business which was transacted by the branches of the two banks outside British India, the above-cited case should have been decided the other way in so far as it related to the matter now under consideration. For the above-mentioned reasons their Lordships are of opinion that this appeal should be dismissed and that the appellant should pay the respondent's costs of this appeal. They will humbly advise His Majesty accordingly.

Solicitors for Appellant: *Lambert & White.*

Solicitors for Respondent: *Solicitor, India Office.*

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Puligadda Venkatasubba Rao (dead) and others .. *Appellants** (*Respondent and Nil*)

v.

Yellapragada Sivaramayya .. *Respondent* (*Petitioner*).

Venkatasubba Rao v. Sivaramayya.

Madras Hindu Religious Endowments Act (II of 1927), S. 73—"Excepted temple"—Scheme for administration—Jurisdiction to frame.

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* A. A. O. No. 90 of 1939. 22nd August, 1940.

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S. 73 of the Madras Hindu Religious Endowments Act must be strictly construed. In spite of the amendments to the section [consequent on *Vasudevan Adiserpad* v. *Bhawadasan Nambudiri*, (1933) I.L.R. 57 Mad. 315 and *Vythilinga Pandarasannadhi* v. *Ranganatha Mudaliar*, (1933) 66 M.L.J. 98: I.L.R. 57 Mad. 362] enlarging its scope it still does not include any suit to settle a scheme. The reason appears to be obvious, namely, that provision has already been made for the framing of schemes in the case of excepted temples by Ss. 62, 63 and 65 of the Act.

Appeal against the order of the District Court of Guntur in I. A. No. 139 of 1938 in O. S. No. 3 of 1935.

V. Rangachari for Appellants.

P. Somasundaram for Respondent.

The Court delivered the following

JUDGMENT.—This appeal relates to a temple at Rajavole in the Guntur District which is an 'excepted temple' within the meaning of that expression in the Madras Hindu Religious Endowments Act. Plaintiff as a worshipper at that temple filed a suit under S. 73 of the Act to remove the defendant from his trusteeship, and appoint another trustee in his place. The suit was compromised, and as part of the terms of the compromise a scheme was framed for the future administration of the temple. Plaintiff then applied under O. 23, r. 3, Civil Procedure Code, for a decree in the terms of the compromise, and the learned District Judge of Guntur, overruling defendant's objections to the application granted the decree. Defendant now appeals.

Of the grounds of objection only two need now be considered. The first was that defendant in consenting to the compromise, had been subjected to undue influence. No serious attempt has been made to substantiate this ground in appeal. I agree with the learned District Judge in rejecting it.

The second ground is that the Court had no jurisdiction to frame a scheme and therefore no jurisdiction to incorporate in its decree a scheme framed by the parties. It appears from para. 4 of the learned District Judge's order that before him the proposition that the Court is entitled to frame a scheme under S. 73 of the Act was not disputed. Before me this question is the main subject-matter of the appeal, and as its decision is one affecting the jurisdiction of the Court I cannot refuse to adjudicate upon it merely because of what appears to me an unwise and ill-advised concession made in the District Court.

To my mind it is clear that the appeal must succeed on the very simple ground that S. 73 does not, on its very face,

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authorise a suit to frame a scheme. That S. 73 must be construed strictly is laid down in *Vasudevan Adiserpad* v. *Bhawadasan Nambudiri*[1], where, on an interpretation of the section as it then stood, it was held that the Court had no power to direct "accounts and enquiries" and again in *Vythilinga Pandarasannadhi* v. *Ranganatha Mudaliar*[2], where the decision was that a suit in regard to the administration or management of a kattalai was not maintainable under the section. The scope of the section has been enlarged by amendments enacted as the result of these judgments but it still does not include any suit to settle a scheme. The reason appears to be obvious, namely, that provision has already been made for the framing of schemes in the case of excepted temples by Ss. 62, 63 and 65 of the Act.

I accordingly allow this appeal, set aside the order of the learned District Judge and direct that the suit be restored to his file and disposed of according to law. As the appellant failed to present his case properly before the District Judge he must pay his own costs. Respondent's costs of the appeal will be costs in the suit.

K. S. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE MOCKETT.

The Official Receiver, Guntur .. *Appellant** (*Petitioner-10th Counter-petitioner*)

v.

Amara Seshayya and others .. *Respondents* (*Decree-holder and Defendants 8 and 11 to 14*).

Official Receiver, Guntur v. Seshayya.

Civil Procedure Code (V of 1908), Ss. 47 and 115 and O. 21, rr. 58 and 63—Representative of judgment-debtor—Official Receiver preferring objection under O. 21, r. 58—Right to prefer appeal—Hindu joint family—Partition—Remedy of creditor against sons—Attachment before judgment effected before partition—Whether enables creditor to proceed in execution—Remedy by way of suit available—Revision—Sustainability.

The facts of each case have to be taken into consideration in order to find out whether the Official Receiver is a representative of the judgment-debtor or not. Where the Official Receiver contended that all the property of the insolvent had vested in him with effect from the date of the insolvency

1. (1933) I.L.R. 57 Mad. 315.
2. (1933) 66 M.L.J. 98: I.L.R. 57 Mad. 362.

* A. A. O. No. 469 of 1938 and C. R. P. No. 1427 of 1938. 23rd August, 1940.

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petition and he was therefore in the position of a third party objecting to attachment under O. 21, r. 58, Civil Procedure Code, and the objection was disallowed,

Held, that the Official Receiver had no right of appeal in such a case and that his remedy was to file a suit under O. 21, r. 63 of the Code.

Mohitosh Dutta v. *Rai Satish Chandra Chaudhuri Bahadur*, (1931) 35 C. W.N. 971 and *Official Receiver of Kistna* v. *Imperial Bank of India*, (1934) 68 M.L.J. 78: I.L.R. 58 Mad. 403, referred to.

If the decree debt is one binding on the joint family the decree-holder can have a remedy against the sons after partition by way of a separate suit but he cannot proceed by way of execution as against their interest in the joint family property. The decree-holder cannot in such a case proceed in execution against the interest of the sons merely because there was an attachment before judgment prior to the partition.

It cannot be said that whenever there is a remedy by way of suit the remedy by way of revision cannot be allowed.

Ittiachan v. *Velappan*, (1885) I.L.R. 8 Mad. 484 (F.B.), considered.

Appeal against and petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Guntur dated 5th April, 1938 and passed in E. P. No. 84 of 1937 in O. S. No. 34 of 1931.

P. Satyanarayana Rao for Appellant.

V. Govindarajachari for Respondents.

The judgment of the Court was delivered by

Burn, J.—This appeal and this revision petition are brought against the order passed by the learned Subordinate Judge of Guntur in E. P. No. 84 of 1937 in O. S. No. 34 of 1931. The E. P. was dated 1st March, 1937. The suit had been decreed on the 14th December, 1931, against ninth defendant for a sum of Rs. 23,741-1-2 with interest and costs. It was alleged in the E. P. that certain sums had been recovered in execution in 1936 and 1937 and that an amount of Rs. 30,582 plus further interest and costs was still due. The prayer in the E. P. was for execution against five defendants impleaded in the E.P. as supplemental defendants 10 to 14. The supplemental tenth defendant is the Official Receiver of Guntur and defendants 11 to 14 are said to be the minor undivided sons of K. Venkatasubba Rao the eighth defendant in the suit. K. Venkatasubba Rao had been adjudicated insolvent in I. P. No. 74 of 1931 and certain items of the joint family property had been sold by the Official Receiver for a sum of Rs. 6,555. The decree-holder alleged that he had attached the properties of the eighth defendant before judgment in O. S. No. 34 of 1931. He said that he desired attachment by means of a prohibitory order of a

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sum of Rs. 5,244 representing the 4/5th share of the supplemental defendants 11 to 14 (the minor sons of the eighth defendant) of the sum of Rs. 6,555. He prayed that the Official Receiver the tenth defendant might be ordered to deposit this amount in Court so that it might be paid to him to the credit of this decree in O. S. No. 34. He prayed also for the issue of a sale notice regarding the remaining joint family properties which had been attached and for payment of 4/5th of the sale proceeds of such items to him. The Official Receiver opposed this application and the minor sons also opposed it. The learned Subordinate Judge overruled these objections and ordered that the preliminary attachment of the sum of Rs. 5,244 should be made absolute. Hence this appeal and the revision petition which are filed by the Official Receiver.

Mr. Govindarajachari on behalf of the respondent decree-holder raised a preliminary objection to the maintainability of the appeal and after hearing his arguments and the arguments of Mr. P. Satyanarayana Rao for the appellant we find ourselves obliged to accept the preliminary objection. Mr. Govindarajachari's contention was that the Official Receiver did not in this proceeding represent any of the parties to the decree and that consequently no appeal would lie from the order passed by the learned Subordinate Judge. Mr. Satyanarayana Rao attempted to show that the Official Receiver could be considered to be a representative of the sons of the insolvent eighth defendant. It has been pointed out by Rankin, C.J., in the case *Mohitosh Dutta* v. *Rai Satish Chandra Chaudhuri Bahadur*[1], that no hard and fast rule can be laid down regarding the position of the Receiver in insolvency in such a case as this. The learned Chief Justice observes:

"It appears to me that any general statement to the effect that a Receiver is or is not a representative for the purposes of S. 47 of the Code is necessarily misleading. It all depends on the purpose and nature of the application made by the Receiver whether he is a representative of the judgment-debtor or not. For some purposes he would be entitled as representing the judgment-debtor to litigate matters under S. 47 of the Code; but where he comes to the executing Court for the purpose of saying that as the judgment-debtor's property now belongs to the Receiver the Court cannot sell for the judgment-debtor's debt that which is the property of another person because it has vested in the Receiver for the benefit of the creditors, then, for that purpose the Receiver is not, in my judgment, a representative of the judgment-debtor. The Receiver in such a case, if he is not acting under

1. (1931) 35 C.W.N. 971.

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S. 52 of the Provincial Insolvency Act but acting under the usual provisions of the Civil Procedure Code, is really a third party making a claim."

To the same effect is the decision of a Bench of this Court in *Official Receiver of Kistna* v. *Imperial Bank of India*[1]. The facts of each case have to be taken into consideration in order to find out whether the Official Receiver is a representative of the judgment-debtor or not. In the present case the Official Receiver contended that all the property of the insolvent had vested in him with effect from the date of the insolvency petition. He was therefore in the position of a third party objecting to attachment under O. 21, r. 58 of the Code of Civil Procedure and when his objection was disallowed by the learned Subordinate Judge he had no right of appeal but had the right of filing a suit under O. 21, r. 63 of the Code of Civil Procedure.

As for the contention that he was a representative of the sons of the insolvent, that is based on the fact that in 1933 a suit for partition was filed against the eighth defendant on behalf of his eldest son a minor at that time who was the only son of the insolvent then in existence. That was O. S. No. 372 of 1933. Before it was decided in 1936 two other sons had been born to the insolvent. A decree was passed for partition and in that the Official Receiver was appointed as a Special Receiver with directions to pay out of the insolvent's estate all the debts that were properly binding upon the estate and to distribute the rest between the insolvent eighth defendant and his minor sons. It is however not possible to hold that in this execution proceeding the Official Receiver was representing the sons in his capacity as Special Receiver in the partition suit. As a matter of fact the sons were not parties to O. S. No. 34 of 1931 for the simple reason that none of them had been born when that suit was filed. They were not parties therefore to the decree. We are told moreover that in his capacity as Special Receiver in the partition suit the Official Receiver did file a claim under O. 21, r. 58, Civil Procedure Code, which was dismissed by the learned Subordinate Judge on the 28th March, 1938.

We think it is clear that in this case the Official Receiver is not a representative of any of the parties to the suit and therefore has no right of appeal. Sustaining Mr. Govindaraja-

1. (1934) 68 M.L.J. 78: I.L.R. 58 Mad. 403.

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chari's preliminary objection we must dismiss A. A. O. No. 469 of 1938.

Mr. Satyanarayana Rao then proceeded to argue C. R. P. No. 1427 of 1938 which was filed as an alternative remedy. His main contention is that the learned Subordinate Judge had no jurisdiction in this case to attach the sum of Rs. 5,244 as representing the share of the insolvent's minor sons. To understand this it is necessary to mention the facts which have been very perfunctorily dealt with in the order of the learned Subordinate Judge. O. S. No. 34 of 1931 was filed on the 7th April, 1931 and the decree was passed on the 14th December, 1931. On the 11th April, 1931, the insolvent's property had been attached before judgment. Six days after that Insolvency Petition No. 74 of 1931 was filed against the eighth defendant and he was adjudicated insolvent on the 10th October, 1932. The partition suit (O. S. No. 372 of 1933) was filed as already mentioned on the 14th July, 1933 and on the 14th August, 1936, a preliminary decree for partition was passed. This E. P. was filed on the 1st March, 1937. Now it is quite clear that after partition the interest of the sons cannot be pursued in execution of a decree passed against the father alone. There are many cases in which this has been laid down and it is only necessary to refer to the latest decision in this Court, *Kuppan Chettiar* v. *Masa Goundan*[1]. If the decree-debt is one binding on the joint family the decree-holder can have a remedy against the sons after partition by way of a separate suit but he cannot proceed by way of execution against their interest in the joint family property. Mr. Govindarajachari does not dispute this statement of the law but he contends that the attachment before judgment which was made on the 11th April, 1931, puts this case into a different category altogether. His contention is that since the decree-holder in O. S. No. 34 attached the whole of the joint family property before judgment that attachment enables him to proceed now against the interest of the sons in spite of the fact that they were not parties to the suit. We are unable to accept this contention. The principle laid down in the case cited and in the other cases of the same sort does not make any distinction between attachments effected before judgment and attachments attempted after judgment. It must be borne in mind that when this attachment before judgment was made no son

1. (1937) 1 M.L.J. 249 : I.L.R. (1937) Mad. 1004.

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had been born to the eighth defendant. We have been told from the Bar by Mr. Govindarajachari that the insolvent's eldest son (the first plaintiff in the partition suit) was born on the 29th October, 1931, and that therefore he must have been in *gremio matrix* on the date of attachment. The documents filed before us do not show the date of birth of any of the insolvent's sons. But that is a matter of no importance, because the respondent in this case was not at any time purporting to act against the shares of the sons in pursuance of the attachment effected before judgment. His application was expressly for a fresh attachment of a sum of money in the hands of the Official Receiver. For this reason it is also unnecessary to consider a subsidiary contention of Mr. P. Satyanarayana Rao that upon adjudication the whole of the insolvent's property vested in the Official Receiver with effect from the date of the Insolvency Petition, making the attachment before judgment of no avail (vide *Raghunath Das* v. *Sundar Das Khetri*[1]).

On this ground alone the revision petition must be allowed. Mr. Satyanarayana Rao for the petitioner has raised two other points. One is that this decree-holder was made a party to the partition suit (O. S. No. 372 of 1933). It is alleged that in that suit he did not claim any priority over other creditors and that he is bound by the decree in that suit. The decree provided for what was virtually an administration of the estate of the insolvent eighth defendant in O. S. No. 34 of 1931 directing the Official Receiver as Special Receiver to sell so much of the insolvent's property as was necessary to discharge all his legitimate debts and divide the surplus between the insolvent and his sons. In the present E. P. it is clear that the decree-holder in O. S. No. 34 of 1931 is attempting to get an advantage over the other creditors of K. Venkatasubba Rao. He is trying to collect Rs. 5,244 towards his decree alone without regard to the debts of the insolvent which are binding upon his estate. It is we think quite true to say as Mr. Satyanarayana Rao says that this sum of Rs. 5,244 cannot in any sense be held to be the property of the minor sons of K. Venkatasubba Rao. It represents 4/5th of the sale proceeds of certain items of joint family property. It has no separate existence as the property of the minor sons. It is merely a part of the joint family estate and in O. S. No. 372 of 1933 it has been found that that sum is

1. (1914) 27 M.L.J. 150: L.R. 41 I.A. 251: I.L.R. 42 Cal. 72 (P.C.).

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liable for the discharge of certain other debts besides the one due to the decree-holder in O. S. No. 34 of 1931. It is impossible therefore to say that the minor sons of K. Venkatasubba Rao are entitled to this sum of Rs. 5,244. They have been declared to be entitled to their respective shares of whatever may be left after Venkatasubba Rao's debts have been discharged. This contention also we think must prevail. Mr. Govindarajachari has not been able to show us any reason why the decree-holder in O. S. No. 34 of 1931 should be allowed to ignore the decree in O. S. No. 372 of 1933 to which he was a party, and to proceed in execution of his decree in a manner which is contrary to the terms of that decree.

Another contention of Mr. Satyanarayana Rao is that since the cash attached was in the hands of the Special Receiver in O. S. No. 372 of 1933 leave of the Court was necessary before it could be attached. He has referred us to the case *Thayumana* v. *Ramaswami*[1] and the case cited in that decision. It is not necessary to pronounce upon the validity or otherwise of this contention since we are satisfied that on the grounds already mentioned the petition must succeed.

Mr. Govindarajachari attempted to argue that revision could not be allowed in this case because the Official Receiver had a remedy by way of suit under O. 21, r. 63. He refers us to the Full Bench decision *Ittiachan* v. *Velappan*[2]. In that judgment dealing with a similar revision petition (266 of 1884) the learned Judges have observed " we have no power to interfere under S. 622, Civil Procedure Code—the petitioner's remedy is by suit." From this we are asked to infer that the Full Bench laid down that whenever there is a remedy by way of suit the remedy by way of revision cannot be allowed. We can only say that this decision has never been considered in this Court as laying down any such proposition. In point of fact the learned Judges do not say that *because* the petitioner has a remedy by way of suit therefore they have no power to interfere by way of revision. Cases in which this Court has interfered in revision in spite of the fact that the petitioner had another remedy are too numerous to be quoted. The principle that revision should not be allowed where another remedy is available is a principle which may very conveniently be applied at the stage of admission. This revision petition was admitted by

1. A.I.R. 1925 Mad. 51. 2. (1885) I.L.R. 8 Mad. 484 (F.B.).

Mr. Justice Varadachariar nearly two years ago and since it has been admitted we think that it would be wrong at this stage to say that it must be dismissed merely because the Official Receiver might have proceeded by way of suit. Since it is clear to us that the learned Subordinate Judge had no jurisdiction to attach this money in the hands of the Official Receiver and Special Receiver it would be an unnecessary multiplication of legal proceedings to refer the petitioner now to a suit. We are satisfied that we have jurisdiction to act under S. 115 of the Code of Civil Procedure and to allow this petition.

The order of attachment of the sum of Rs. 5,244 is accordingly set aside and E. P. No. 84 of 1937 dismissed. The petitioner will recover his costs of this petition from the first respondent (plaintiff in O. S. No. 34 of 1931) both here and in the Court below.

B.V.V. *Appeal dismissed.* *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Radhakrishna Chetty and another .. *Petitioners** *(Respondents 1 and 2)*

v.

Miss Teckla Schomberg .. *Respondent (Petitioner).*

Suits Valuation Act (VII of 1887), S. 8—Mortgage suit—Suit for redemption and recovery of surplus profits—If claim for distinct subjects—Jurisdictional valuation.

Where the main relief claimed by a plaintiff in a mortgage suit is for redemption and the prayers for surplus profits or for accounts are only subservient to the main relief claimed, the value placed on the relief for redemption would cover the relief in regard to surplus profits as well and the latter need not be valued separately.

Grandhi Pothanna v. *Satyananda Charyulu*, (1931) 60 M L.J 698 and *Chhiddu Singh* v. *Jhanjhan Rai*, (1922) I.L.R. 45 All. 154, relied on.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Chingleput dated 3rd November, 1939 and passed in Pauper O. P. No. 39 of 1939.

M. Shama Das for Petitioners.

S. Narayana Aiyangar for Respondent.

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*C. R. P. No. 856 of 1940. 1st May, 1940.

Radhakrishna Chetty v. Teckla Schomberg.

The Court delivered the following

JUDGMENT.—The only question to be decided in this revision relates to the jurisdictional value placed by the plaintiff in her suit for redemption in which she asked for certain surplus profits to be decreed in her favour in addition. The lower Court relying on *Jalaldeen Marakayar* v. *Vijayasami*[1] and *Grandhi Pothanna* v. *Satyananda Charyulu*[2], held that the value which the plaintiff had placed on her relief for redemption would cover the relief in regard to surplus profits as well and that the latter need not be valued separately. The defendants have filed the present revision to test the correctness of this order.

Since the value, determinable for the computation of court-fees and for purposes of jurisdiction, is, under the provisions of S. 8 of the Suits Valuation Act, to be the same, the determination of the latter would depend on the decision as to the requisite court-fee required on the present plaint. Learned counsel for the petitioners contends that the plaintiff is asking for two "distinct subjects" within the meaning of S. 17 of the Court-Fees Act and the plaint is therefore chargeable with the aggregate amount of the fees to which the plaint would be liable, when embracing either of such subjects separately. The court-fees are, unless otherwise provided, to be paid *ad valorem* and if the plaintiff is asking for two distinct subjects, it would follow that the fee would be chargeable for each subject separately. But the question is whether the relief claimed by the plaintiff for surplus profits is a distinct subject.

Reliance was placed by learned counsel for the petitioners in this connection on *Nilakantan Nambudripad* v. *Ananthakrishna Aiyar*[3], but that case does not bear out his contention as two distinct alternative reliefs forming different matters were being claimed in that case and the court-fee was required to be paid in respect of each relief separately. The claim for redemption in that suit was based upon the alleged right of the plaintiff as a mortgagor while the alternative relief was based on a contract for a further mortgage which was distinct from the earlier mortgage right. As the alternative claims were held to comprise distinct matters which could have been made the

1. (1915) 29 M.L.J. 142: I.L.R. 39 Mad. 447.
2. (1931) 60 M.L.J. 698.
3. (1906) 16 M.L.J. 462: I.L.R. 30 Mad. 61.

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grounds for separate suits, they were held to form "distinct subjects" within the meaning of S. 17 of the Court-Fees Act. It was, however, stated in that judgment that "where reliefs are claimed in the alternative with reference to the same cause of action, S. 17 would not govern the case." This observation is fatal to the petitioners' contention and when this was pointed out by me to their learned counsel, he had to concede it.

It is true that the plaintiff has, in her plaint, asked for surplus profits separately and this was the main ground on which the correctness of the lower Court's order was impugned. But having read the plaint carefully, I am of opinion that the reliefs claimed by the plaintiff, both for redemption and for recovery of mesne profits, are based on her right to redeem and arise out of the same cause of action. S. 7, sub-cl. (*ix*) of the Court-Fees Act provides that in suits against a mortgagee for recovery of the property mortgaged, the fee would be "according to the principal money expressed to be secured by the instrument of mortgage." In so far as a suit for redemption is a suit against a mortgagee for the recovery of the property mortgaged, the fee would have to be paid on the principal money expressed to be secured by the mortgage deed although the major portion of the principal amount may have been paid or may be alleged to have been paid before the suit is instituted. Similarly, the amount of interest which may have accumulated on the mortgage and which the mortgagor will be required to pay in addition to the principal due under the deed, will have to be disregarded in computing the fee to be paid for the redemption suit.

Since the main relief claimed by the plaintiff is one for redemption and her prayers for surplus profits or for accounts are only subservient to the main relief claimed by her and as the ascertainment of the amount payable by one party to the other is a condition of redemption and is incidental thereto, the valuation put by the plaintiff in her plaint is correct. The fact that the plaintiff has stated the amount which would be according to her, due by the defendant-mortgagee is, to my mind, immaterial. The taking of an account has to be ordered by a Court under the terms of a preliminary decree passed in a redemption suit (O. 37, r. 7, Civil Procedure Code) and if it appears that the defendant-mortgagee has been overpaid, he would be directed under r. 9 not only to

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re-transfer the property, but to pay to the plaintiff-mortgagor the amount which has been found due to him. In such a case, the plaintiff could not have been, under the provisions of S. 7, sub-cl. (*ix*) of the Court-Fees Act asked to pay any additional court-fee. Why should she be compelled to pay additional court-fee when she has added a prayer in respect of a matter which the Court is bound to inquire into and which must, for that reason, be regarded as more or less superfluous? I would therefore respectfully agree with the reasons given by Mr. Justice Sundaram Chetty in *Grandhi Pothanna* v. *Satyananda Charyulu*[1] and with what was decided in *Chhiddu Singh* v. *Jhanjhan Rai*[2].

The revision fails for the above reasons and is dismissed with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Sevugam Chettiar *alias* Manickavasagam Chettiar .. *Petitioner** (*Respondent-Plaintiff*)

v.

Ranganatha Mudaliar .. *Respondent* (*Petitioner-Defendant*).

Sevuga Chettiar v. Ranganatha Mudaliar.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 8 and 12—Debt scaled down under S. 8 (3)—From what date to carry interest.

Reading S. 8 as a whole, the date mentioned in sub-S. (1) is the date up to which all debts falling under that section have to be scaled down and the balance due after scaling down should carry interest from 1st October, 1937, at the rate mentioned in S. 12.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Tirumangalam dated 30th March, 1939 and made in M. P. No. 277 of 1938 in O. S. No. 343 of 1936.

T. S. Vaidyanatha Aiyar for Petitioner.

V. S. Rangachari for Respondent.

The judgment of the Court was delivered by

Patanjali Sastri, J.

Patanjali Sastri, J.—The only question for determination in this Civil Revision Petition is from what date a debt scaled

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1. (1931) 60 M.L.J. 698. 2. (1922) I.L.R. 45 All. 154.

* C. R. P. No. 1756 of 1939. 30th August, 1940.

Sevugam Chettiar v. Ranganatha Mudaliar.

Patanjali Sastri, J.

down under S. 8 (3) of Madras Act IV of 1938 is to carry interest under S. 12 of the Act. The debt in this case was contracted on 14th September, 1932, and the decree thereon was passed on 21st December, 1936. It was scaled down to Rs. 298-14-11 being the amount by which the sums paid by way of principal, and interest fell short of twice the amount of the principal and there is no dispute before us regarding the amount.

In applying S. 12 of the Act, the Court below was of opinion that when a debt is scaled down under sub-S. 3 of S. 8 it has to be scaled down up to the commencement of the Act and the reference to 1st October, 1937, in sub-S. (1) has no application to cases falling under sub-S. (3). We consider that this view is erroneous. It is true that sub-S. (3) does not mention the date up to which debts have to be scaled down thereunder, but the latter part of that sub-section which makes repayable the principal amount or such portion of the principal amount as is outstanding, if it happens to be smaller than the amount arrived at by the process indicated in the first part, clearly refers back to the result of applying sub-S. (1) under which all interest payable on the 1st October, 1937, is wiped out. As sub-S. (3) thus involves a comparison between the amount arrived at by applying sub-S. (1) and that arrived at by applying the first part of sub-S. (3), in order to ascertain which is smaller, it is clear that the amount payable under the first part of sub-S. (3) must be ascertained with reference to the same date, as otherwise there will be no proper basis for comparison. Sub-Ss. (2), (3) and (4) are, in our view, in the nature of provisos to sub-S. (1) whose operation is limited and qualified by those provisions. We are, therefore, of opinion, reading S. 8 as a whole, that the date mentioned in sub-S. (1) is the date up to which all debts falling under that section have to be scaled down. It follows that sums which remain payable in respect of debts scaled down under that section carry interest from 1st October, 1937, at the rate mentioned in S. 12. The petitioner will thus be entitled to interest on Rs. 298-14-11 from 1st October, 1937, at the decretal rate of 6 per cent. per annum.

The revision petition is allowed and the order of the lower Court will be modified accordingly. The parties will bear their own costs throughout.

K. S. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

C. S. Ramier .. *Petitioner** (*Petitioner-2nd Defendant*)

v.

B. N. Srinivasiah .. *Respondent* (*Respondent-Plaintiff*).

Ramier *v.* Srinivasiah.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Extent of puisne mortgagee's right to scale down when owner of equity of redemption is a non-agriculturist.

A puisne mortgagee impleaded in a suit on the first mortgage is a judgment-debtor and the mortgage debt is payable by him. The mere fact of the sub-mortgage by the puisne mortgagee, an agriculturist to a non-agriculturist does not take the debt outside the purview of the Act. The agriculturist judgment-debtor is entitled to the full benefit of the Act.

Form of decree, where one debtor is an agriculturist and another a non-agriculturist indicated.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Salem dated 10th October, 1938, and made in E. A. No. 194 of 1938 in O. S. No. 37 of 1935.

M. S. Venkatarama Aiyar for Petitioner.

C. S. Venkatachariar and *D. Ramaswami Aiyangar* for Respondent.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—This petition raises questions under S. 19 of Madras Act IV of 1938. The decree in question was passed on a mortgage executed in 1916 by the deceased father-in-law of the first defendant, who has not been proved to be an agriculturist. The appellant (petitioner here) was the second defendant in the suit, he having taken an usufructuary mortgage over the same properties on 22nd May, 1920, undertaking to discharge the prior mortgage. Third defendant (the District Board) has acquired the equity of redemption of certain items and is quite clearly not an agriculturist. On 15th January, 1936, the applicant consented to the passing of a preliminary decree on the prior mortgage and on 6th March, 1937, a final decree was passed. The puisne mortgage right of the applicant has been sub-mortgaged to one Appoji Naidu, who has deposited Rs. 2,700 to the credit of the decree and it was

* C. R. P. No. 1574 of 1938. 18th September, 1940.

Ramier v. Srinivasiah.

Wadsworth, J.

contended in the lower Court by the plaintiff that this deposit satisfied the decree and that there was no longer any decree to be scaled down. This contention was repelled by the lower Court and it has not been contended before us that this view was wrong. The lower Court held, however, that the applicant was not entitled to the benefits of the Act because the scaling down of the decree in his favour would result in a benefit to other defendants who are not agriculturists.

We have already held in C.R.P. No. 653 of 1939 that the representative of a puisne mortgagee who was a judgment-debtor was entitled to be regarded as a debtor under S. 7 and to scale down the decree under S. 19 of the Act and we dissented from the decision of Newsam, J., in *Narayanachari* v. *Annamalai Chettiar*[1]. But that was a case in which there was not the complication of the owner of the equity of redemption being a non-agriculturist, so that the decree could be scaled down as a whole. It is argued by Mr. Ramaswami Aiyangar for the decree-holder that the right of an agriculturist judgment-debtor to scale down a decree should not be allowed to enure for the benefit of a non-agriculturist judgment-debtor, a proposition with which we are in agreement. But we find it difficult to accede to the further contention that, the mortgage being one and indivisible, it is wrong in theory and difficult in practice to scale down the decree against the agriculturist judgment-debtor, while leaving it unamended as against the non-agriculturist judgment-debtors. The theoretical argument is based on the absence from S. 19 of any words excluding the application of the general law governing mortgages. But S. 19 is only the machinery section. The substantive provisions are contained in S. 7 which says:

"Notwithstanding any law........or decree of Court to the contrary, all debts payable by an agriculturist at the commencement of this Act, shall be scaled down......"

Having regard to our previous decisions, we must hold that the applicant is a judgment-debtor and that the decree debt is payable by him. It follows that this debt is to be scaled down, notwithstanding the decree and notwithstanding the provisions of the general law which prevent the person who acquires a partial interest in the hypotheca from denying the liability of his interest to satisfy the whole of the mortgage

1. (1939) 2 M.L.J. 225.

Ramier v. Srinivasiah. — Wadsworth, J.

debt. We are unable to accept the contention that a debt which is payable by an agriculturist falls outside the purview of the Act merely because it is also payable by a non-agriculturist and it seems to us obvious that the mere fact that the applicant has sub-mortgaged his interest to a non-agriculturist will not deprive the applicant of any benefits to which he may be entitled under the Act as a person liable to satisfy the decree. The practical difficulties on which Mr. Ramaswami Aiyangar has laid emphasis, seem to us to be more apparent than real. It will, of course, be necessary to modify the form of decree, reciting separately the amount payable by the puisne mortgagee and declaring that on the payment of this amount by him, the interest of the puisne mortgagee will not be liable to be sold or foreclosed and the hypotheca will be sold only subject to that interest; and that on failure of the puisne mortgagee to pay the amount declared to be due from him within the time allowed, the whole of the mortgaged property including the interest of the puisne mortgagee will be liable to be sold for the full amount of the decree. This procedure will give to the agriculturist judgment-debtor the full benefit of the relief to which he is entitled under the Act and will safeguard the rights of the decree-holder as against those judgment-debtors who are not entitled to the benefits of the Act.

The petition is therefore allowed with costs and the application is remitted to the lower Court for disposal in the light of this judgment.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

A. Sankara Aiyar .. *Petitioner* (Respondent-Plaintiff)*

v.

Yagappan Servai .. *Respondent (Petitioner-Defendant).*

Sankara Aiyar v. Yagappan Servai.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 8 and 9—Mortgage bond of 1929—Later promissory note in 1937 for interest due on mortgage—Decree on promissory note—If decree debt to be scaled down under S. 9 as

* C. R. P. No. 1729 of 1938. 21st August, 1940.

Sankara Aiyar *v.* Yagappan Servai.

one incurred after 1932 or under S. 8 as one incurred before 1932—Promissory note if a fresh advance.

Where for interest due on a mortgage of 1929, the debtor executed a promissory note in January, 1937 and a decree was obtained on the promissory note, the decree is to be scaled down, under S. 8 of the Act treating the promissory note as a renewal of the liability under the mortgage bond to pay interest; and as the claim represents only interest on the mortgage the whole claim must be disallowed. It is not necessary for scaling down that the original debt itself must be the subject-matter of the proceeding before the Court. The execution of the promissory note for interest due on the mortgage does not amount to payment of interest on the debt and a fresh advance of the sum as principal under the note.

Commissioner of Income-tax, Bihar and Orissa v. *Maharajadhiraj of Dharbanga*, (1933) 64 M.L.J. 612: L.R. 60 I.A. 146: I.L.R. 12 Pat. 318 (P.C.), relied on.

Petition under S. 25 of Act IX of 1887, praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Dindigul dated 5th September, 1938 and made in E.A. No. 108 of 1938 in S. C. S. No. 40 of 1937.

V. Seshadri for Petitioner.

K. P. Panchapakesa Aiyar for Respondent.

The judgment of the Court was delivered by

Patanjali Sastri, J.

Patanjali Sastri, J.—This is a petition to revise the order of the Court of the Subordinate Judge of Dindigul dated 5th September, 1938, whereby it entered satisfaction of the decree in S. C. S. No. 40 of 1937 on application by the judgment-debtor, respondent before us, under S. 19 of the Madras Agriculturists' Relief Act.

The respondent executed a mortgage for Rs. 800 in favour of the petitioner on 16th September, 1929, and for interest due on the mortgage, he gave on 23rd January, 1937, a promissory note for Rs. 595-7-0 the sum being endorsed on the mortgage bond as received for interest. The decree which is sought to be scaled down was obtained on this promissory note. The respondent applied in the Court below alleging that he was an agriculturist and that by virtue of the combined operation of Ss. 8 and 9 of the Act, the decree must be deemed to have been satisfied. The application was allowed and full satisfaction of the decree was accordingly recorded. There was no dispute that the respondent was an agriculturist within the meaning of the Act.

Learned counsel for the petitioner contended that the promissory note on which the decree was passed represented a distinct debt consisting of the principal sum Rs. 595-7-0 and the

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interest accruing thereon, and as this debt alone was the subject matter of the proceeding for scaling down, the only relief the respondent could obtain was the scaling down of the interest payable on this debt. We are unable to accept this contention. It is true that, the debt having been incurred in 1937, it has to be scaled down in the manner mentioned in S. 9 of the Act. But in view of the proviso to sub-S. (1) of that section the promissory note which was admittedly taken for interest due on the mortgage bond of 1929 must be taken to be a renewal of the previous liability to pay such interest and therefore dealt with under S. 8. This section clearly provides that all interest outstanding on the 1st October, 1937, shall be deemed to be discharged, and we are unable to discover in the terms of the section any justification for the view that it is only the *interest* payable in respect of the debt which is made the subject-matter of the proceeding before the Court that can be scaled down and not the *debt* where such debt itself consists only of interest due on another debt. It is obvious that to apply the section in the manner suggested for the petitioner would render its provisions practically nugatory. For, a creditor could defeat the object of the section by the simple expedient of suing for the interest alone in the first instance and then suing for the principal, as in the case of most debts there is usually a distinct covenant to pay interest. Similarly, the provisions of Ss. 9 and 13 dealing with other classes of loans could also be evaded by adopting the same device. We have therefore no hesitation in rejecting the contention which would thus have the effect of largely defeating the vital provisions of the Act. These sections clearly enact that interest due on the various classes of debts for which they respectively make provisions should be dealt with in the manner mentioned therein, and it is the duty of the Court whenever a claim is made for interest on debts falling under one or other of these classes to scale down the claim in accordance with these provisions whether or not the debt in respect of which such claim is made is the subject-matter of the proceeding; that is to say, for example, where a claim is made for interest on a debt incurred before the 1st of October, 1932, the Court should apply sub-S. (1) of S. 8 and disallow the claim, although the creditor might not have put the debt itself in suit.

It was then argued that the execution of a promissory note for interest due on another debt amounted to a payment of

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interest on the debt and a fresh advance of the sum as principal under the note. It is however difficult to see how it can have that effect, at any rate in the absence of any special bargain between the parties of which there is no evidence in this case. In rejecting a similar contention advanced in support of assessment to income-tax of interest for which a promissory note had been taken from the debtor, their Lordships of the Privy Council observed in *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraj of Dharbhanga*[1]:

"A debtor who gives his creditor a promissory note for the sum he owes can in no sense be said to pay his creditor; he merely gives him a document or voucher of debt possessing certain legal attributes."

It follows that the promissory note and the decree based thereon must be deemed to be discharged as interest outstanding on the mortgage debt on the 1st October, 1937. This is also the view taken by Abdur Rahman, J., in C. R. P. No. 769 of 1940.

The revision petition fails and is dismissed with costs.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MOCKETT.

Kadirvelu Chettiar .. *Petitioner* (1st Respondent-Plaintiff)*

v.

Kempu Chettiar and others .. *Respondents (Petitioners-Defendants and party respondent).*

Kadirvelu Chettiar v. Kempu Chettiar.

Civil Procedure Code (V of 1908), S. 144—Decree-holder assigning decree to third party during pendency of revision petition against decree—Third party realising decree amount—Re-trial ordered in revision—Decree for smaller amount in re-trial—Restitution.

S. 144 of the Code of Civil Procedure is worded in the most comprehensive terms and it should be widely construed. Its object is to put right what was originally an error of the Court and to restore the parties to the position they would have occupied. The word 'party' should be given a wide meaning, so as to include persons who would become subsequently concerned.

The fact that a party to a suit (a plaintiff) who has obtained a decree wrongly against another person prefers to get the immediate benefit of it by a sale or transfer, rather than by way of execution, in no way affects the right of the original party defendant to recover in restitution what he has

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1. (1933) 64 M.L.J. 612: L.R. 60 I.A. 146: I.L.R. 12 Pat. 318 at 336 (P.C.).

* C. R. P. No. 820 of 1939. 3rd October, 1940.

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paid over under pressure of the original erroneous decree. The fact that he paid it over to a nominee of the original plaintiff is wholly irrelevant to his right to recover against the person who caused him to make that payment, namely, the original plaintiff.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Chingleput, dated 27th February, 1939 and made in E. P. No. 69 of 1938 in S. C. No. 15 of 1933.

V. T. Rangaswami Aiyangar and *K. Ramaswami Aiyangar* for Petitioner.

M. S. Venkatarama Aiyar for Respondents.

The Court delivered the following

JUDGMENT.—The point to which Mr. Rangaswami Aiyangar has directed a very interesting and careful argument does not appear to have been decided in any reported case. It can be very simply stated. On the 20th September, 1933, there was a decree in favour of the present petitioner against respondents 1 to 3 in this petition for Rs. 320-7-0. The respondents (the defendants in the suit) preferred a Civil Revision Petition early in 1934. It is numbered, I am told, 92 of 1934, and so it must obviously have been very early in the year. On the 31st of March, 1934, the decree-holder transferred his decree. On the 20th of September, 1934, the transferee decree-holder was recognised by Court. On the 6th of May, 1936, the Civil Revision Petition was heard and decided. The decree of the 20th September, 1933, was set aside and a re-trial was ordered. Before the Civil Revision Petition was decided, the transferee decree-holder had realised the amount of the decree from the judgment-debtors, the present respondents 1 to 3. On the re-hearing, only Rs. 75 with proportionate costs was decreed. The present respondents 1 to 3 then applied under S. 144 of the Code of Civil Procedure for the recovery of the amount paid by them to the transferee decree-holder and they made as respondents to that application both the original decree-holder and the transferee. It was mentioned to me that the transferee decree-holder was not made a party to the Civil Revision Petition which resulted in the re-hearing. It is against the order of the learned Subordinate Judge on the application for restitution that this Civil Revision Petition comes before me.

The learned Judge took the view that when a decree-holder, after having obtained a decree, assigns it to a third party, he is

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presumed to have the benefit of the decree and, when the third party to whom he has assigned the decree realized the amount from the defendant, the right to claim restitution as against the original decree-holder arises. He therefore made an order for restitution against both the original decree-holder and the transferee decree-holder for an amount which may be said to represent the original decree after deducting the amount of the second decree and making allowances for costs and interest. Mr. Rangaswami Aiyangar has argued that that order is an illegal order and that the only person against whom restitution can be made is the transferee decree-holder and not the original decree-holder. S. 144, which has been frequently discussed in cases, is worded in the most comprehensive terms, and I think the result of the cases is that it should be widely construed. Its object is to put right what was originally an error of the Court and to restore the parties to the position they would have occupied. It is argued that, after the transfer has been made, the original decree-holder ceased to be a party. In my view, that position is covered exactly by S. 144. In the decision reported in *Govindappa* v. *Hanumanthappa*[1], the more difficult position, as to whether the transferee decree-holder can be made the subject of an order under S. 144 has been decided and decided against the transferee decree-holder. It seems to me that the case before me is precisely covered by S. 144 and that the word 'party' should be given a wide meaning, because it is clear that it is not confined only to the original parties to the suit, but applies also to persons who would become subsequently concerned. That, I think, may be derived from the observations in two cases. The first is in *Doraisami Aiyar* v. *Annasami Aiyar*.[2] At p. 310, Subrahmania Aiyar, J., states:

> "The principle of the doctrine of restitution is that on the reversal of a judgment the law raises an obligation in the party to the record who received the benefit of the erroneous judgment to make restitution to the other party for what he had lost. . . . That obligation it is the duty of the Courts to enforce unless it is shown that restitution would be clearly contrary to the real justice of the case."

Now the present party, the original plaintiff, unquestionably received the benefit from the erroneous judgment because he was able to sell his decree to the transferee decree-holder.

1. (1912) 23 M.L.J. 513: I.L.R. 38 Mad. 36.
2. (1900) 10 M.L.J. 307: I.L.R. 23 Mad. 306.

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In the Allahabad case *Brij Lal* v. *Damodar Das*[1], Walsh, J. after reiterating that S. 144 is very wide in its terms, says that the word 'party' is not used in that section in the sense 'party to the suit', the expression ordinarily found in other parts of the Code, but must mean 'party to the application'. I think that what the learned Judge intends is that it is not confined to the expression 'party to the suit' but may include any other persons who are parties to the application. In my view, the fact that a party to a suit who has obtained a decree wrongly against another person prefers to get the immediate benefit of it by a sale, that is to say, a transfer, rather than waiting to execute against the party, in no way affects the rights of the original party to recover in restitution what he has paid over under pressure of the original erroneous decree. The fact that he has paid it over to a nominee of the original plaintiff seems to me wholly irrelevant to his right to recover against the person who caused him to make that payment, namely, the original plaintiff. I think that any other view might open the door to fraudulent transfers to men of straw and might defeat the very object of S. 144. I think the order of the lower Court was a proper order and I do not propose to interfere with it in any way although it was at one time suggested that the order might be varied by directing that the remedy should be first exhausted against the transferee decree-holder. That, however, is not a matter for consideration in revision. This petition will be therefore dismissed with costs of the fourth respondent.

I should like to add, and counsel agree, that the references in *Govindappa* v. *Hanumanthappa*,[2] to *Tangi Joghi* v. *Hall*,[3] are evidently printing errors and that throughout that case the references were intended to be to the case of *Doraisami Aiyar* v. *Annasami Aiyar*,[4] reported in the same volume at p. 306.

K. S. *Petition dismissed.*

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1. (1922) I.L.R. 44 All. 555 at 560.
2. (1912) 23 M.L.J. 513: I.L.R. 38 Mad. 36.
3. (1899) I.L.R. 23 Mad. 203.
4. (1900) 10 M.L.J. 307: I.L.R. 23 Mad. 306.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Chinna Goundan and another .. *Appellants** (*Respondents 2 and 3*)

v.

Kalyanasundaram Aiyar and others .. *Respondents (Plaintiff-Petitioner and Respondents* 6 to 9 and 11 and 12).

Chinna Goundan *v.* Kalyanasundaram Aiyar.

Madras Estates Land Act (I of 1908), S. 6 (1) Expl. (2)—Madras Act XVIII of 1936—Decree for eviction before the Amending Act VIII of 1934 was passed—Execution after the Act—Plea of occupancy rights under the Act—If can be raised as a bar to execution—S. 127 of Act VIII of 1934 if controls Expl. (2) to S. 6 (1).

Where a decree for eviction was passed against tenants in January, 1934, but before they were actually evicted, the Estates Land (Amendment) Act (XVIII of 1936) was passed whereby the lands in question fell in an estate, the decree-holder cannot evict the occupants in execution as by reason of S. 6 (1) Expl. (2) the tenants acquire occupancy rights, having been in possession on 30th June, 1934. S. 127 of Act VIII of 1934 does not control the Expl. (2) to S. 6 (1).

The Executing Court ought to give effect to this plea as it does not attack the decree but only pleads that the decree has become incapable of execution, by reason of a subsequent statute.

Shyam Mandal v. *Satinath Banerjee*, (1916) I.L.R. 44 Cal. 954, relied on.

Appeal against the order of the District Court of Salem dated 13th December, 1938, in A. S. No. 94 of 1938 preferred against the order dated 25th January, 1938, in E. P. No. 652 of 1937 in O. S. No. 250 of 1916, D. M. C., Sankaridrug at Salem.

M. Krishna Bharathi for Appellants.

A. Srirangachariar for Respondents.

The Court delivered the following

JUDGMENT.—The appellants in this appeal are the judgment-debtors and the respondent is the holder of a decree which was obtained in 1922 and finally confirmed by the High Court in L. P. A. on 26th January, 1934. The decree is for the eviction of the appellants.

The appellants contended in the Courts below that the execution application could not be permitted, as, owing to the recent amendment of the Estates Land Act, they had acquired occupancy rights. This contention was upheld by the learned

* A.A.A.O. No. 86 of 1939. 23rd August, 1940.

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District Munsif, but on appeal, the learned District Judge of Salem has a owed execution to proceed.

There appears to have been some dispute in the Court of the District Munsif as to whether the land which is the subject-matter of this appeal was or was not part of an estate, as now defined by the Act. However, the respondent, who was the appellant before the learned District Judge, and against whom the District Munsif decided this point, did not raise it in his grounds of appeal and I need not therefore consider it either.

It is clear that at the present time and at the time when this execution application was presented, the appellants here were in occupation of land which was part of an estate. They now rely upon S. 6 (1), Expl. (2) of the Estates Land Act, which enacts that any person who was in possession on 30th June, 1934, of any land which is now an estate by virtue of the Act of 1936 shall have occupancy rights. It is contended, on the other hand, by the respondent, that he is protected by S. 127 of Act VIII of 1934. The first sub-section of that section runs as follows:

"Subject to the provisions of sub-section (2), nothing in this Act or in any repeal or amendment effected thereby shall affect any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act under a decree or order of a competent Court."

It is pointed out for the respondent that his decree is dated 26th January, 1934, before the Act VIII of 1934 came into force and it is argued that under the provisions of this section, the rights which he has acquired cannot be attacked. I am unable to see how this section can apply to the facts of the present case. It is clear from the language of the section that it relates only to such repeal or amendment as Act VIII of 1934 itself brings about. Explanation 2 to S. 6 (1) was enacted, not by Act VIII of 1934 but by Act XVIII of 1936. It is impossible therefore that S. 127 of Act VIII of 1934 could control or in any way apply to Explanation 2 to S. 6 (1) of the Act as we now have it. This contention on the part of the respondent must therefore be overruled.

It is next contended on behalf of the respondent that if he is not permitted to execute his decree, it will infringe the well-known principle of law that the executing Court cannot go behind the terms of the decree. This argument also I am unable to accept. The plea which the judgment-debtors are now putting

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forward in no way affects the validity of the decree. If their contention is accepted, it does not in the slightest amount to an assertion that the decree in 1934 ought not to have been passed. No new facts are alleged which would in any way involve the reopening of the decision then arrived at by the Court. All that they are pleading is that certain events have happened, namely, a new Act has been passed, the effect of which renders the decree which is perfectly valid in itself inexecutable in practice. I see no reason or principle of law upon which the appellants should be debarred from raising this plea. On the other hand, in *Shyam Mandal* v. *Satinath Banerjee*[1], I find it stated that a particular objection which is there being dealt with is one that could properly be taken in proceedings in execution of the decree.

> "The judgment-debtor, when he takes such objection, does not attack the decree, he merely urges that the decree, though properly made, has, by reason of events subsequent, become incapable of execution."

I hold therefore that by reason of Expl. 2 to S. 6 (1) of the Act, the appellants cannot be evicted from the land and that they are entitled to raise this plea against the decree-holder when he attempts to execute his decree.

In the result, this appeal must be allowed and the order of the learned District Munsif must be restored with costs throughout.

Leave granted.

S. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Punyam Rangaswami Reddi .. *Petitioner* (Petitioner)*

v.

Gali Gopalakrishna Reddi .. *Respondent (Counter-Petitioner).*

Rangaswami Reddi v. Gopalakrishna Reddi.

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (ii), Proviso D and S. 15—Usufructuary mortgagee of zamin getting himself recognised as the 'landholder' by the Collector—Owner retaining ryoti lands as tenant of his mortgagee—If a 'landholder' excluded from the benefits of the Act.

The petitioner owned the *kudivaram* in certain lands in an estate under the Madras Estates Land Act, which was paying Rs. 1,200 as peishcush. He purchased the zamin rights and was recognised as landholder by the Collec-

1. (1916) I.L.R. 44 Cal. 954 at 963.

* C.R.P. No. 790 of 1939. 18th September, 1940.

Ranga-swami Reddi v. Gopala-krishna Reddi.

tor. In 1934 he executed two usufructuary mortgages each covering one moiety of the zamin right in the estate. He retained his ryoti lands and became the tenant of his mortgagees in respect of those lands In 1935 the respondent one of the mortgagees obtained from the Collector recognition as the 'landholder'. In an application for scaling down by the owner,

Held, that notwithstanding the recognition of the respondent as the landholder, the petitioner as owner of the estate must also be deemed to be a "landholder" within the definition in S. 3 (5) of the Madras Estates Land Act. He is therefore not an agriculturist under Act IV of 1938 and is disentitled to the benefits conferred by S. 15 of the Act.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Special Deputy Collector of Chandragiri dated 6th January, 1939 and made in M. A. No. 752 of 1938.

T. L. Venkatarama Aiyar for Petitioner.

S. A. Seshadri Aiyangar for Respondent.

The judgment of the Court was delivered by

Wads-worth, J.

Wadsworth, J.—The question in this Civil Revision Petition is whether, having regard to the terms of Proviso D to S. 3 (*ii*) of the Madras Agriculturists' Relief Act, the petitioner is an agriculturist entitled to the benefits of S. 15 of the Act. The petitioner owns the kudivaram interest in certain lands in the village of Kolathur, which is an estate under the Madras Estates Land Act, paying a peishcush of Rs. 1,200. Some years ago he purchased the zamin rights of the estate and in 1927 he was recognised by the Collector as the landholder. In 1934 he executed two usufructuary mortgages, each covering one moiety of the zamin right in the estate. He retained his ryoti lands and thus became the tenant of his mortgagees in respect of those lands. In 1935 the respondent (one of the mortgagees) applied to the Collector for recognition as the landholder of the estate. His application was opposed by the mortgagees of the other half of the zamin and the petitioner was also a party to the proceedings. The Collector recognised the respondent as the landholder, holding that the petitioner was no longer entitled to collect the rents and that the respondent was entitled to a larger share of the income than either of the mortgagees of the other half. The question is whether in view of this order, the petitioner can be deemed to be a landholder of an estate in respect of which a sum exceeding Rs. 500 is paid as peishcush. The lower Court held that he was a landholder and therefore disentitled to the benefits conferred on agriculturists by S. 15 of Act IV of 1938.

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The question is by no means free from difficulty. Proviso D to S. 3 (*ii*) excludes from the category of agriculturists any person who "is a landholder of an estate under the Madras Estates Land Act, 1908, or of a share or portion thereof in respect of which estate, share or portion any sum exceeding Rs. 500 is paid as peishcush. . . .". The exclusion of a landholder of a share or portion of an estate paying a peishcush exceeding Rs. 500 seems to indicate that the Legislature had in mind the qualification of ownership of the zamin interest rather than the qualification of recognition by the Collector. But the definition of a 'landholder' in the Estates Land Act as a person owning an estate or a part thereof or entitled to collect the rents of a whole or any portion of the estate, has the following subsidiary clause:—

"Where there is a dispute between two or more persons as to which of them is the landholder for all or any of the purposes of this Act or between two or more joint landholders as to which of them is entitled to proceed and be dealt with as such landholder, the person who shall be deemed to be the landholder for such purposes shall be the person whom the Collector subject to any decree or order of a competent Civil Court may recognize or nominate as such landholder in accordance with rules to be framed by the local Government in this behalf."

One of the rules framed under this section provides that where two landholders have equal claims to recognition, the Collector shall recognize the more competent.

Under this provision of law, the respondent has been recognized by the Collector as the landholder for all the purposes of the Act. It is argued that by reason of this recognition, the other joint landholders (including the petitioner) ceased to be landholders for any of the purposes of the Act and that since the definition exists only for the purposes of the Act, they ceased to have the status of landholders at all.

Now there can be no doubt that the acceptance of this view of the law would lead to serious anomalies. Take the case of an estate paying a peishcush of Rs. 2,000, which is enjoyed in two equal moieties by *A* and *B*. The Collector would have to decide whether *A* was more competent than *B* and the result would be that the more competent man who was recognized as the landholder would not be an agriculturist, while the less competent man, though owning a portion of an estate paying a peishcush of Rs. 1,000, would be entitled to the benefits of Act IV of 1938 as an agriculturist, though it appears to have been intended that he should not be so entitled. In fact the result of

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this interpretation of Proviso D would be practically to nullify the exclusion from the category of agriculturists of landholders of a share or portion of an estate paying a peishcush exceeding Rs. 500.

At the same time there are serious difficulties in interpreting the word 'landholder' in this proviso in accordance with its dictionary sense as a proprietor or owner and without regard to the definition in the Madras Estates Land Act. The word 'landholder' is used in Ss. 3 (*ii*) (*b*), 3 (*iv*), 15, 16 and 17 of Act IV of 1938 and in each of these sections it appears to be used in its technical sense as a landholder under the Estates Land Act. Moreover in Proviso D to S. 3 (*ii*), though the words "under the Madras Estates Land Act," appear grammatically to qualify 'estate' rather than 'landholder' the whole phrase seems to have reference to that Act and it is to be presumed that the legislature had in mind the definition of the term 'landholder' in that Act rather than the dictionary meaning of the word.

The solution of the difficulty seems to us to lie in a more careful reading of the second clause of S. 3 (5) of the Estates Land Act. This clause seems to contemplate two classes of dispute. One is a dispute between two or more persons as to which of them is the landholder for all or any of the purposes of the Act, that is to say a dispute regarding title. The other is a dispute between two persons who are admittedly joint landholders as to which of them is entitled to proceed and be dealt with as the landholder, that is to say, it is a dispute not regarding title but regarding the right of management. In the latter class of cases, the proper order to be passed by the Collector is not one recognizing the successful party as the landholder for all purposes under the Act, but one recognizing him as entitled to proceed and be dealt with as the landholder. When such an order is passed, though the successful party would be solely entitled to conduct proceedings and to perform the functions of the landholder so long as the order is in force, it would not have the effect of taking the joint proprietor out of the definition of 'landholder' in the first clause of the sub-section. It is true that the Collector's order in the present case purported to recognize the respondent as the landholder for all purposes under the Act, but this order can have no larger effect than the recognition which the Collector was empowered to make.

It follows that, notwithstanding the recognition of the respondent as the landholder, the petitioner as owner of the estate must also be deemed to be a landholder within the definition in S. 3 (5) of the Madras Estates Land Act. He is therefore not an agriculturist under Act IV of 1938. The petition is therefore dismissed with costs.

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Wadsworth, J.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Palani Goundan .. *Petitioner* (Petitioner)*

v.

Peria Goundan .. *Respondent (Respondent-Plaintiff).*

Palani Goundan v. Peria Goundan.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Decree on mortgage—Purchaser of equity of redemption—If judgment-debtor—Liability of, if 'debt' under Act liable to be scaled down.

The purchaser of the equity of redemption at a sale in execution of a money decree against the mortgagors claimed to have the mortgage decree amended under S. 19 of Act IV of 1938.

Held, in the absence of any definition in the Act, there is no obvious reason why the term 'judgment-debtor' should not be understood as including a person whose liability is a 'debt', as defined by the Act, more especially as that definition includes a judgment debt. *Panduranga Mudaliar* v. *Vythilinga Reddi*, (1907) 17 M.L.J. 417: I.L.R. 30 Mad. 537, applied. *Ganapathi Bhatta* v. *D'Sousa*, (1940) 2 M.L.J. 317, overruled.

The liability of the purchaser of the equity of redemption, is a 'debt' within the meaning of the Act. *Perianna* v. *Sellappa*, (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218, relied on.

It is immaterial whether or not the debtor had the agriculturist character when the debt was originally incurred, where it was incurred prior to 1st October, 1937.

Petition under S. 115 of Act V of 1908, praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Namakkal dated 21st September, 1938 and made in I. A. No. 840 of 1938 in O.S. No. 678 of 1932.

V. N. Venkatavaradachariar for Petitioner.

R. Desikan for Respondent.

The judgment of the Court was delivered by

Patanjali Sastri, J.

Patanjali Sastri, J.—This is a petition to revise an order of the District Munsif of Namakkal dismissing the petitioner's

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* C. R. P. No. 1734 of 1938. 18th September, 1940.

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Patanjali Sastri, J.

application under S. 19 of the Madras Agriculturists' Relief Act for scaling down the amount payable under the decree dated 14th August, 1932, in O. S. No. 678 of 1932 on the file of that Court.

The respondent obtained the decree on foot of a mortgage to which he claimed to be subrogated and was proceeding with its execution when the petitioner, having purchased the equity of redemption in the properties on 17th April, 1936, in execution of a money decree against the mortgagors, intervened with a claim to have the respondent's decree amended under S. 19 of the Act. There is no dispute that the petitioner is an agriculturist but the respondent objected that the petitioner was not a 'judgment-debtor' within the meaning of that section. The Court below upheld the objection and dismissed the application. It appears to have been conceded in the Court below that the defendants in the mortgage suit against whom the decree was passed were not agriculturists at the commencement of the Act as, after the purchase by the petitioner as aforesaid, they had no agricultural lands left in their possession, and it was presumably a matter of indifference to them whether or not the amount of the decree was reduced.

Before dealing with the main question as to whether or not the petitioner can be regarded as a judgment-debtor within the meaning of S. 19 of the Act, we will mention, only to dismiss, the suggestion that, in view of the definition of 'debt' in S. 3 (*iii*), unless the debt for the repayment of which the decree was passed was a debt due by an agriculturist even at its inception, S. 19 could have no application. The object of the Act is clearly to provide relief for debtors who are agriculturists at the commencement of the Act (*See* S. 17) while S. 19, read with the definition of 'agriculturist' seems to require that the debtor seeking relief should be an agriculturist at the time of the application, and the first paragraph of S. 19 further requires, with a view to prevent abuse of the provisions of the Act, that the debtor should also have been an 'agriculturist' on the 1st October, 1937, as the proposal of affording relief to indebted agriculturists was made known that date. Thus, it is clear that the agriculturist character of the debtor is not relevant for purpose of scaling down debts under the Act except with reference to these three dates, and it is immaterial whether or not the debtor had such character when the debt was

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originally incurred where it was incurred prior to the 1st October, 1937.

Turning now to the main question whether the petitioner can be said to be a 'judgment-debtor' within the meaning of S. 19, it will be observed that the definition of that term in S. 2 (10), Civil Procedure Code, as meaning "any person against whom a decree has been passed or an order capable of execution has been made" has not been incorporated in this Act. On the other hand, the definition of 'debt' in S. 3 (*iii*) includes debts payable under a decree or order of a Court. According to the decision in *Perianna* v. *Sellappa*[1], the liability of the petitioner as the purchaser of the properties subject to the mortgage decree is a 'debt' within the meaning of the Act. In these circumstances, if the contention of the respondent were to be accepted, it would have the startling result, that though the petitioner as well as his liability comes within the purview of S. 7 which provides that the debt 'shall be scaled down in accordance with the provisions of this Chapter', that is, of Chapter II of the Act which contains the substantive provisions as to scaling down of debts, he would be excluded from such relief by reason of the 'procedure' provided in S. 19 for obtaining it being inapplicable to him. On the other hand, it stands to reason that the procedure provided in a statute for enforcement of the substantive rights conferred thereby should be construed as far as possible, so as to give effect to and not to nullify those rights. This is by no means in conflict with the principle we have often reiterated in connection with this Act, namely, that its provisions being of an expropriatory character should be strictly construed and its scope ought not to be extended beyond what is clearly and expressly indicated by its terms. In the absence of any definition in this Act, there is no obvious reason why the term 'judgment-debtor' should not be understood as including a person whose liability is a 'debt' as defined by the Act, more especially as that definition includes a judgment-debt.

As pointed out by learned counsel for the petitioner, there is authority for the view that even under the Civil Procedure Code, the term 'judgment-debtor' notwithstanding the definition contained therein, includes those who claim through or in his right. In *Panduranga Mudaliar* v. *Vythilinga Reddi*[2], it was

1. (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218.
2. (1907) 17 M.L.J. 417: I.L.R. 30 Mad. 537.

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held by a Bench of this Court that S. 258 corresponding to O. 21, r. 2 of the present Code was applicable to persons in the position of the respondent before us. The learned Judges observed:

"We think however that the word 'judgment-debtor' in S. 258 should be construed as including those who claim through him or in his right. To hold otherwise would lead to obvious hardships which we cannot think were contemplated"

This decision was followed by Seshagiri Aiyar, J., in *Matharasappa Chettiar* v. *Muthu Chettiar*[1] and was referred to with approval by Wadia, J., in *Shivbasappa Chinnappa* v. *Marigowda Huchangowda*[2].

The respondent's learned counsel placed reliance on the decision of Horwill, J., in *Ganapathi Bhatta* v. *D'Sowsa*[3], which no doubt supports his contention. The learned Judge held that the word 'judgment-debtor' in S. 19 must be understood in the sense defined in the Civil Procedure Code, and therefore a purchaser of the equity of redemption from a Receiver in the insolvency of a judgment-debtor was not entitled to apply under that section. Distinguishing *Panduranga Mudaliar* v. *Vythilinga Reddi*[4], the learned Judge observed that:

"Even there it was not said that persons claiming through judgment-debtors were also judgment-debtors. It only says that S. 258 applied to those claiming through them and in their right as well as to judgment-debtors."

We cannot agree with this view of that decision. The learned Judges there referred to the contention for the appellant before them based upon the definition of 'judgment-debtor' in the Code of Civil Procedure, and they expressly held in the passage quoted above that the word 'judgment-debtor' in S. 258 included those who claimed through or under him. Nor is there any change in this respect in the present Code, as the learned Judge appears to have supposed. The learned Judge also placed reliance upon *Thiruvengadam Pillai* v. *Doridla Subbiah*[5], as expressly deciding the point. The case itself related to the right of a transferee of a decree to apply under O. 21, r. 53 to execute the decree when such decree had been attached by a creditor of the decree-holder. In support of their con-

1. (1919) 9 L.W. 596.
2. (1933) I.L.R. 58 Bom. 485.
3. (1940) 2 M.L.J. 317.
4. (1907) 17 M.L.J. 417: I.L.R. 30 Mad. 537.
5. (1912) 13 I.C. 659.

clusion that the assignee of an attached decree was not in the same position as the decree-holder himself for purposes of execution, the learned Judges observed:

" We may also point out that the definition of judgment-debtor, as given in S. 2, cl. 10 of the Code of Civil Procedure does not include the assignee of the judgment-debtor."

The observation is thus purely *obiter*, if it is to be understood as anything more than a statement of a fact. However that may be under the Code of Civil Procedure, we consider that there are as already indicated cogent reasons for not construing the word 'judgment-debtor' in the restricted sense of the definition in S. 2 (10) of the Code of Civil Procedure, and we are accordingly of opinion that the petitioner is entitled to apply under S. 19 of the Madras Act IV of 1938 for amendment of the decree by scaling down the amount payable thereunder in accordance with the provisions of the Act.

In this view, it is unnecessary to consider the question whether the petitioner could rely on S. 146, Civil Procedure Code, when the defendants in the mortgage suit had ceased to be agriculturists at the commencement of the Act.

We set aside the order of the Court below and remand the case for disposal in the light of our judgment herein. The petitioner will have his costs of this revision petition.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HORWILL.

The Official Assignee, Madras .. *Appellant** (*Applicant*)

v.

H. D. Hukumchand Khimsura .. *Respondent* (*Respondent*).

Official Assignee, Madras v. Hukumchand Khimsura.

Pledge—Deposit of insurance policies accompanied by a letter setting out the policies as articles pledged—If creates a valid lien in favour of creditor.

The mere fact of deposit of insurance policies by way of pledge created no lien in favour of the creditor. A letter which set out the policies as articles pledged was merely evidence of the deposit and did not amount to a valid assignment of the policies and conferred no rights on the creditor.

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* O.S.A. No. 13 of 1940. 9th September, 1940.

Official Assignee, Madras v. Hukumchand Khimsura.

Appeal against the judgment and order of the Hon'ble Mr. Justice Somayya dated 8th January, 1940 and made in the exercise of the Insolvency Jurisdiction of the High Court in Application No. 344 of 1939 in Petition No. 148 of 1938.

K. V. Ramachandra Aiyar and *S. Tyagaraja Aiyar* for Appellant.

A. V. Seshayya for Respondent.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The appellant in this case is the Official Assignee of Madras, who represents the estate of one C. Subramania Iyah, an insolvent. Before his adjudication, the insolvent borrowed a sum of Rs. 300 from the respondent, who is a money-lender and as security for the loan deposited with him two policies of insurance on his life. The deposit was evidenced by a document in writing and the question which arises in this appeal is whether this document amounts to an assignment of the insolvent's interest in the policies. It was held by Somayya, J., that the document constitutes an assignment, and the appellant challenges the correctness of this finding.

The document is in the form of a letter signed by the insolvent in favour of the respondent and commences thus:

> "I have taken from you a loan of Rs 300 in words Rupees Three Hundred only at 1¼ pies per rupee per mensem on the pledge of the articles noted below on the following conditions."

It will be sufficient for the purposes of this appeal to state three of the conditions, namely, Nos. 4, 6 and 7, which read as follows:

> "4. I authorise you to hold and retain the below mentioned jewels with you as a collateral security for a general balance of account *i.e.*, not only for the aforesaid debt but also for any sums that I might have borrowed or may borrow from you or for any balance of account that may be due to you.
>
> 6. I have received to-day a copy of this letter giving full description of the pledge.
>
> 7. If I fail to redeem the articles within six months, or if I fail to pay interest for six months you may realize your dues either by sale or by public auction of all or any of the pledged properties after seven days' notice by post or by personal service or by registered post to the address given above. I shall be responsible for any deficiency and you will refund the surplus if any."

Immediately following the signature are these words:

> "*Particulars of Pledge.*
>
> One Postal Endowment Assurance Policy No. 22786 for Rs. 1,500.
>
> One National Insurance Company Table No. III Endowment Assurance sum assured Rs. 1,000 Policy No. E. 114692."

Official Assignee, Madras v. Hukumchand Khimsura.

Leach, C.J.

The letter was in fact a printed form used by the respondent for an advance on the security of jewellery with certain details filled in by pen. No attempt was made to alter this very inappropriate form to make it read as a transfer of the respondent's interest in these policies.

The learned Judge has rightly pointed out that it is well established that the transfer of an actionable claim referred to in S. 130 of the Transfer of Property Act may be one of absolute assignment or by way of security. His reasons for holding that the letter signed by the insolvent operates as a transfer are that the law does not require any particular form of writing and that he was satisfied that there was here a writing by which security was created. We find ourselves unable to concur in the opinion of the learned Judge that the document operates as an assignment. It is quite true that the form of the instrument or words used are not of importance, provided that it is clearly indicated that the owner of the actionable claim is transferring his interest. A mere intention to create a pledge would not amount to an assignment within the meaning of S. 130 of the Transfer of Property Act. This was pointed out by the Privy Council in *Mulraj Khatau* v. *Visvanath Prabhuram Vaidya*[1]. In that case the appellant claimed to be entitled to an insurance policy which had been assigned to him in writing. The respondent also claimed to be entitled to it on the ground that it had been deposited by the owner with him by way of pledge, but Lord Moulton in delivering the judgment of the Board pointed out that a pledge does not satisfy the requirements of S. 130.

Now when the document in this case is read, what does it amount to? It amounts to an instrument evidencing the deposit of the policies of insurance by way of pledge, and nothing more. Under this document the respondent has merely the rights of a pledgee of movable property. A mortgagee is a transferee but a pledgee is not, although the pledgee has a special interest in the property as the holder of security. He may sell the property pledged if the condition of repayment is not fulfilled, but that does not make him in any way the owner or transferee of the property. The only difference which I can see between this case and *Mulraj Khatau* v. *Visvanath Prabhuram Vaidya*[1] is that in this case there is a document evidencing the pledge

1. (1912) 24 M.L.J. 60: L.R. 40 I.A. 24: I.L.R. 37 Bom. 198 (P.C.).

Official Assignee, Madras v. Hukumchan Khimsura.

Leach, C.J.

whereas in the other case the pledge was unaccompanied by any acknowledgment. An instrument evidencing a pledge and nothing more certainly cannot be read as an assignment.

The learned advocate for the respondent has referred us to *Rama Iyen* v. *Venkatachalam Pattar*[1] and *Muthukrishna Aiyar* v. *Veeraraghava Aiyar*[2], but the facts in those cases are very different from the facts in the present case. In the first of those cases, on the back of a promissory note was endorsed a direction to pay the amount to a certain person to whom the instrument was delivered. It was held that the direction to pay coupled with the delivery of the instrument amounted to an assignment within the meaning of S. 130 of the Transfer of Property Act. There are many differences between that case and the present one, but it is only necessary to mention that here there is no direction to the insurance companies to pay the amounts of the policies to the respondent. In the second case the instrument read as follows:

"As I have received Rs. 600 from you by mortgaging the following, *i.e.*, the house......and the promissory note mentioned as '2' in the Schedule.... for Rs. 500 executed by my brother Sankarasubbier on the 21st November, 1901.........I promise to repay the said sum of Rs. 600 with interest thereon at one per cent. per month within a year from the date hereof failing which I shall repay the principal and interest thereon at 1½ per cent. per month and add the interest to principal every year and repay the same with compound interest at the rate aforesaid failing which you may proceed against the mortgaged properties, other properties or personally for the collection thereof." (*Muthukrishnlen* v. *Veeraraghava Aiyar*[3].)

There was disagreement in this case between Sundara Aiyar and Sadasiva Aiyar, JJ. and consequently the appeal was placed before a Bench of three Judges. It was held that the mortgage had operated as an assignment of the promissory note. The difference between that case and the present one is that in that case there was a mortgage and a mortgage implies a transfer of the mortgagor's interest in the property, whereas in the present case there has been merely a pledge and a pledge has not the same significance.

For the reasons indicated the appeal will be allowed with costs here and below.

K. S. *Appeal allowed.*

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1. (1906) 16 M.L.J. 554: I.L.R. 30 Mad. 75.
2. (1913) 25 M.L.J. 356: I.L.R. 38 Mad. 297 (F. B.)
3. (1912) 23 M.L.J. 430.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE MOCKETT.

Nannapaneni Seshayya .. *Appellant** (*Accused-Prisoner*).

Seshayya, *In re.*

Criminal trial—Conviction for murder—Failure to award the only possible sentence—Power of High Court to enhance sentence.

Where on a conviction for murder the Sessions Judge sentenced an accused to transportation for life on the ground that the guilt was proved only by circumstantial evidence, though strong,

Held, that it matters not how an accused's guilt is established whether by the testimony of eye-witnesses or by the testimony of combined circumstances provided that it is established beyond all reasonable doubt. The measure of proof must be the same in either case.

The High Court can enhance the sentence to one of death as the lower Court had manifestly failed in its duty to impose the only possible sentence.

Gunduthalayan, In re, (1929) 58 M.L.J. 490: I.L.R. 53 Mad. 585, explained.

Appeal against the order dated 2nd July, 1940, of the Court of Session of the Guntur division in Sessions Case No. 22 of 1940 and Case taken up in revision by the High Court calling on the accused in Guntur Division Sessions Case No. 22 of 1940 to show cause why the sentence passed on him should not be enhanced.

S. Vepa and *J. Krishnamurthy* for Appellant.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The judgment of the Court was delivered by

Mockett, J.

Mockett, J.—The appellant has been convicted by the learned Sessions Judge of Guntur of the murder of a little girl one Seetharamamma. The trial Court imposed a sentence of transportation for life and the learned Judge who perused the judgment of the trial Court ordered the issue of a notice to the prisoner to show cause why the sentence should not be enhanced to a sentence of death.

* * * *

[After dealing with the evidence His Lordship concludes.]

In our view the guilt of the accused has been proved beyond any shadow of doubt and we have no reason to suppose that the evidence for the prosecution is other than true.

This appeal will therefore be dismissed.

In considering the question whether the sentence should be enhanced, it is well to remember that the appellant has been

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* Crl. Appeal No. 476 of 1940. 11th October, 1940.
Crl. R. C. No. 479 of 1940.
(Taken up No. 3 of 1940).

Seshayya, In re.
Mockett, J.

convicted of the murder of a little girl whom he was proved to have taken from her house for reasons which have been shown to be false. He was never intending to take her to her grandfather. The moment the girl's mother heard of his supposed intention she was surprised. She states she wondered why after the quarrel between herself and the wife of the accused, the accused should take her daughter away without her permission because be it remembered that when P. W. 1 left the house that day there was no question. The accused never asked her permission to take her daughter so far away as Tekkallapad nine miles distance. We cannot doubt therefore that this murder was premeditated and deliberate. Why exactly it was perpetrated is known only to the appellant. The learned Judge dealt with the question of sentence as follows:

"As to the punishment since the guilt of the accused has been proved by strong circumstantial evidence this is not a case calling for capital punishment. I therefore sentence him to transportation for life."

That reason namely that the conviction was based on circumstantial evidence has been in innumerable cases condemned by this High Court. It was condemned in 1914 by Ayling and Kumaraswami Sastri, JJ., in *Muniyandi* v. *Emperor*[1], in 1921 by Ayling and Krishnan, JJ., in *Public Prosecutor* v. *Paramandi*[2] and again in 1929 condemned by Waller and Krishnan Pandalai, JJ., in *Chava Indramma* v. *Emperor*[3]. There is thus ample authority for so self-evident a proposition. It must surely be obvious that it matters not how an accused's guilt is established whether by the testimony of eye-witnesses or by the testimony of combined circumstances provided that it is established beyond all reasonable doubt and the measure of proof must be the same in either case. Our attention has been drawn to some decisions the effect of which is as stated in the headnote in *Gunduthalayan*, In re[4]:

"Where on a conviction for murder the Sessions Court awarded a sentence lesser than death, the High Court will not enhance the sentence, unless it is satisfied that on the evidence in the case the sentence of death is the only possible sentence which could have been passed by the Sessions Court."

As on a conviction for murder the law provides for an alternative sentence we have no doubt that when using the phrase

1. (1915) M.W.N. 34.
2. (1921) 40 M.L.J. 464: I.L.R. 44 Mad. 443.
3. (1929) 2 Mad. Crl. C. 158.
4. (1929) 58 M.L.J 490: I.L.R. 53 Mad. 585.

Seshayya, *In re.* Mockett, J.

'the only possible sentence' the Court intended to express the view that it was only in cases in which the lower Court had manifestly failed in its duty that the High Court would impose the sentence of death. As stated by Waller, J., in *Chava Indramma* v. *Emperor*[1], because the lower Court had failed in its duty there was no reason why the High Court should do the same. In this case we consider that the trial Court's duty was to impose the sentence of death. There must be cases in which that is manifestly so and perhaps as good an example as can be given is the case of the deliberate murder of a small child for purposes of robbery or any other purpose such as this case. No doubt examples can be multiplied but such an example may be mentioned. For reasons which are wholly unsupportable and which Mr. Vepa did not attempt to support the learned Judge has passed the lesser sentence. There are no other reasons justifying such a course. It is our duty to pass a sentence of death.

We therefore enhance the sentence of transportation for life to a sentence of death and direct that the accused be hanged by the neck until he be dead.

K.S. *Appeal dismissed and sentence enhanced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HORWILL.

The Municipal Council, Palni, through its Commissioner *Appellant** (*Defendant*)

v.

Sri Dhandayuthapani Devasthanam, Palni, through its managing trustee Mr. T. P. Venkatarangam Pillai. *Respondent* (*Plaintiff*).

Municipal Council, Palni *v.* Sri Dhandayuthapani Devasthanam, Palni.

Madras District Municipalities Act (V of 1920), Ss. 81 and 83 (1) (a)—Construction—Power house of Devasthanam—When exempt from property-tax—Power-house used for supplying electricity to shops and hotels and yielding profits—Effect.

A power-house was erected by the Palni Devasthanam at the foot of the Palni Andavar Hill. The power-house supplied energy not only to light up the hill and its approaches but also to certain shops and a hotel in the hill, for consideration yielding a profit. It was contended that the hill having been set apart for public worship and continued to be *used* for such

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1. (1929) 2 Mad. Cri. C. 158.

* S.A. No. 931 of 1937. 19th September, 1940.

Municipal Council, Palni v. Sri Dhandayuthapani Devasthanam, Palni.

worship, the power-house at the foot of the hill was not taxable as it was exempted under S. 83 (1) (a).

Held, if electricity had been used only for lighting the temple and its approaches the Devasthanam will be entitled to exemption. As the power-house was, however, used for supplying electricity to shops and a hotel yielding a profit it was liable to assessment to property-tax. The property set apart for public purpose may or may not be used for the purpose. But to claim exemption from taxation it should not be used for any other purpose.

Municipal Council, Srirangam v. *Srirangam Devasthanam*, (1936) M.W.N. 1088, not followed.

Appeal against the decree of the Court of the Subordinate Judge of Dindigul in A.S. No. 84 of 1936 preferred against the decree of the Court of the District Munsif of Palni in O.S. No. 55 of 1936.

K. S. Sankara Aiyar for *T. R. Venkatarama Sastri* for Appellant.

T. M. Krishnaswami Aiyar for Respondent.

This second appeal coming on for hearing on 21st August, 1940, the Court (*Venkataramana Rao, J.*) delivered the following

JUDGMENT.—The question for decision in this appeal is whether the Municipal Council, Palni, is entitled to levy property-tax in respect of the electric power-house installed by the Sri Dandayuthapani Devasthanam at the foot of the Palni Andavar Hill on which the shrine of Dandayuthapani is situate. The Devasthanam claims exemption under S. 83 of the District Municipalities Act on the ground that it is a place set apart for public worship and is actually used for such worship. The learned District Munsif took the view that the said power-house was not set apart for public worship and that the electric energy from the said power-house was being utilised for lighting, not only the temple, but also certain shops and a coffee hotel which have been leased out by the Devasthanam authorities to strangers and therefore no exemption can be claimed under S. 83 of the Act. An appeal was preferred against this decision by the Devasthanam and the learned Subordinate Judge before deciding the appeal called for a finding as to whether the Palni Andavar Hill including the temple or only the latter is a place set apart for public worship. The learned District Munsif submitted the finding that the hill itself, and not merely the temple must be held to be a place set apart for public worship. The learned Subordinate Judge accepted this finding and held that though the electric energy generated from the power-house was also being supplied to light a coffee hotel and some fruit stalls on the top of the hill, they were intended to further public worship as fruit is presented by pilgrims to the deity and, incidentally to add to the amenities of pilgrims and

Municipal Council, Palni v. Sri Dhandayuthapani Devasthanam, Palni.

therefore the power-house was set apart for public worship and was being so used. Against this decision the Municipal Council has preferred this appeal.

Mr. T. R. Venkatarama Sastri who appears for the Municipality contends that the learned Judge has misconstrued S. 83 of the District Municipalities Act. The Palni Andavar Hill bore S. No. 811 and comprised 129 acres 67 cents. Under the Municipal Town Survey in 1896 S. No. 811 was split up into several numbers and the hill alone was given S. No. 862 wherein the power-house is now situate. Mr. Venkatarama Sastri is not able to challenge the finding that S. No. 862 at any rate is a place set apart for public worship. Still the question arises whether the plaintiff can claim exemption in respect of the power-house. The learned Subordinate Judge in arriving at the conclusion which he did, relied on *The Municipal Council, Srirangam* v. *The Srirangam Devasthanam*[1], which took the view that if a certain place was set apart for public worship, any portion of that place, though not actually used for public worship, would be exempt from taxation. Mr. Venkatarama Sastri canvasses this position and argues that in order that exemption may be claimed under that section, it is not enough that a certain area is set apart for public worship but no portion of the area should be used for any other purpose than public worship and if any portion of that area is used for purposes other than public worship, the Municipality will be entitled to levy the tax. In this case it is admitted that the electric energy is also supplied to light a coffee hotel from which the Municipality derives income. Mr. T. M. Krishnaswami Aiyar contends that the electric energy generated in the power-house is mainly used for lighting the temple and for facilitating public worship and that the fact that incidentally some income is derived by letting a portion of the place to a coffee hotel would not make the place any the less a place actually used for public worship. S. 83 of the District Municipalities Act so far as it is relevant for the purposes of this case runs thus:

> "The following buildings and lands shall be exempt from the property tax: (*a*) places set apart for public worship and either actually so used or used for no other purpose........"

Two conditions are required in order to claim exemption from property-tax on the ground that a certain place is used for public worship, namely, (1) the place must be one which has been set apart for public worship; and (2) (*a*) it must either be actually so used; (*b*) or used for no other purpose. The place need not be one where worship is actually carried on but it may be a place

1. (1936) M.W.N. 1088.

Municipal Council, Palni v. Sri Dhandayuthapani Devasthanam, Palni.

which is used in aid of or for facilitating public worship. It cannot be denied that lighting the temple and the hill is necessary for facilitating public worship. It may therefore be said that the place where the electrical energy is generated for the purpose of lighting the temple and the hill is a place actually used for public worship. But the question still remains whether the place must be exclusively used for the said purpose. The context indicates, and there is a good deal of force in the argument of Mr. Venkatarama Sastri, that the place must be exclusively used for that purpose and if any portion of the place is used for purposes other than public worship it cannot be said to be a place actually used for public worship. Though as was held by K. S. Menon, J., the word 'or' in S. 83 is disjunctive still the words 'used for no other purpose' throw light on the interpretation of the words 'actually so used'. In my opinion the decision in *The Municipal Council, Srirangam* v. *The Srirangam Devasthanam*[1] requires re-consideration. If I differ from that decision there will be two conflicting decisions and it is very undesirable, especially in the case of a taxing statute, that there should be this uncertainty. I therefore think it desirable that this second appeal should be decided by a Bench.

This second appeal came on for final hearing this day* before the Bench.

The judgment of the Court was delivered by

Leach, C. J.

The Chief Justice.—The Municipal Council of Palni has assessed to the property-tax leviable under S. 81 of the Madras District Municipalities Act, 1920, a power-house belonging to the Sri Dandayuthapani Devasthanam. The power-house is situate at the foot of the Palni Andavar Hill and within the municipal limits. The trustees objected on the ground that this building was exempt from taxation by reason of the provisions of S. 83 (1) (*a*) of the Act. The property having been assessed to this tax and the tax having been paid, the trustees instituted a suit in the Court of the District Munsif of Palni for the recovery of the amount. The District Munsif found against the plaintiff and dismissed the suit, but on appeal his decision was reversed and the suit was decreed. The Municipal Council now appeals to this Court.

It is common ground that the whole hill was set apart for religious purposes. On the top of the hill is a famous temple

1. (1936) M W N. 1088.

* 19th September, 1940.

Municipal Council, Palni v. Sri Dhandayuthapani Devasthanam, Palni.

Leach, C. J.

which is approached by means of a long flight of steps. At the top of the hill there are also shops and a hotel which supply the needs of the pilgrims who visit the temple. In 1929, the trustees built the power-house and installed electric plant for the purpose of lighting the way up to the temple and the temple itself. Later on, they supplied electricity to the shop-keepers and the hotel-keeper for which the trustees charged profitable rates. The fact that electricity was supplied to the shops and to the hotel led the Municipal Council to assess the power-house to the property-tax. If the power-house is to be exempt from this tax, the building must come within the purview of S. 83 (1) (*a*) because there is no other section in the Act which can relieve the trustees from the obligation of paying the property-tax.

S. 83 (1) reads as follows:

"The following buildings and lands shall be exempt from the property-tax—

(*a*) place set apart for public worship and either actually so used or used for no other purpose, choultries, buildings used for educational purposes, including hostels, public buildings and places used for the charitable purpose of sheltering the destitute or animals, libraries and play-grounds which are open to the public and such ancient monuments protected under the Ancient Monuments Preservation Act, 1904, or parts thereof as are not used as residential quarters or as public offices."

It is not necessary to go beyond the words "places set apart for public worship and either actually so used or used for no other purpose", as it is clear that the power-house is not a building of the nature of any of those subsequently mentioned. In our opinion, the words "places set apart for public worship and either actually so used or used for no other purpose" read with the opening words of the section mean that there shall be exemption for places set apart for public worship and used for that purpose and for places set apart for public worship, but not actually in use. If a place is used for a purpose other than public worship, the place does not fall within the exemption, even though the intention was that it should be used for public worship. It has been suggested that the use of the word 'or' instead of 'and' makes a difference. It does make a difference, but not the difference suggested. If the word were 'and' and not 'or' there would only be exemption when a place was set apart for public worship and actually used for that purpose, but as a result of using the word 'or' there is exemption when the place has been set apart for public worship,

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but is not actually in use. The drafting leaves much to be desired, but it is obvious that the intention is to exempt buildings which are intended for religious purposes and are not being used for secular purposes.

What is the position here? The hill has been set apart for public worship and it cannot be disputed that if this power-house were merely used for lighting the temple and the approach to it the power-house would be exempted from taxation. But, inasmuch as the power-house, which stands on a part of the hill, is being used for commercial purposes as well as purposes of public worship, the conditions of the exemption are not fulfilled. The Municipal authorities are not suggesting that because a part of the hill, namely, the site of the power-house, is being used for other purposes the whole hill and everything erected thereon should be deemed to be taken out of the section. Their case is merely confined to the power-house and we consider that it is well founded.

In the course of arguments two decisions of this Court were referred to, namely, *The Municipal Council, Srirangam* v. *The Srirangam Devasthanam*[1] and *The Municipal Council of Tirupati* v. *Sree Mahant Prayag Dossjee Varu*[2]. The first case certainly supports the trustees, but we consider that it was wrongly decided. The second case is not really in point. In *The Municipal Council, Srirangam* v. *The Srirangam Devasthanam*[1], the council wished to assess to property-tax certain shops within the Srirangam temple. The learned Judge (K. S. Menon, J.) considered that as the word 'or' and not the word 'and' was used in S. 83 (1) (*a*), the shops were not taxable. We have said sufficient to indicate that in our opinion this argument cannot be accepted and that the decision of K. S. Menon, J., ought not to be followed. In *The Municipal Council of Tirupati* v. *Sree Mahant Prayag Dossjee Varu*[2], the question was whether buildings used for stabling Devasthanam horses which were employed in carrying drums in temple processions or allowed for the use of pilgrims to whom honour was shown by the Mahant were exempt from the property-tax. It was held that they were exempt. This decision is not open to criticism, because the buildings were used for purposes connected with worship in a public place. If the power-house

1. (1936) M.W.N. 1088. 2. (1914) 27 M.L.J. 231.

with which this appeal is concerned were merely used for lighting the approach to the temple and the temple itself, there would, as I have already indicated, be no doubt, that the Municipality would not be entitled to levy the tax. But the power-house is being used for commercial as well as religious purposes and this brings it within the taxing section.

Municipal Council, Palni v. Sri Dhandayuthapani Devasthanam, Palni.

Leach, C.J.

The appeal will be allowed and the suit dismissed with costs here and in the two Courts below.

K. S. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from a decree of the High Court of Judicature at Lahore.]

PRESENT:—LORD THANKERTON, LORD RUSSELL OF KILLOWEN, SIR GEORGE RANKIN, LORD JUSTICE GODDARD AND MR. M. R. JAYAKAR.

Mosque known as Masjid Shahid Ganj and others *Appellants**

v.

Shiromani Gurdwara Parbandhak Committee, Amritsar and another. *Respondents.*

P.C.

Shahid Ganj Masjid v. Shiromani Gurdwara Parbandhak Committee, Amritsar.

Limitation Act (IX of 1908), S. 28 and Art. 144—Dedication of property for mosque—Adverse possession by Sikhs for more than twelve years—Suit by "mosque" as artificial person and by certain minors for declaration and injunction—Competency—Notice of right of individual beneficiaries—Effect on adverse possession—Limitation—Previous unsuccessful proceedings by mutawali *for recovery of the wakf property—Subsequent suit for declaration and injunction by beneficiaries—Barred by* res judicata.

Practice—Mahomedan Law—If can be proved as foreign law by expert witnesses—Mahomedan law and Limitation Act—Change of sovereignty—Effect on private rights.

A mosque with the adjacent land was dedicated in 1722 and one *S* and his descendants were appointed *mutawalis*. From 1762 onwards the dedicated property was in the hostile occupation, possession, and user of Sikhs and the mosque was not used as a place of worship by Muslims though the building was still referred to as a mosque and retained to the end its outward appearance. Land adjacent to the mosque became the site of a Sikh shrine (Gurdwara) and was regarded as a place of martyrs (shahid ganj). In 1849 at the time of the British annexation the dedicated properties were in the possession of certain Sikhs, the mahants of the Gurdwara. There were a series of unsuccessful proceedings between 1850 to 1856 to recover possession of the property for the purposes of Islam. On 22nd December, 1927, by a Government notification under the Sikh Gurdwaras

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* P. C. Appeal No. 91 of 1938. 2nd May, 1940.

P.C.

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Act (Punjab Act VIII of 1925) the mosque and land adjacent thereto were included as belonging to the Sikh Gurdwara. Among the claims preferred was one dated 16th March, 1928, by the Anjuman Islamia of the Punjab "on behalf of the Muhammadans" claiming that the land and the property were dedicated for a mosque and did not belong to the Gurdwara. The Sikh Gurdwaras Tribunal, on 20th January, 1930, held, that the Anjuman's case failed by reason of adverse possession and previous decisions. The claim of certain mahants that the property was their private property was also rejected. After the dismissal of an appeal by the latter claimant to the High Court on 19th October, 1934, the property and building were given into the custody of the managers of the Gurdwara. On the night of 7th July, 1935, the mosque was demolished by the Sikhs. On 30th October, 1935, the present suit was filed against the Sikh Committee in management praying for (*i*) a declaration that the building was a mosque in which the plaintiffs and all followers of Islam had a right to worship; (*ii*) an injunction restraining any improper use of the building and any interference with the plaintiffs' right of worship; and (*iii*) a mandatory injunction to reconstruct the building. There was no prayer for possession of the property or ejectment of the defendants. The "mosque" itself was made the first plaintiff suing by a next friend and some of the other plaintiffs were minors or women. Both the trial Court and the High Court on appeal dismissed the suit. On further appeal to the Judicial Committee,

Held, (*i*) Mahomedan Law is applicable to Muslim religious institutions only in so far as it has not been modified by legislation and the Indian Limitation Act (IX of 1908) is applicable to immovables made wakf though the ownership in such property is said to be in God.

(*ii*) Muslim law is not the common law of India but is under legislative enactments applied by British Indian Courts to certain matters and to certain persons as part of the law of the land which the Courts administer as being within their own knowledge and competence. It is the duty of the Courts themselves to interpret the law and to apply it and not to depend on the opinion of witnesses however learned they may be. Only on foreign law opinions of experts are allowed to be admitted.

Observations of Sulaiman, J., in *Aziz Bano* v. *Muhammad Ibrahim Husain*, (1925) I.L.R. 47 All. 823, adopted.

(*iii*) Suits cannot be brought by or against Muslim institutions like a mosque, as artificial persons in the British Indian Courts.

(*iv*) The property in question having been possessed by the Sikhs adversely to the wakf and to all interests thereunder for more than twelve years, the right of the mutawali to possession for the purposes of the wakf came to an end under Art. 144 of the Limitation Act and the title derived under the dedication from the settlor or wakif became extinct under S. 28. The individual character of the right to go to a mosque for worship matters nothing when the land is no longer wakf, and is no ground for holding that a person born long after the property has become irrecoverable can enforce partly or wholly the ancient dedication. The rights of the worshippers stand or fall with the character of the property and do not continue apart from their right to have the property recovered for the wakf and applied to its purposes. Notice of the rights of individual beneficiaries does not modify the effect under the Limitation Act of possession adverse to the wakf.

(*v*) The suit is also barred on the general principles of *res judicata*, by the decision in the suit of 1855 and also under S. 37 of the Sikh Gurdwaras Act by the decision of the tribunal rejecting the petition of the Anjuman Islamia.

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(*vi*) There is always a presumption that change of Sovereignty would not affect private rights to property.

Appeal from a decree of the High Court of Judicature at Lahore, dated 26th January, 1938* affirming a decree of the District Judge, Lahore, dated 25th May, 1936.

The facts and arguments appear sufficiently from the judgment.

L. P. E. Pugh and *J. M. Pringle* for Appellants.

H. N. Wallink and *W. Wallach* for Respondents.

2nd May, 1940. Their Lordships' judgment was delivered by

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SIR GEORGE RANKIN.—Before 1935 there had stood for many years to the south of what is now called the Naulakha Bazaar, in the city of Lahore, a structure having three domes and five arches, which had been built as a mosque (masjid) and which retained, notwithstanding considerable disrepair, sufficient of its original character to suggest, or even to proclaim, its original purpose. It had a projecting niche (mehrab) in the centre of the west wall such as is used in mosques as the place from which the imam leads the prayers. Its dedication is no longer in dispute, having been established as of the year 1134 A.H. or 1722 A.D. by the production and proof of a deed of dedication executed by one Falak Beg Khan. By this deed, Sheikh Din Mohammad and his descendants were appointed mutawalis. The deed speaks of a school, a well and an orchard as being among the appurtenances of the mosque and gives the total area of the dedicated property as three kanals and fifteen marlas; but it is not now necessary to ascertain with precision the limits of the original curtilage.

No less well established than the dedication is the fact that from about 1762 A.D. the building, together with the courtyard, well and adjacent land, has been in the occupation and possession of Sikhs. The occupation of Lahore by the "Bhangi Sardars" in 1762 was the commencement of Sikh power in this part of India. Sikh rule continued under Ranjit Singh, who in 1799, established himself by force of arms as the local ruler. It ended only in 1849, ten years after the death of Ranjit Singh, when the Punjab as a result of the second Sikh war became part of British India by annexation. At some time during the Sikh domination, land adjacent to the mosque building (but to the north of what is now the Naulakha Bazaar) became the site

* A.I.R. 1938 Lah. 369 (F.B.)

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of a Sikh shrine (gurdwara) and the tomb of a Sikh leader named Bhai Taru Singh situated thereon was held in reverence. The land, which in 1722 had been dedicated to the purposes of a mosque, came to be held and occupied by the managers and custodians of the Sikh institution and the mosque building was used by them. Until about 50 years ago, part of the building was used for the worship of the Granth Sahib or holy book of the Sikhs. Other parts have been used for secular purposes being let out to tenants, or used for storing chaff (bhusa) or holding rubbish.

By a tradition which can ot be ignored (though their Lordships are thankful to be free of any duty to investigate its truth) the land adjacent to the building was regarded by the Sikhs as a place of martyrs (shahid ganj), it being commonly held among them that Bhai Taru Singh had on this spot suffered for his religion at the hands of Muslim rulers and that many others including women and children had been executed here. Thus communal feelings have long been in a state of tension as between Muslims and Sikhs with respect to this masjid shahid ganj. Its history after 1760 is summarized in the trial Judge's finding that "this mosque has not been used as a place of worship by Muslims since it came into Sikh possession and control;" in the Chief Justice's statement that "there has been a complete denial to the Muslims of all their rights;" and in the language of Bhide, J., that:

"It is scarcely likely that the Mahomedans would have been allowed to have access to the building for any purpose whatever during this period (1760 to 1853)."

These findings are not in any way blunted by the consideration that a pious mutawali might properly have let parts of the waqf property to tenants appropriating the rents to the purposes of the waqf. The possession of the Sikhs has been hostile not merely to the claim of other persons to the office of mutawali of this mosque, but hostile to the waqf itself and all interests thereunder. On the other hand it is true that the building has been frequently and indeed has been generally referred to as a mosque by those who have had its custody as well as by others and that it retained to the end the outward appearance of a mosque.

In 1849, at the time of the British annexation, the mosque building and the property which had been dedicated therewith

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were in the possession of certain Sikhs, mahants of the gurdwara. It is unnecessary to decide whether they held it under a revenue-free grant made to them by the Sikh authorities as it is certain that they held it and used it for their own purposes and for the purposes of the gurdwara as already described. The facts are made plain by the action taken to recover the property for the purposes of Islam soon after Sikh authority had given place to British. A criminal case brought in 1850 by one Nur Ahmad claiming to be mutawali and proceedings in the Settlement Department, brought by him in 1853, came to nothing as he had been long out of possession. A civil suit with a like object was brought and dismissed in 1853. On 25th June, 1855, yet another suit by Nur Ahmad was brought in the Court of the Deputy Commissioner, Lahore, against the Sikhs in possession of the property: it was dismissed by that officer on 14th November, 1855, by the Commissioner on 9th April, 1856 and on further appeal by the Judicial Commissioner on 17th June, 1856.

In 1925 the Sikh Gurdwaras Act (Punjab Act 8 of 1925) was passed for the purpose of ascertaining what Sikh shrines were in existence and what property they owned; and of vesting the management of such shrines in certain committees (and other bodies). This step had become necessary to bring to an end disturbances which had been caused by disagreement between different schools or sects among the Sikhs. On 22nd December, 1927, by a Government notification the old mosque building and land adjacent thereto was included as belonging to the Sikh gurdwara "Shahid Ganj Bhai Taru Singh." Seventeen claims were made by various petitioners to have rights therein. One dated 8th March, 1928, was by Mahant Harnam Singh and others to the effect that the property belonged to them personally and not to the institution of which they were the head. Another dated 16th March, 1928, was by the Anjuman Islamia of the Punjab "on behalf of the Mahomedans" claiming that the land and property were dedicated for a mosque and did not belong to the gurdwara.

Both sets of claimants failed before the Sikh Gurdwaras Tribunal which decided on 20th January, 1930, that the mahants' possession had been held on account of the gurdwara and that the Anjuman's case failed by reason of adverse possession and previous decisions. No appeal was brought by the

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Anjuman from the latter decision but against the former an appeal brought by the mahants was dismissed by the High Court on 19th October, 1934. In the result the property and building were given into the custody of the defendants and on the night of 7th July, 1935, the building was suddenly demolished by or with the connivance of its Sikh custodians under the influence of communal ill-feeling. Riots and disorder ensued and much resentment was felt and expressed by the Muslims.

The plaint in the present suit was filed on 30th October, 1935, in the Court of the District Judge, Lahore, against the Shiromani Gurdwara Parbandhak Committee, and the Committee of Management for the Notified Sikh Gurdwaras at Lahore —the authorities who were in possession of the disputed property as being property belonging to the gurdwara. It contained no claim for possession of the property or ejectment of the defendants or that the property be handed over to the hereditary mutawali. The relief claimed was a declaration that the building was a mosque in which the plaintiffs and all followers of Islam had a right to worship, an injunction restraining any improper use of the building and any interference with the plaintiffs' right of worship: and a mandatory injunction to reconstruct the building. The learned District Judge dismissed the suit by decree dated 25th May, 1936, and an appeal to the High Court was dismissed on 26th January, 1938,[1] by Young, C.J. and Bhide, J., Din Mohammad, J., dissenting.

By the Punjab Laws Act, 1872, the Mahomedan law is made applicable to the religious institutions of the Muslims but only in so far as it has not been modified by legislation. Thus, the Limitation Act, 1908, applies though limitation is not an original principle of Mahomedan law. The length of time which had elapsed since the property claimed had been lost to Muslims and the repeated failure of the attempts previously made to recover it for their use and benefit, were manifest objections to the grant of the relief sought. To assist in surmounting these difficulties, the suit was brought by eighteen plaintiffs of which the first was the mosque itself suing by a next friend—not the waqf or institution or charity in some abstract sense but the mosque in the sense of the site and build-

1. A.I.R. 1938 Lah. 369 (F.B.).

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ing. The declaration sought was "that plaintiff 1 was and is the site of a waqf mosque," the injunction sought was that the defendants "should not use plaintiff 1 for any purpose which may be contrary to its sanctity" and the mandatory injunction asked for was "to reconstruct that portion of plaintiff 1 that is, the mosque which they demolished."

The choice of this curious form of suit was motived apparently by a notion that if the mosque could be made out to be a "juristic person" this would assist to establish that a mosque remains a mosque for ever, that limitation cannot be applied to it, that it is not property but an owner of property. A second feature of the suit as framed is that a number of the plaintiffs were minors or women. This was thought to be of some assistance to the plaintiffs in meeting objections taken under the Sikh Gurdwaras Act, 1925, to the competence of the suit, but it was also relied upon before the Board in argument as relevant to the general question of limitation.

A third feature of the suit has reference to the method of trial, the learned District Judge having been persuaded that the mode by which a British Indian Court ascertains the Mahomedan law is by taking evidence. The authority of Sulaiman, J., to the contrary, *Aziz Banu* v. *Muhammad Ibrahim Husain*[1], was cited to him but he wrongly considered that S. 49, Evidence Act, was applicable to the ascertainment of the law. He seems also to have relied on the old practice of obtaining the opinions of pandits on questions of Hindu law and the reference made thereto in *Collector of Madura* v. *Moottoo Ramalinga Sethupathy*[2]. No great harm, as it happened, was done by the admission of this class of evidence as the witnesses made reference to authoritative texts in a short and sensible manner.

But it would not be tolerable that a Hindu or a Muslim in a British Indian Court should be put to the expense of proving by expert witnesses the legal principles applicable to his case and it would introduce great confusion into the practice of the Courts if decisions upon Hindu or Muslim law were to depend on the evidence given in a particular case, the credibility of the expert witnesses and so forth. The Muslim law is not the common law of India; British India has no common law in the

1. (1925) I.L.R. 47 All. 823 at 835. 2. (1868) 12 M.I.A. 397 at 436-9.

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sense of law applicable *prima facie* to everyone unless it be in the statutory Codes, *e. g.*, Contract Act, Transfer of Property Act. But the Muslim law is under legislative enactments applied by British Indian Courts to certain classes of matters and to certain classes of people as part of the law of the land which the Courts administer as being within their own knowledge and competence. The system of "expert advisers" (muftis, maulvis or in the case of Hindu law pandits) had its day, but has long been abandoned, though the opinions given by such advisers may still be cited from the reports. Custom, in variance of the general law, is matter of evidence but not the law itself. Their Lordships desire to adopt the observations of Sulaiman, J., in the case referred to:

> "It is the duty of the Courts themselves to interpret the law of the land and to apply it and not to depend on the opinion of witnesses however learned they may be. It would be dangerous to delegate their duty to witnesses produced by either party. Foreign law, on the other hand, is a question of fact with which Courts in British India are not supposed to be conversant. Opinions of experts on foreign law are therefore allowed to be admitted."

It has been made clear by learned counsel for the appellants that the plaintiffs do not now claim any relief extending beyond the actual site of the mosque building. The first question to be asked with reference to this immovable property is the question: In whom was the title at the date when the sovereignty of this part of India passed to the British in 1849? It may have been open to the British on the ground of conquest or otherwise to annul rights of private property at the time of annexation as indeed they did in Oudh after 1857. But nothing of the sort was done so far as regards the property now in dispute. There is nothing in the Punjab Laws Act or in any other Act authorising the British Indian Courts to uproot titles acquired prior to the annexation by applying to them a law which did not then obtain as the law of the land. There is every presumption in favour of the proposition that a change of sovereignty would not affect private rights to property: cf. *West Rand Central Gold Mining Co.* v. *Rex*[1].

Who then immediately prior to the British annexation was the local sovereign of Lahore? What law was applicable in that State to the present case? Who was recognized by the local sovereign or other authority as owner of the property now in

1. (1905) 2 K.B. 391.

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dispute? These matters do not appear to their Lordships to have received sufficient attention in the present case. The plaintiffs would seem to have ignored them. It is idle to call upon the Courts to apply Mahomedan law to events taking place between 1762 and 1849 without first establishing that this law was at that time the law of the land recognized and enforced as such. If it be assumed, for example, that the property in dispute was by general law or by special decree or by revenue-free (muafi) grant vested in the Sikh gurdwara according to the law prevailing under the Sikh rulers, the case made by the plaintiffs becomes irrelevant. It is not necessary to say whether it has been shown that Ranjit Singh took great interest in the gurdwara and continued endowments made to it by the Bhanji Sardars as was held by Hilton, J. (20th January, 1930) presiding over the Sikh Gurdwaras Tribunal. Nor is it necessary that it should now be decided whether the Sikh mahants held this property for the Sikh Gurdwara under a muafi grant from the Sikh rulers. It was for the plaintiffs to establish the true position as at the date of annexation. Since the Sikh mahants had held possession for a very long time under the Sikh State there is a heavy burden on the plaintiffs to displace the presumption that the mahants' possession was in accordance with the law of the time and place. There is an obvious lack of reality in any statement of the legal position which would arise assuming that from 1760 down to 1935 the ownership of this property was governed by the Mahomedan law as modified by the Limitation Act, 1908.

The rules of limitation which apply to a suit are the rules in force at the date of institution of the suit, limitation being a matter of procedure. It cannot be doubted that the Limitation Act of 1908 applies to immovables made wakf notwithstanding that the ownership in such property is said, in accordance with the doctrine of the two disciples, to be in God. Thus in *Abdur Rahim* v. *Narayan Das Aurora*[1], it was expressly stated by Lord Sumner delivering the judgment of the Board:

"The property in respect of which a wakf is created by the settlor is not merely charged with such several trusts as he may declare, while remaining his property and in his hands. It is in very deed 'God's acre' and this is the basis of the settled rule that such property as is held in wakf is inalienable except for the purposes of the wakf."

1. (1922) 44 M.L.J. 624: L.R. 50 I.A. 84: I.L.R. 50 Cal. 329 (P.C.).

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Yet in that very case it was taken as plain that if Art. 134, Limitation Act, did not apply to a wakf the claim to recover possession of wakf property was governed either by Art. 142 or Art. 144.

The rule of Hanafi law that wakf property is taken to have ceased to be held in human ownership is applied to all such property even if the wakf be a wakf-al-al-aulad or wakf for the benefit of descendants. The result of the rule is not that the property cannot in any circumstances be alienated but that it can only be alienated for proper purposes and save as provided by the terms of the endowment with the leave of the Court. In some circumstances it can even be taken in execution. In the particular case of a mosque, like that of a graveyard, the wakf property is intended to be used *in specie* for a certain purpose—not to be let or cultivated so that the income may be applied to the purposes of the wakf. This and other facts make some case for a contention that such property cannot be alienated on any conditions or with any sanction, though their Lordships are by no means satisfied to affirm so wide a proposition. But the Limitation Act is not dealing with the competence of alienations at Mahomedan law. It provides a rule of procedure whereby British Indian Courts do not enforce rights after a certain time, with the result that certain rights come to an end. It is impossible to read into the modern Limitation Acts any exception for property made wakf for the purposes of a mosque whether the purpose be merely to provide money for the upkeep and conduct of a mosque or to provide a site and building for the purpose. While their Lordships have every sympathy with a religious sentiment which would ascribe sanctity and inviolability to a place of worship, they cannot under the Limitation Act accept the contentions that such a building cannot be possessed adversely to the wakf, or that it is not so possessed so long as it is referred to as ' mosque" or unless the building is razed to the ground or loses the appearance which reveals its original purpose.

The argument that the land and buildings of a mosque are not property at all because they are a "juristic person" involves a number of misconceptions. It is wholly inconsistent with many decisions whereby a worshipper or the mutawali has been permitted to maintain a suit to recover the land and buildings for the purposes of the wakf by ejectment of a trespasser. Such suits had previously been entertained by Indian Courts in the

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case of this very building. The learned District Judge in the course of his able and careful judgment noted that the defendants were not pressing any objection to the constitution of the suit on the ground that the mosque could not sue by a next friend. He went on to say:

"It is proved beyond doubt that mosques can and do hold property. There is ample authority for the proposition that a Hindu idol is a juristic person and it seems proper to hold that on the same principle a mosque as an institution should be considered as a juristic person. It was actually so held in *Jindu Ram* v. *Hussain Bakhsh*[1], and later in *Maula Bukhsh* v. *Hafizuddin*[2]."

That there should be any supposed analogy between the position in law of a building dedicated as a place of prayer for Muslims and the individual deities of the Hindu religion is a matter of some surprise to their Lordships. The question whether a British Indian Court will recognize a mosque as having a *locus standi in judicio* is a question of procedure. In British India the Courts do not follow the Mahomedan law in matters of procedure (cf. *Jafri Begum* v. *Amir Muhammad Khan*[3], per Mahmood, J.) any more than they apply the Mahomedan criminal law or the ancient Mahomedan rules of evidence. At the same time the procedure of the Courts in applying Hindu or Mahomedan law has to be appropriate to the laws which they apply. Thus the procedure in India takes account necessarily of the polytheistic and other features of the Hindu religion and recognizes certain doctrines of Hindu law as essential thereto, for example that an idol may be the owner of property. The procedure of our Courts allows for a suit in the name of an idol or deity though the right of suit is really in the shebait, *Jagadindra Nath* v. *Hemanta Kumari*[4].

Very considerable difficulties attend these doctrines—in particular as regards the distinction, if any, proper to be made between the deity and the image: cf. *Bhupati Nath* v. *Ram Lal*[5], Golap Chandra Sarkar Sastri's Hindu Law, Edn. 7, pp. 865, *et seq*. But there has never been any doubt that the property of a Hindu religious endowment —including a thakurbari—is subject to the law of limitation: *Damodar Das* v. *Lakhan Das*[6], and *Iswar Bhubaneshwari Thakurani* v. *Braja*

1. (1914) 24 I.C. 100.
2. A.I.R. 1926 Lah. 372.
3. (1885) I.L.R. 7 All. 822 at 841-2 (F.B.).
4. (1904) L.R. 31 I.A. 203: I.L.R. 32 Cal. 129 (P.C.).
5. (1909) I.L.R. 37 Cal. 128 at 153.
6. (1910) 20 M.L.J. 624: L.R. 37 I.A. 147: I.L.R. 37 Cal. 885 (P.C.)

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Nath Deo[1]. From these considerations special to Hindu law no general licence can be derived for the invention of fictitious persons. It is as true in law as in other spheres *"entia non sunt multiplicanda praeter necessitatem."* The decisions recognizing a mosque as a "juristic person" appear to be confined to the Punjab: *Shankar Das* v. *Said Ahmad*[2], *Jindu Ram* v. *Hussain Bakhsh*[3], *Maula Bukhsh* v. *Hafizuddin*[4]. In none of these cases was a mosque party to the suit, and in none except perhaps the last is the fictitious personality attributed to the mosque as a matter of decision. But so far as they go these cases support the recognition as a fictitious person of a mosque as an institution—apparently hypostatizing an abstraction. This, as the learned Chief Justice in the present case has pointed out, is very different from conferring personality upon a building so as to deprive it of its character as immovable property.

It is not necessary in the present case to decide whether in any circumstances or for any purpose a Muslim institution can be regarded in law as a "juristic person." The recognition of an artificial person is not to be justified merely as a ready means of making enactments—well or ill-expressed—work conveniently. It does not seem to be required merely to give an extended meaning to the word "person" as it appears in the Punjab Pre-emption Act, 1905, or in the definition of 'gift' contained in S. 122, T. P. Act. It is far from clear that it is required in order that property may be devoted effectively to charitable purposes without the appointment of a trustee in the sense of the English law. It would seem more reasonable to uphold a gift, if made directly to a mosque and not by way of wakf, as having been made to the mutawalli than to do so by inventing an artificial person in addition to the mutawalli (and to God in whom the ownership of the mosque is placed by the theory of the law).

Their Lordships do not understand that in this respect a mosque is thought to be in any unique position according to the authorities on Mahomedan law. "A gift may be made to a mosque or other institution" (Tyabji's Principles of Mahomedan Law, Edition 2, 1919, p. 401, *cf.* Abdur Rahim's Muhammadan Jurisprudence, p. 218). A gift can be made to a mad-

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1. (1937) 2 M.L.J. 527: L.R. 64 I.A. 203: I.L.R. (1937) 2 Cal. 447 (P.C.).
2. (1884) 153 P.R. 1884.
3. (1914) 24 I.C. 100.
4. A.I.R. 1926 Lah. 372.

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rasah in like manner as to a masjid. The right of suit by the mutawali or other manager or by any person entitled to a benefit (whether individually or as a member of the public or merely in common with certain other persons) seems hitherto to have been found sufficient for the purpose of maintaining Mahomedan endowments. At best the institution is but a *caput mortuum*, and some human agency is always required to take delivery of property and to apply it to the intended purposes. Their Lordships, with all respect to the High Court of Lahore, must not be taken as deciding that a "juristic personality" may be extended for any purpose to Muslim institutions generally or to mosques in particular. On this general question they reserve their opinion; but they think it right to decide the specific question which arises in the present case and hold that suits cannot competently be brought by or against such institutions as artificial persons in the British Indian Courts.

The property now in question having been possessed by Sikhs adversely to the wakf and to all interests thereunder for more than 12 years, the right of the mutawali to possession for the purposes of the wakf came to an end under Art. 144, Limitation Act, and the title derived under the dedication from the settlor or wakif became extinct under S. 28. The property was no longer for any of the purposes of British Indian Courts, "a property of God by the advantage of it resulting to his creatures." The main contention on the part of the appellants is that the right of any Moslem to use a mosque for purposes of devotion is an individual right like the right to use a private road, *Jawahra* v. *Akbar Husain*[1], that the infant plaintiffs, though born a hundred years after the building had been possessed by Sikhs, had a right to resort to it for purposes of prayer; that they were not really obstructed in the exercise of their rights till 1935 when the building was demolished; and that in any case in view of their infancy the Limitation Act does not prevent their suing to enforce their individual right to go upon the property. This argument must be rejected. The right of a Muslim worshipper may be regarded as an individual right, but what is the nature of the right? It is not a sort of easement in gross, but an element in the general right of a beneficiary to have the wakf property recovered by its proper custodians and applied

1. (1884) I.L.R. 7 All. 178 (F.B.).

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to its proper purpose. Such an individual may, if he sues in time, procure the ejectment of a trespasser and have the property delivered into the possession of the mutawali or of some other person for the purposes of the wakf. As a beneficiary of the religious endowment such a plaintiff can enforce its conditions and obtain the benefits thereunder to which he may be entitled. But if the title conferred by the settlor has come to an end by reason that for the statutory period no one has sued to eject a person possessing adversely to the wakf and every interest thereunder the rights of all beneficiaries have gone: the land cannot be recovered by or for the mutawali and the terms of the endowment can no longer be enforced: *cf. Chidambaranatha Thambiran* v. *Nallasiva Mudaliar*[1]. The individual character of the right to go to a mosque for worship matters nothing when the land is no longer wakf and is no ground for holding that a person born long after the property has become irrecoverable can enforce partly or wholly the ancient dedication.

This seems to their Lordships a sufficient answer to the argument that the only article of the Limitation Act which affects the right of the plaintiffs (other than plaintiff 1) is Art. 120. Under that Article any plaintiff who had been of age for more than six years before the date of the suit would be barred as he has clearly been excluded from resort to the building for purposes of prayer. But the true answer to these plaintiffs and to the minor plaintiffs is that the rights of the worshippers stand or fall with the wakf character of the property and do not continue apart from their right to have the property recovered for the wakf and applied to its purposes. As the law stands, notice of the rights of individual beneficiaries does not modify the effect under the Limitation Act of possession adverse to the wakf. Were the law otherwise the effect of limitation upon charitable endowments would be either negligible or absurd. The plaintiffs may, if they choose, refrain from asking that the land be recovered for the wakf but they do not alter the character of their right by deserting the logic of their case.

It remains to say that in the opinion of their Lordships the present suit is concluded on the general principle of *res*

1. (1917) 33 M.L.J. 357: I.L.R. 41 Mad. 124 at 135.

P.C.

Shahid Ganj Masjid v. Shiromani Gurdwara Parbandhak Committee, Amritsar.

Sir George Rankin.

judicata by the decision in the suit of 1855 and also under S. 37, Sikh Gurdwaras Act, 1925, by the decision of the Tribunal (20th January, 1930) rejecting the petition of the Anjuman Islamia. The mere circumstance that the plaintiffs have chosen not to seek recovery of the land in dispute but ask for relief in the forms of declaration and injunction does not avail to enable them to litigate again the claim made by Nur Ahmad as mutawali to recover the property for the purposes of the wakf. The ground of the decision of 1855 does not affect the question of *res judicata*. S. 37 of the Act of 1925 is as follows:

"Except as provided in this Act no Court shall pass any order or grant any decree or execute wholly or partly, any order or decree, if the effect of such order, decree or execution would be inconsistent with any decision of a tribunal, or any order passed on appeal therefrom, under the provisions of this part."

It is sufficiently plain that if the present suit were to succeed the effect of the decree would necessarily be inconsistent with the decision of the tribunal rejecting the petition of the Anjuman Islamia. Unless therefore the case can be brought within the opening words of S. 37—"except as provided in this Act"—that section is fatal to the claim. Their Lordships are of opinion that the words of the exception have no reference to the provisions of cl. *(ii)* of S. 30 which states the circumstances under which a suit shall be tried notwithstanding that the claim was not put forward before the Tribunal. S. 37 assumes that a Civil Court has before it a competent suit in which one party or another would but for the section be entitled to a certain order or decree, and it provides that such order or decree shall not be made if the effect of it would be inconsistent with any decision of a Tribunal. The words of exception with which S. 37 opens are doubtless accounted for by the provisions of S. 34 authorizing appeals to the High Court. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the respondents' costs.

Solicitors for Appellants: *Peake & Co.*

Solicitors for Respondents: *Charles Russell & Co.*

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ABDUR RAHMAN.

Bongi Narayana *alias* Demullu and another .. *Petitioners** (*Plaintiff and L.R. of 4th Defendant*)

v.

Bangari Gurramma and others .. *Respondents* (*Defendants 1 to 3*).

Narayana v. Gurramma.

Civil Procedure Code (V of 1908), O. 1, r. 10—Scope—Transposition of parties—When permissible—Promissory note in renewal of earlier one—Insufficiently stamped—Prior note not wiped off.

Where a later promissory note in renewal of an earlier one is found to have been insufficiently stamped and hence inadmissible in evidence the prior promissory note cannot be said to have been merged in or wiped off by the later document.

Where an endorsee of a promissory note which was in renewal of an earlier one brought a suit and it was discovered that the suit promissory note was inadmissible in evidence,

Held: The endorser (the payee of the earlier promissory note) who had been impleaded as a defendant can be transposed as a plaintiff and permitted to amend the plaint and continue the suit on the original promissory note. The powers conferred on Courts under O. 1, r. 10, Civil Procedure Code, are wide enough to enable the Court to make such an order.

Krishnaji Shivaji Pawar v. *Hanmaraddi bin Mallaraddi Maidur*, (1934) I.L.R. 58 Bom. 536 and *Lakshmi Narasimhachariar* v. *Mangammal*, (1939) 49 L.W. 387, distinguished.

Petition under S. 25 of Act IX of 1887, praying that the High Court will be pleased to revise the decree of the Court of the Subordinate Judge of Vizagapatam in S. C. S. No. 315 of 1936 and I.A. No. 1055 of 1936.

Kasturi Seshagiri Rao for Petitioners.

P. Somasundaram and *P. Suryanarayana* for Respondents.

The Court delivered the following

JUDGMENT.—This is a revision against an order of the Subordinate Judge of Vizagapatam dismissing a suit of small cause on the grounds that the promissory note which formed the basis of the suit was not sufficiently stamped and the application made by the fourth defendant to be transposed as a plaintiff and seeking permission to continue the suit on the original cause of action was not maintainable. The suit as framed was certainly based on the promissory note; but either as a matter of history as to how the promissory note came into existence or with the object of disclosing as to how the cause of action had accrued, it was stated in paras. 3 and 4 of the

* C. R. P. No. 1006 of 1937. 16th August, 1940.

plaint that there were prior dealings between the parties and the last promissory note on which the suit was based, was only executed in renewal of a prior promissory note of 1930.

The only questions that have been debated before me are whether the application made by the fourth defendant for transposition should not have been allowed and whether the fourth defendant should not have been permitted to continue the suit on the basis of the original cause of action as the promissory note which formed the basis of the present suit was found to be insufficiently stamped. After hearing learned counsel for the parties, I have no hesitation in holding that the fourth defendant should have been ordered to be transposed as a plaintiff and having regard to the allegations made in paras. 3 and 4 of the plaint, the suit should have been treated as one on the original cause of action. If the later promissory note of 1930 was found to have been insufficiently stamped, as it was in the present case and hence inadmissible in evidence, the prior promissory note of 1927 cannot be said to have been merged in or wiped off by the later document. It is true that the present suit was brought by the plaintiff on account of the endorsement made on the later promissory note of 1930 and an application was made on behalf of the fourth defendant only when it was discovered that the later promissory note was inadmissible in evidence, but the Court could certainly make an order, after it was moved to do so under the wholesome provisions of O. 1, r. 10, Civil Procedure Code, when it was found to be necessary for the final adjudication of the questions involved in the suit and would have in any case avoided multiplicity of proceedings. Even if the rules of procedure had not permitted such a course, the Court would have been fully justified—nay perhaps obliged, to invent a procedure as long as it was not prohibited either expressly or impliedly from doing so and to grant relief. But this question does not fortunately arise in this case as the powers conferred on Courts under O. 1, r. 10, Civil Procedure Code, are wide and the section has to be liberally construed.

Learned counsel for the respondent relied on two decisions one of which is reported in *Krishnaji Shivaji Pawar* v. *Hanmaraddi bin Mallaraddi Maidur*[1]. This case has no application because the father who made a petition to be impleaded in that

1. (1934) I.L.R. 58 Bom. 536.

Narayana v. Gurramma.

suit was not on the record and it was considered that a substitution of the name of the right plaintiff could only be ordered if the suit was not at the date of such substitution barred by limitation. This is not the case here. The second decision which is reported in *Lakshmi Narasimhachariar* v. *Mangammal*[1], has also no application as the petition for amendment was made in that case for the first time in appeal while here the petition was made in the trial Court before the suit was disposed of.

I would in the circumstances accept the revision and order the fourth defendant to be transposed as a plaintiff and permit him to amend the plaint so as to base the cause of action on the original promissory note of 1927 with such other facts as may entitle him to bring his suit within time. There is no reason however why the fourth defendant should not be put on terms and pay the costs to the other side. The application has been obviously made as the promissory note was found to be insufficiently stamped. Bearing in mind however that the defendants who had executed the promissory note were to blame themselves for this defect, I would order the fourth defendant to pay a sum of Rs. 25 only as costs to the defendants 1 to 3. So far as this revision is concerned, the parties will bear their own costs.

K. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Puranam Egna Narayanayya .. *Petitioner* (1st Respondent-Plaintiff)*

v.

Desaboyina Venkatayya and others .. *Respondents (Petitioners and Respondent 2 and 3rd Respondent's L.R.).*

Narayanayya v. Venkatayya.

Madras Agriculturists' Relief Act (IV of 1938), S. 10 (2) (ii)—Payment of price and execution of sale deed in favour of X—Agreement by X before registration to have the land conveyed by the vendor to Y direct—Y paying cash and executing a promissory note to X—Registered sale deed executed by vendor in favour of Y—Y executing a mortgage next day in favour of X to

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1. (1939) 49 L.W. 387.

* C. R. P. No. 346 of 1939. 29th August, 1940.

Narayanayya v. Venkatayya.

cover the amount due on the promissory note—Liability under—If excluded by S. 10 (2) (ii) of Act IV of 1938.

A sale deed in respect of land was executed in favour of *X* who paid the price to the vendor. But before the registration of the sale deed *X* entered into an agreement to have the land conveyed by the vendor to *Y* direct. Accordingly *Y* paid some cash and executed a promissory note to *X*. A registered sale deed in favour of *Y* was duly executed by the vendor at the instance of *X* and the next day *Y* executed a mortgage in favour of *X* to cover the amount due on the promissory note of the previous day. An application to scale down this debt was resisted on the ground that this was a liability excluded by S. 10 (2) (ii) of Act IV of 1938.

Held, *X* was not the seller of the property for he had no interest which he could convey. The title remained with the vendor at the time of the transfer to *Y* and though the vendor was under an obligation to *X* that obligation did not have the effect of vesting any title in *X* who cannot therefore be regarded as a seller and the amount due from *Y* will not carry any charge such as is provided for in S. 55 (4) of the Transfer of Property Act.

Zamindar of Polavaram v. *Maharajah of Pittapur*, (1936) 71 M. L. J. 347: L R. 63 I.A. 304: I. L. R. 59 Mad. 910 (P. C.) and *Kalyanasundaram Pillai* v. *Karuppa Mooppanar*, (1926) 52 M.L.J. 346: L.R. 54 I.A 89: I.L.R. 50 Mad. 193 (P.C.), distinguished.

The liability therefore is not excluded from the scaling down provisions by the operation of S. 10 (2) (ii) of Act IV of 1938.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Markapur dated 10th September, 1938 and made in I. A. No. 354 of 1938 in O. S. No. 323 of 1937.

V. S. Narasimhachar for Petitioner.

P. Satyanarayana Rao for Respondents.

The judgment of the Court was delivered by

Wadsworth, J.

Wadsworth, J.—The petitioner in this revision petition entered into an agreement with one Seshayya to purchase land, paid the price and got a sale deed executed. When he was about to get the sale deed registered he was approached by the first respondent who himself wanted a conveyance of the same land. There was an agreement whereby the petitioner undertook to get the land conveyed by Seshayya to the first respondent and on that date the first respondent executed in favour of the petitioner a promissory note and paid a certain sum in cash. On the same day at the instance of the petitioner Seshayya executed a registered sale deed in favour of the first respondent and on the following day 11th August, 1921, the first respondent executed a mortgage to the petitioner to cover the amount embodied in the promissory note of the previous day. In 1937 the petitioner sued on his mortgage and on 6th November, 1937, he got a

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preliminary decree which was followed on 11th March, 1938, by a final decree for Rs. 2,575 and odd.

When Madras Act IV of 1938 came into force the first respondent applied under S. 19 of that Act to scale down the decree debt. The application was resisted on the ground that the debt in question was a liability for which a charge is provided under S. 55 (4) (*b*) of the Transfer of Property Act and therefore by the operation of S. 10 (2) (*ii*) of Act IV of 1938 was excluded from the scaling down provisions. This plea was rejected by the lower Court and the petitioner seeks to revise that order. The only question therefore is whether the liability covered by the mortgage is one in respect of which a charge is provided under S. 55 (4) (*b*) of the Transfer of Property Act.

S. 55 (4) (*b*) provides that the seller is entitled to a charge upon the property in the hands of the buyer for the amount of the purchase money or any part thereof remaining unpaid. Is the petitioner in this case a seller and is the money in respect of which this mortgage was executed, unpaid purchase money in the hands of the buyer? It seems to us quite clear that the answer to both these questions must be in the negative. The petitioner was not the seller of the property for he had no interest which he could convey. The title remained with Seshayya at the time of the transfer to the first respondent and though Seshayya was under an obligation to the petitioner, that obligation did not have the effect of vesting any title in the petitioner. So much follows from S. 54 of the Transfer of Property Act which lays down that a contract for the sale of immovable property does not of itself create any interest in or charge on such property.

The petitioner relies on two decisions of the Privy Council. *Zamindar of Polavaram* v. *Maharajah of Pittapur*[1] was a case in which property had been purchased at Court auction by the decree-holder and 30 days had elapsed from the sale without objection, at which juncture there was a compromise whereby the sale was confirmed except with reference to one item which was to be left in the hands of the judgment-debtor subject to a payment representing the value thereof. The payment was not made. The mortgage by which it was secured was found to be

1. (1936) 71 M.L.J. 347; L.R. 63 I.A. 304: I.L.R. 59 Mad. 910 (P.C.).

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unenforceable and their Lordships of the Privy Council held that there was a charge in favour of the decree-holder purchaser for the amount due under the agreement of compromise as unpaid purchase price. Their Lordships held that the title of the decree-holder purchaser was complete although there had been no formal order of confirmation and that the recording of the compromise was a sufficient conveyance of that title to the judgment-debtor without the formalities of confirmation of the sale and a separate conveyance by the Court auction purchaser. That decision proceeded on the special facts of the case which have little or no similarity to the facts before us. It cannot be authority for the view that whenever a person who has no title but merely a right to a conveyance of title, arranges with his prospective vendor for a conveyance in favour of the third party, the rights of a seller subsist in favour of the person who has arranged for the conveyance but has not actually conveyed anything. The other decision is of *Kalyanasundaram Pillai* v. *Karuppa Mooppanar*[1], which is merely to the effect that when there is a gift deed registered after an interval of time, title passes as on the date of the execution deed and not as on the date of its registration. This again is no authority for the view that when there is a deed not made effective by registration it conveys title. Clearly there was no title in the petitioner which he could convey to the first respondent. He cannot therefore be regarded as a seller and the amount due from the first respondent to him will not carry any charge such as is provided in S. 55 (4) (*b*) of the Transfer of Property Act.

The decision of the lower Court is correct and the petition is dismissed with costs.

K. S. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN.

Natesa Aiyar and another .. *Petitioners* (Defendants-Respondents)*

v.

Singaravelu Pillai .. *Respondent (Decree-holder-Petitioner).*

Natesa Aiyar v. Singaravelu Pillai.

Madras Debt Conciliation Act (XI of 1936), S. 25—Stay of execution in respect of same debt—If can be granted more than once—Application for conciliation—If can be made more than once.

1. (1926) 52 M.L.J. 346: L.R. 54 I.A. 89: I.L.R. 50 Mad. 193 (P.C.).

*C. R. P. No. 24 of 1940. 12th September, 1940.

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Debtors cannot make more than one effective application for the conciliation of a particular debt under the provisions of the Madras Debt Conciliation Act. The meaning of the provision in the second part of S. 7 is that an applicant can make a fresh application (where his application has been rejected on formal grounds); the absence of any similar provision in S. 9 (when an application for conciliation has been dismissed on the merits) is conclusive that in such a case no fresh application can be made. Stay could not be ordered more than once under S. 25 in respect of the same debt.

Ellappa Chettiar, In re, (1939) 2 M.L.J. 727, followed.

Case-law discussed.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Negapatam dated 13th December, 1939, in E. A. No. 995 of 1939 in S. C. S. No. 267 of 1937.

R. Somasundaram for Petitioners.

K. S. Desikan for Respondent.

The Court delivered the following

JUDGMENT.—This is an application to revise an order passed by the learned District Munsif of Negapatam on the 13th December, 1939, in E. A. No. 995 of 1939 in Small Cause Suit No. 267 of 1937. The applicant before the District Munsif was the decree-holder in the small cause suit. The petitioners in this case are the defendants in the small cause suit. The facts which it is necessary to mention are that while execution proceedings were pending, the judgment-debtors filed a petition O. P. No. 61 of 1939 before the Debt Conciliation Board, Negapatam, and in consequence of that the sale of the judgment-debtors' property which had already been proclaimed was stopped on the 1st May, 1939, presumably under the provisions of S. 25 of the Madras Debt Conciliation Act, 1936. The judgment-debtors' petition O. P. No. 61 of 1939 was dismissed by the Debt Conciliation Board on the 28th June, 1939. After that dismissal the decree-holder proceeded with execution and the sale of the properties was fixed to take place on the 6th November, 1939. The learned District Munsif says that the judgment-debtors' pleader applied for an adjournment of the sale on the ground that he wanted time to raise the decree amount and accordingly the sale was adjourned to the 27th November, 1939. Instead of paying up the decree amount the judgment-debtors proceeded to file O. P. No. 197 of 1939 before the Debt Conciliation Board for the conciliation of the same debt and the Board intimated to the District Munsif that such a petition

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had been presented and requested the District Munsif to stay the sale proceedings in execution of the small cause decree. The decree-holder thereupon applied to the District Munsif to direct the sale advertised for the 4th December, 1939, to go on disregarding the fact that the judgment-debtors had filed an application before the Debt Conciliation Board. The decree-holder contended that the Debt Conciliation Board had no jurisdiction to stay the sale. The learned District Munsif after considering such authorities as there are, decided to follow a decision of Mr. Justice Stodart reported in *Ellappa Chettiar*, In re[1]. The learned Judge held in that case that a judgment-debtor is not entitled to obtain a stay under S. 25 of Madras Act XI of 1936 in any individual suit or proceeding more than once. It was argued before the learned Judge that upon a second application to the Conciliation Board the judgment-debtors were again entitled to stay. The learned Judge thought that to admit such a proposition would lead to absurd results. There was nothing he said in the Act to prevent a debtor filing one application after another and if under S. 25 of the Act he could obtain stay of the suit or other proceedings as long as an application was pending before the Board he would be enabled to put his opponent to great trouble and inconvenience suffering little if any expense himself. That in the opinion of the learned Judge was not the intention of the law. This it may be said is the only direct decision upon this point so far pronounced.

In the case reported in *Hirannayya* v. *Thippeswami*[2], Mr. Justice Stodart and myself held that S. 25 of the Act was mandatory and that a sale in execution held in violation of the provisions of S. 25 is void. Learned counsel for the petitioners relies strongly upon this decision which he says has been followed by other learned Judges. It does not however deal with the question with which this petition is concerned, namely, whether the Court of the District Munsif of Negapatam can be compelled to stay execution proceedings in respect of the same judgment debt more than once under the provisions of the Madras Debt Conciliation Act. Learned counsel for the petitioners has referred me to a case decided by Mr. Justice Wadsworth in *Roopchand Merlacha* v. *Sha Motaji Mokanaji*[3], but that

1 (1939) 2 M.L.J. 727. 2. (1938) 2 M.L.J. 1032.
3. (1940) 2 M.L.J. 283.

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case also does not touch the point now in issue. That was a case in which an application under S. 4 of Madras Act XI of 1936 had been rejected under the provisions of S. 7 of the Act. The second part of S. 7 says:

"The rejection of an application under this section shall not preclude the applicant from making a fresh application."

The learned Judge therefore held that although the statutory bar imposed by S. 25 of the Act would cease to operate immediately upon the dismissal of an application under S. 7 yet upon a re-presentation of the application under the authority given by the second part of that section the bar would again come into operation. That is not the case with which I have to deal. Learned counsel has also referred me to a case decided by Mr. Justice Horwill and reported at *Sundaralingam* v. *Venkataramanayya*[1]. In that case the learned Judge held that even though an application might be frivolous or vexatious nevertheless under S. 25 of the Act the Court would be bound to stop all further proceedings in connection with the debt which was being considered by the Conciliation Board. There is no question there of successive petitions by the same debtor in respect of the same debt.

After considering the matter as well as I am able I find myself practically in agreement with Mr. Justice Stodart. It has been pointed out to me by Mr. Desikan for the respondent that the wording of S. 4, sub-S. (1) is:

"A debtor may make an application for the settlement of his debts......"

He has also pointed out that when an application is dismissed under S. 9 of the Act there is no provision in S. 9 or elsewhere in the Act similar to the second part of S. 7. S. 7 provides for the rejection of an application if it does not comply with any of the requirements mentioned in Ss. 5 and 6. These requirements are all matters of a formal nature, and the meaning of the provision in the second part of S. 7 appears to be that if an application has to be rejected merely for want of some formality, the debtor should not be precluded from bringing a fresh application. The absence of any provision for a fresh application with regard to the same debt when the application has been dismissed on the merits would seem to indicate that in such cases the Legislature did not contemplate a fresh application by the same debtor. To suppose that a debtor may go on

1. (1940) 2 M.L.J. 322.

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without limit making successive applications for the settlement of his debts under S. 4 and thereby causing an executing Court to stay its hand under S. 25 is equivalent to supposing that the Legislature intended to put it in the power of a debtor to postpone execution of a decree against him to the Greek Kalends.

I cannot believe that the Legislature intended debtors to be allowed to make more than one effective application for the conciliation of a particular debt under the provisions of this Act. The presence of the provision in S. 7 by which an applicant can make a fresh application if his application has been rejected on formal grounds and the absence of any similar provision in S. 9 appear to me to be conclusive on this point. For this reason I think the learned District Munsif was right in following the decision of Mr. Justice Stodart and in holding that stay could not be ordered more than once under S. 25 in respect of the same debt.

This petition is accordingly dismissed with costs.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Periyatan Katanhipalli Kannan Nambiar .. *Petitioner* (Petitioner-1st Defendant)*

v.

Ullannur Madhathil Subramania Pattar and others. .. *Respondents (Respondents-Plaintiffs and Defendants 2 to 6).*

Kannan Nambiar v. Subramania Pattar.

Madras Agriculturists' Relief Act (IV of 1938), S. 8—Mortgage to stakeholder of chit fund for payment of Rs. 9,000 in eighteen instalments of Rs. 500 each—Suit on mortgage—Compromise decree for payment of smaller amount in five instalments—Liability of decree to be scaled down—Date on which liability to be regarded as incurred.

A mortgage bond in favour of a stake-holder was executed on 16th July, 1923, for payment of Rs. 9,000 in eighteen instalments of Rs. 500 each payable every eight months in respect of future subscriptions for one ticket in a chit fund. A suit on the mortgage was compromised, the plaintiff agreeing to accept payment of a smaller sum in five instalments in full satisfaction of the claim, and a decree in terms was passed on 14th April, 1936. In an application for scaling down the compromise decree,

Held, that the liability must be considered to have been incurred on the date of the mortgage and regarded as renewed or at all events included in a

* C. R. Ps. Nos. 257 and 691 of 1939. 10th September, 1940.

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fresh document under the compromise on which the decree was based and the decree must be scaled down accordingly.

Petitions under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the orders of the District Court of North-Malabar dated 26th August, 1938 and made in I. As. Nos. 144 and 145 of 1938 in O. S. No. 1 of 1936.

P. Govinda Menon for Petitioner in C. R. P. No. 257 of 1939.

K. Kuttikrishna Menon for Respondent in C. R. P. No. 257 and Petitioner in C. R. P. No. 691 of 1939.

O. T. G. Nambiar for Respondent in C. R. P. No. 691 of 1939.

The judgment of the Court was delivered by

Patanjali Sastri, J.

Patanjali Sastri, J.—These revision petitions arise out of applications made by defendants 1 and 2 (judgment-debtors and respondents in C. R. P. No. 691 of 1939) under S. 19 of the Madras Agriculturists' Relief Act for scaling down the compromise decree in O. S. No. 1 of 1936 on the file of the lower Court. The suit was brought on a mortgage bond executed on 16th July, 1923, for the payment of Rs. 9,000 in eighteen instalments of Rs. 500 each payable every eight months commencing from 7th February, 1924. The decree-holder (the petitioner in C. R. P. No. 691 of 1939) started a kuri-chit as stake-holder with twenty subscribers each contributing Rs. 10,000 in twenty equal instalments on the terms and conditions set out in what is called the *kurivari*. According to these terms, the amounts collected from the subscribers in respect of each instalment was to be put up for auction among them and allotted to the bidder who offered the highest discount, such discount being distributed among the subscribers as 'profits'. The defendants 1 and 2 who had together subscribed for one 'ticket' in the kuri-chit on behalf of their *tarwad* were the successful bidders at the second auction held on 7th June, 1923, and they were paid Rs. 5,800 being the balance after deducting the discount of Rs. 4,200 offered by them. Having already paid two instalments, they executed the mortgage bond (Ex. I) according to the stipulation in the *kurivari* for the due payment of the remaining eighteen instalments amounting to Rs. 9,000. The respondents thereafter paid ten instalments but failed to pay the remaining eight instalments, and O. S. No. 1 of 1936 was brought for the recovery of these

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Patanjali Sastri, J.

instalments with interest amounting in all to Rs. 7,640. The defendants 1 and 2 admitted the execution of the bond and pleaded that the interest claimed was penal while the other members of the *tarwad*, who got themselves impleaded as defendants 3 to 6 contested the liability of the *tarwad* for the debt. The suit was eventually compromised, the plaintiff agreeing to accept payment of a smaller sum in five instalments in full satisfaction of the claim and defendants 3 to 6 withdrawing their opposition and agreeing to pay the sum personally, and the decree now sought to be scaled down was passed on 14th April, 1936, in accordance with the compromise.

Various contentions were raised on either side in the Court below on a consideration of which the Court held that (1) the applicants for relief were 'agriculturists' as defined in the Act; (2) that S. 4 (*f*) of the Act had no application as the judgment-debtors could not, in any view, be regarded as trustees; (3) that the provisions of the Act were applicable to compromise decrees also; and (4) that for purposes of scaling down the decree the liability of the debtors must be taken to have accrued on the several dates fixed for payment of the instalments in the security bond, Ex. I. On these findings, the learned Judge directed the decree to be scaled down in accordance with S. 8 of the Act in respect of the instalments which fell due prior to the 1st October, 1932, and in accordance with S. 9 in respect of the instalments which fell due subsequently. From this decision, the decree-holder has preferred C. R. P. No. 691 of 1939 contending that the compromise decree cannot properly be regarded as a renewal of the liability under Ex. I, and the first defendant has preferred C. R. P. No. 257 of 1939 raising the contention that in respect of the entire amount decreed, the liability of the debtors must be held to have been incurred on the date of the security bond and not on the dates fixed for payment of the instalments thereunder, and that the entire debt has therefore to be scaled down under S. 8 of the Act.

As regards C. R. P. No. 691 of 1939, we have already held in *Ramamurthi* v. *Sitaramayya*[1], that the mere fact that a decree is based on a compromise does not exempt it from the operation of Act IV of 1938, that to the extent to which the

1. (1940) 2 M.L.J. 293.

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compromise can be said to be a renewal of the debt upon which the suit was laid, it is liable to be scaled down with reference to the principal sums originally or subsequently advanced. Learned counsel for the decree-holder, however, laid stress on the observation at p. 296:

"It is not necessary for the purpose of this case to decide what would be the position in a more complicated case when the compromise is the result of mutual concessions and advantages which together make up an agreement from which it would be extremely difficult to disentangle that part which is a renewal of the original debt."

and urged that having regard to the concessions made on either side under the compromise here in question, the liability thereunder could not be regarded as a renewal in whole or in part of the liability under the security bond. We are unable to agree with this contention. The observation relied on had no reference to cases like the one now before us involving an abatement of a portion of the claim by one side and the withdrawal of opposition and offer of additional security for the due payment of the reduced claim by the other, but envisaged cases, where, for instance, by some property being offered and accepted in full or part satisfaction of the claim, it becomes impossible to regard the transaction in any sense as a renewal of the original debt. No such difficulty arises here, and the decision referred to above applies equally to the facts of the present case.

Learned counsel next urged that, in any case, the liability of the defendants 3 to 6 who did not join in the execution of Ex. I could be taken to have arisen only on the date of the compromise decree, namely, 14th April, 1936, and should accordingly be scaled down under S. 9 of the Act. It is true that these defendants disputed the liability of their shares in the *tarwad* properties mortgaged under Ex. I, but the compromise obviously proceeds on the basis that Ex. I was binding on the entire properties mortgaged thereunder as contended by the decree-holder. In such circumstances, the correct view, it seems to us, is to regard the compromise as acknowledging and defining the antecedent liability of these defendants in respect of their shares of the properties mortgaged under Ex. I—see *Khunni Lal* v. *Gobind Krishna Narain*[1]. In this view, the liability of these defendants was, according to the decision in

1. (1911) 21 M.L.J. 645; L.R. 38 I.A. 87: I.L.R. 33 All. 356 at 357 (P.C.).

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Perianna v. *Sellappa*[1], a debt liable to be scaled down under the Act and must further be regarded as renewed or, at all events, included in a fresh document, under the compromise on which the decree was based—*see* our decision in *Doraikannu Odayar* v. *Veerasami Padayachi*[2].

Turning now to C. R. P. No. 257 of 1939, the only question we have to decide relates to the date on which the liability of the judgment-debtors can properly be said to have been incurred. The contention for the decree-holder is that the security bond (Ex. I) only affirmed the pre-existing liability of the judgment-debtors as subscribers to the kuri-chit to pay their subscriptions according to the instalments fixed in the *kurivari*, and did not change the character of such liability, that the liability to pay the future instalments of subscription could not be deemed to have been incurred before such instalments fell due, and that the position under the security bond was in no way different. Learned counsel for the judgment-debtors, on the other hand, contends that whatever might be the position with regard to the liability of a subscriber to pay the instalments of his subscription to the kuri before he bids for and receives the amount at an auction, he can thereafter be regarded only as a borrower of the sum received less the instalments already paid by him, undertaking to repay the loan in instalments that still remain to be paid, and the liability under the security bond which he executes for the due payment of such instalments is a *debitum in praesenti solvendum in futuro,* incurred on the date of the bond itself. The question is one of some difficulty not the least part of which arises from the somewhat conflicting decisions dealing with these peculiar kuri transactions which are so common in some parts of this Presidency. On the whole, however, we are of opinion that the judgment-debtor's contention is supported by a preponderance of authority and must be accepted. It will be observed that the *kurivari* makes a distinction between the liability of a subscriber who has bid for and received the amount at an auction and the liability of one who has not yet been thus benefited. In the latter case, para. 5 provides that if the instalment is not paid on the date fixed for an auction, the subscriber will have no right to participate in the discount realised from the successful bidder at the auction, and,

1. (1938) 2 M.L.J. 1068: I.L.R. (1939) Mad. 218.
2. (1940) 2 M.L.J. 651.

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further, if it remains unpaid even after one month from the date of the auction, the stake-holder shall be at liberty to remove the name of the subscriber and admit another in his place, while, in the former, if the benefited subscriber commits default in paying any instalment remaining due, it is provided that "the money due for such instalment or the entire amount due for all the future instalments till the termination of the chit fund, shall be realised by the stake-holder together with profit at eight annas per day from the date of default", a provision which also finds a place in the security bond Ex. I. It is thus clear that the liability of a successful bidder at an auction held under the kuri is placed on a different footing from that of an ordinary subscriber, and it will not therefore be correct to say that the security bond merely affirmed the pre-existing liability to pay the instalments of the contribution to the kuri fund.

It has been repeatedly held by this Court—and it must now be taken as settled—that a provision in a kuri entitling the stake-holder to recover from the benefited subscriber the amount of all the instalments immediately on default in the payment of any one of them is not penal and is enforceable, although there has been some difference of opinion as to the ground on which such decision is to be based. In *Vaidyanatha Aiyar* v. *Govindasami Odayar*[1], the learned Judges seem to have viewed the advance to the successful bidder at an auction as a loan to him, for they observed:

> "The subscription at each of these intermediate instalments was available for loan to the successful bidder at the auction, which was held every six months, the successful bidder being the bidder who offered to accept the lowest proportion of the total subscription."

Relying upon this and the earlier decisions of this Court, Ananthakrishna Aiyar, J., held in *Kunju Nair* v. *Narayanan Nair*[2], that the transaction was in essence a loan of a common fund to one member and that it was "a debt *in praesenti* to be paid by particular instalments if certain conditions be duly observed, but otherwise to be paid up at once irrespective of the benefit of time and instalments."

The learned Judge pointed out that it had been so viewed in this Presidency since *Kamakshi Achari* v. *Appavu Pillai*[3]. In *Subbiah* v. *Shanmugham*[4], Srinivasa Aiyangar, J., held that a

1. (1921) 42 M.L.J. 551.
2. (1932) 65 M.L.J. 29.
3. (1863) 1 M.H.C.R. 448.
4. A.I.R. 1928 Mad. 245.

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provision for acceleration of payment of the future instalments was penal and unenforceable as there was no *debitum in praesenti* in such cases, but this decision was reversed on appeal in *Subbiah Pillai* v. *Muthiah Pillai*[1].

In *Raghavan Pattar* v. *Arumugham*[2], another Bench took the view that the successful bidder at an auction was a purchaser of the sum, and the contract thus being one of sale and not of borrowing, no question of penalty could arise. They approved the decision of Ananthakrishna Aiyar, J., in *Kunju Nair* v. *Narayanan Nair*[3], though it was based on a different ground. It is, however, worthy of note that even in this view the liability for the 'purchase money' must be held to have been incurred on the date of the security bond taken from the 'purchaser.'

The decree-holder strongly relied upon the decision in *Marudakonar* v. *Veerammal*[4], as showing that there is no present debt in such cases until the instalments actually fall due. That was a case where the stake-holder assigned to the plaintiff the security bond executed by a successful bidder who had received the kuri fund at an auction. The kuri, however, had to be closed down owing to the inability of the subscribers to pay their subscriptions. In rejecting the contention of the plaintiff's counsel before this Court that the plaintiff was entitled to recover the amount due under the security bond as the assignee thereof, unaffected by the discontinuance of the kuri, as payments under the bond were not conditioned on its continuance, Varadachariar, J., observed:

"It seems to me only reasonable to hold that in cases like the present the security bond must be interpreted in the light of the rules, and the obligation undertaken by it is not repayment of the benefit already received—as if it were a debt—but the payment of future subscriptions. Whether the continuance of the chit was a condition precedent or not, will not depend merely on the terms of the bond but must be decided with reference to the surrounding circumstances, including the rules of the chit fund."

Though this passage strikes a somewhat different note as to the nature of the obligation undertaken by a successful bidder at an auction under a kuri chit, it cannot be said that the learned Judge was making a definite pronouncement on the question whether or not such obligation wss a *debitum in praesenti solvendum in futuro*, as that question did not arise for consideration. All that the learned Judge had to consider was

1. (1933) 65 M.L.J. 302.
2. (1934) 68 M.L.J. 283.
3. (1932) 65 M.L.J. 29.
4. (1937) 2 M.L.J. 17.

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whether such a bond could be enforced without reference to the obligation of the stake-holder under the rules of the kuri to continue it to the end. Mockett, J., the other learned Judge who took part in the decision made no reference to this aspect.

We are therefore of opinion that in view of the several decisions of this Court referred to above, the liability of the judgment-debtors must be considered to have been incurred on the date of the mortgage bond, namely, July 16, 1923, and the decree must be scaled down under S. 8 of the Act. The same view was taken by one of us in C. R. P. No. 1483 of 1939.

In the result, C. R. P. No. 257 of 1939 is allowed and the order of the Court below will be modified accordingly. The petitioner will have the costs of this revision petition. C. R. P. No. 691 of 1939 is dismissed with costs. The case will be remanded to the Court below for disposal in the light of this judgment.

K. S. *C. R. P. No. 257 of 1939 allowed and C. R. P. No. 691 of 1939 dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KING.

Udambanthala Nalupurapatti Mammad *Appellant** (*Petitioner*)

v.

Vyagram Narayana Pattar and others. *Respondents* (*Respondents*).

Nalupura-patti Mammad v. Narayana Pattar.

Madras Agriculturists' Relief Act (IV of 1938), S. 3 (ii), Proviso D—Total payments of land revenue by jenmi *exceeding Rs. 500 only if other payments as ryotwari pattadar are included—Proviso D applicability of.*

Where the total payments by a *jenmi* to the government (including amounts paid as ryotwari pattadar) on account of land revenue exceeds Rs. 500, Proviso D to S. 3 (*ii*) is applicable and excludes him from being an agriculturist under the Act.

Appeal against the order of the District Court of South Kanara, dated 3rd day of January, 1940 and passed in A. S. No. 419 of 1939—R. I. A. No. 846 of 1939 in O. S. No. 1069 of 1935, D. M. C., Kasaragod.

K. Kuttikrishna Menon for Appellant.

O. T. G. Nambiar for Respondents.

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* C. M. S. A. No. 51 of 1940. 6th September, 1940.

The Court delivered the following

JUDGMENT.—It is a plausible argument that as ryotwari pattadars are entitled to the benefits of this Act no matter how much land revenue they pay, a *jenmi* who is also a ryotwari pattadar and who in the former capacity pays less than Rs. 500 should also be so entitled.

Nalupurapatti Mammad v. Narayana Pattar.

But there are no words in the proviso restricting the land revenue payable by a *jenmi* to the revenue payable only on the land so held by him and taking the clause in its plain meaning we have here a *jenmi* whose total payments to Government on account of land revenue exceed Rs. 500. I cannot therefore hold that the Courts below have wrongly construed the proviso. The appeal fails and is dismissed with costs of respondent 2.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

Amad Koya and another .. *Petitioners* (Petitioners-Defendants)*

v.

Appu and another .. *Respondents (Respondents-Plaintiffs).*

Amad Koya v. Appu.

Madras Agriculturists' Relief Act (IV of 1938), S. 15—Arrears of rent for faslis prior to 1345 due from tenant assigned by jenmi *to third person—If can be deemed to be discharged by tenant depositing rent for faslis 1346 and 1347—Malabar Tenancy Act, S. 3 (k) and (j)—*'Jenmi' *or 'intermediary'—If includes assignee of right to collect rents.*

Under S. 15 of Act IV of 1938 only arrears of rent payable to a *jenmi* or intermediary could be deemed to be discharged by depositing the rent for faslis 1346 and 1347 but the liability to an assignee of such arrears of rent could not be scaled down. The words '*jenmi*' and 'intermediary' in S. 3 (*k*) and (*j*) of the Malabar Tenancy Act do not include an assignee of the right to collect rent though under the corresponding provision S. 3 (5) of the Madras Estates Land Act the term 'landholder' does include any person entitled to collect rent.

Petition under S. 25 of Act IX of 1887 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Calicut, dated 30th August, 1938 and passed in I. A. No. 1362 of 1938 in S. C. No. 281 of 1937.

K. Kuttikrishna Menon for Petitioners.

K. P. Raman Menon for Respondents.

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* C. R. P. No. 1632 of 1938. 4th September, 1940.

Amad Koya
v.
Appu.

Wadsworth, J.

The judgment of the Court was delivered by

Wadsworth, J.—This Civil Revision Petition raises the question whether S. 15 of the Madras Act IV of 1938 can be invoked in favour of a tenant whose rent is payable to an assignee of rent from a Malabar *jenmi*. The petitioners here were the applicants in the Court below and they were the judgment-debtors. The suit was brought by the first plaintiff as assignee of the rent for the period from 1929-30 to 1936-37, his assignor being the second plaintiff, the *jenmi*. The assignment was dated 17th February, 1937, and there was a decree dated 9th October, 1939, in favour of the first plaintiff, the assignee, alone. Defendants applied under Ss. 19 and 15 of Act IV of 1938 to scale down this decree.

S. 15 (1) of the Act begins as follows:

"All rent payable by an agriculturist to a landholder or an under-tenure-holder under the Madras Estates Land Act, 1908, or to a *jenmi* or intermediary under the Malabar Tenancy Act, 1929, which has accrued for the fasli year 1345 and prior faslis and which is outstanding on the date of the commencement of this Act shall be deemed to be discharged. ......"

Mr. Kuttikrishna Menon for the petitioners has contended that the effect of these words is to give to the tenant a right to scale down the rent, whether or not it is due to a *jenmi* or intermediary on the date of the commencement of the Act, provided that in its origin it partakes of the character of rent due to a *jenmi* or intermediary. It is quite clear that the definitions of the words "*jenmi*" and "intermediary" in Ss. 3 (*k*) and 3 (*j*) of the Malabar Tenancy Act do not include an assignee of the right to collect rents, though under the corresponding provision, S. 3 (5) of the Madras Estates Land Act, the term "landholder" does include a person entitled to collect rent. It is not very apparent why an assignee of the right to collect rent in Malabar should have been treated differently from an assignee of the right to collect rent in other parts of the Presidency: but the fact remains that the terms '*jenmi*' and "intermediary" used in this section and in the succeeding Ss. 16 and 17 are not extended by any words in the Act so as to include an assignee of the right to collect rents, and the definitions in the Malabar Tenancy Act do not cover such an assignee. It seems to us apparent that, reading S. 15 (1) in its plain terms, there must be rent outstanding on the date of the commencement of the Act, which rent must be, as on that date, payable by an agriculturist to a landholder or an under-tenure-holder or to a

jenmi or intermediary. If these conditions are not satisfied, the section had no application. It may be that the omission of any provision relating to an assignee of a right to collect rent in the case of a Malabar tenancy is a lacuna due to the inadvertence of those who drafted the Act: but, even so, the remedy is the amendment of the Act. Dealing with an expropriatory measure we cannot extend the language so as to expropriate more persons than those actually comprised within its terms. In the present case it seems to us clear that as the arrears with which we are concerned were not outstanding as rent payable to a *jenmi* or intermediary on the date of the commencement of the Act, the petitioners are not entitled to the benefit of S. 15 of the Act.

Amad Koya v. Appu. Wadsworth, J.

We may add that to read the term "*jenmi*" or "intermediary" in S. 15 (1) as including an assignee of the right to collect rent would lead to the difficulty that under S. 15 (4) there is no provision for notice to such an assignee, and in Ss. 16 and 17 the same terms are repeated with reference to safeguarding of certain rights of the landholder and with reference to limitation, which also have not been extended to cover an assignee.

In the result, therefore, we dismiss the Civil Revision Petition with costs.

K. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE PATANJALI SASTRI.

Muthu Goundan .. *Petitioner* (Creditor-Respondent)*

v.

Peria Goundan and another .. *Respondents (Debtors-Petitioners).*

Muthu Goundan v. Peria Goundan.

Madras Debt Conciliation Act (XI of 1936), Ss. 17 and 18—Petition for conciliation of debts—Liability to eventual dismissal under S. 17—Effect on jurisdiction of Board to certify under S. 18 that a fair and reasonable offer has been refused.

The fact that a Debt of Conciliation Board may have to eventually dismiss a debtor's petition owing to the refusal by the creditors representing more than fifty per cent. of the total amount of debts to agree to a settlement, does not deprive the Board of its power of certifying that a reasonable offer has been refused.

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* C. M. P. No. 1261 of 1940. 18th April, 1940.

Muthu Goundan v. Peria Goundan.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue a *writ of certiorari* calling for the records in D. C. B. No. 558 of 1939 on the file of the Debt Conciliation Board, Namakkal, Salem District, and to quash the order passed by the said Board on the 17th November, 1939.

C. S. Krishnamurthi Aiyar and *C. S. Vidhyasankara Aiyar* for Petitioner.

A. Srirangachariar for Respondents.

The order of the Court was made by

Leach, C.J.

The Chief Justice.—This matter raises the question whether a Debt Conciliation Board is entitled to give a certificate under S. 18 of the Madras Debt Conciliation Act, 1936, when it will be bound eventually to dismiss under S. 17 of the Act a petition for the settlement of the petitioner's debts. The respondent applied to the Debt Conciliation Board, Namakkal, for a settlement of his debts under the provisions of S. 4 of the Act. His only creditor was the petitioner in these proceedings, who has security. The petitioner appeared before the Board and informed it that he was not prepared to agree to a settlement of his debt. Before there can be a settlement of debts under the Act creditors representing more than fifty per cent. of the total amount of debts must agree to a settlement. If no amicable settlement is arrived at within twelve months from the date of the application the Board is bound by virtue of the provisions of S. 17 to dismiss the application. In this case the Board did not at once dismiss the petition as the result of the petitioner's objection, but proceeded to consider what would be the amount payable by the respondent to the petitioner if the debt was scaled down in accordance with the provisions of the Madras Agriculturists' Relief Act. The Board had no power to scale down the debt, as was pointed out by this Court in *Jonnalagadda Ramaswami Chetty* v. *Ramachandra Rao*[1]. The Board did not, however, purport to scale down the debt. It merely considered what would be the figure arrived at if the provisions of the Madras Agriculturists' Relief Act were applied. It found that on this basis the debt due to the petitioner would be reduced to Rs. 1,954. Thereupon the respondent expressed his willingness to pay this amount with interest at $6\frac{1}{4}$ per cent. from 1st

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1. (1939) 2 M.L.J. 789: I.L.R. (1940) Mad. 188.

Muthu Goundan v. Peria Goundan.

Leach, C.J.

October, 1937, till the date of payment. The Board considered that this was a reasonable offer and granted a certificate under S. 18 (1) of the Madras Debt Conciliation Act. The petitioner says that the Board had no power to pass this order and therefore it should be quashed.

Sub-S. (1) of S. 18 states that where, *during the hearing* of any application made under S. 4, any creditor refuses to agree to an amicable settlement, the Board shall, if it is of opinion that the debtor has made such creditor a fair offer which the creditor ought reasonably to accept, grant the debtor a certificate, in such form as may be prescribed in respect of the debts owed by him to the creditor. The effect of a certificate is that when a creditor sues in a Civil Court for the recovery of his debt the Court cannot allow the plaintiff any costs in the suit, or any interest on the debt after the date of the certificate in excess of simple interest at six per cent per annum on the principal amount due on the date of the certificate. This provision is contained in sub-S. (2). Rules have been framed under the Act and they contain the form of certificate to be given under S. 18 (1). The form reads as follows:

"This is to certify that during proceedings No. of under the Madras Debt Conciliation Act, 1936, between (debtor) on the one hand and (creditor) on the other hand, for the settlement of an alleged debt of Rs. the said creditor has, in our opinion, refused a fair offer of settlement made by the said debtor, which the said creditor ought reasonably to have accepted.

2. The following particulars of the debt were furnished by the said creditor under S. 10 (1) of the Act."

Action under S. 18 does not depend on a majority of the creditors agreeing to a settlement of the debts owing to them. The opening words of sub-S. (1) of S. 18, namely, "Where, during the hearing of any application under S. 4" make it quite clear that the certificate can be granted during the pendency of the proceedings if a fair offer has been made by the debtor and has been refused by the creditor. The form of certificate given in the rules emphasizes this. The fact that the Board may have to dismiss a debtor's petition as the Board will have to do in this case, does not deprive it of the right of exercising its power of certifying that a reasonable offer has been refused. As the Board did not purport to scale down the debt under the provisions of the Madras Agriculturists' Relief Act, but merely took into consideration the provisions of

Muthu Goundan v. Peria Goundan.

Leach, C.J.

that Act in order to consider what would be a fair offer by the respondent, it cannot be said that it has acted contrary to or without jurisdiction or even contrary to law.

The petitioner's application for a *writ of certiorari* must be dismissed with costs.

K. S. *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Gorle Satyanarayana .. *Petitioner* (Petitioner-1st Defendant)*

v.

Gorle Peddi Naidu and another .. *Respondents (Respondents-Plaintiff and Transferee-Decree-holder).*

Satyanarayana v. Peddi Naidu.

Madras Agriculturists' Relief Act (IV of 1938), S. 19—Application under to appellate Court—If original matter—Civil Procedure Code (V of 1908), O. 7, r. 10—Applicability.

An application under S. 19 of Act IV of 1938 for scaling down a decree passed by an appellate Court was dismissed on the ground that the application ought to have been presented in the Court of first instance. In revision

Held, that the nature of an application under S. 19 of the Madras Agriculturists' Relief Act was akin to an original petition and therefore O. 7, r. 10 which applies to a plaint in a suit, applies equally to such an application by force of S. 141, Civil Procedure Code and the application ought to have been returned for presentation to the proper Court.

Thakur Parshad v. *Fakir ul-lah*, (1894) 5 M.L.J. 3: L.R. 22 I.A. 44: I.L.R. 17 All. 106 (P. C.) and *Venkatanarasimha Rao* v. *Suryanarayana*, (1925) 50 M.L.J. 75, referred to.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Vizagapatam dated 15th September, 1939 and passed in I. A. No. 424 of 1938 in A. S. No. 165 of 1934.

B. V. Ramanarasu for *V. Govindarajachari* for Petitioner.

Kasturi Seshagiri Rao and *Kasturi Sivaprasada Rao* for Respondents.

The Court delivered the following

JUDGMENT.—This revision petition is filed against an order dismissing an application under S. 19 of Act IV of 1938 on the ground that it was presented in the wrong Court. The application was in fact presented to the appellate Court, whereas in

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*C. R. P. No. 1010 of 1940. 2nd October, 1940.

Satyanarayana v. Peddi Naidu.

accordance with the decision in *Rentala Gangaraju* v. *Bikkina Bulli Ramayya*[1], it should have been presented in the Court of First Instance. The decision upon which the lower Court proceeded took a view of the law which was by no means universally accepted before that decision appeared and it cannot be said that the applicant in applying to the Court which actually passed the decree which he desired to scale down was going contrary to the obvious meaning of the section under which his application was framed. It was only by reading S. 19 along with S. 20 that this Court arrived at the conclusion that the proper Court to receive an application under S. 19 was the Court of First Instance. We must therefore take it that the application to the appellate Court was one which, according to the applicant's view of the law, was *bona fide* presented in the proper Court though by reason of the subsequent decision it became apparent that his view of the law was wrong.

That being so, should the lower Court have dismissed his application or should it have returned the application for presentation in the proper Court? The question is whether O. 7, r. 10, Civil Procedure Code, read with S. 141 applies to an application of this nature. There is a good deal of case-law on the applicability of S. 141, Civil Procedure Code. The cases mostly depend on the decision of the Privy Council in *Thakur Parshad* v. *Fakir-ul-lah*[2], where their Lordships decided that S. 647 of the old Code (corresponding to S. 141) does not apply to proceedings in execution. The reasoning of that decision is that an elaborate procedure is set forth in the Code itself for proceedings in execution and it would be surprising if the framers of the Code had intended to apply another procedure mostly unsuitable by saying in general terms that the procedure for suits should be followed as far as applicable. Then follows the following sentence:

"Their Lordships think that the proceedings spoken of in S. 647 include original matters in the nature of suits such as proceedings in probates, guardianships and so forth and do not include executions."

The decision in *Sarat Chandra Bose* v. *Bisweswar Mitra*[3] and other decisions of a like nature have added to this *obiter dictum* of the Privy Council the word 'only' and have laid it down that S. 141 extends the procedure of the Code as far as

1. (1939) 1 M.L.J. 329: I.L.R. (1939) Mad. 520.
2. (1894) 5 M.L.J. 3: L.R. 22 I.A. 44: I.L.R. 17 All. 106 (P.C.).
3. (1926) I.L.R. 54 Cal. 405.

Satyanarayana *v.* Peddi Naidu.

it can be made applicable *only* to original proceedings in the nature of suits, such as proceedings in probate, guardianship and so forth. This view has not been universally followed, for this Court has held in *Venkatanarasimha Rao* v. *Suryanarayana*[1], that O. 9, r. 9 read with S. 141 can be applied to an application for the restoration of a petition dismissed for default which petition itself was preferred under O. 9, r. 9. In *Venkatarama* v. *Marudachala*[2], this Court has held that by virtue of S. 141, O. 9, r. 5 can be applied to an application for a personal decree in a mortgage suit.

It seems to me, however, that it is unnecessary for me to decide whether or not S. 141 should be restricted to original proceedings more or less in the nature of suits; for I am of opinion that an application under S. 19 of Act IV of 1938 can be brought under this category. An application under S. 19 is not an application to amend a decree so as to bring it in accordance with the judgment; nor is it an application which can be said to be ancillary to the suit in which the decree was passed. It is in substance an application to enforce a new right created by a statute which came into force after the decree was passed. It is in no way ancillary to the decree but destructive of the decree; and though it may result in the amendment of the decree and the recording of satisfaction it is not, in my opinion, an application in the suit in which the decree was passed, but an entirely separate proceeding to enforce a new right quite distinct from the right declared in the original suit. In this view therefore, even adopting the strict view of S. 141 taken by the Calcutta High Court in *Sarat Chandra Bose* v. *Bisweswar Mitra*[3], I am of opinion that S. 141, Civil Procedure Code, extends to such an application the procedure provided in this Code, including that laid down in O. 7, r. 10. It follows that the Court below wrongfully failed to exercise its jurisdiction to return this application for presentation in the proper Court.

The revision petition is therefore allowed with costs and the application will be returned to the applicant by the lower Court for presentation in the Court having jurisdiction.

K. S. *Petition allowed.*

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1. (1925) 50 M.L.J. 75.
2. A.I.R. 1931 Mad. 795.
3. (1926) I.L.R. 54 Cal. 405.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Kumaraswami Reddiar .. *Petitioner** (*Respondent-Plaintiff*)

v.

Muthugopal Naicker (deceased) and others. *Respondents* (*Petitioners and L. Rs.*).

Kumaraswami Reddiar *v.* Muthugopal Naicker.

Madras Agriculturists' Relief Act (IV of 1938), Ss. 19 and 23—Sale in execution of mortgage decree—Application by judgment-debtor—Qualification for benefits under—Necessity to give notice to puisne mortgagee.

Even in respect of a sale of mortgaged properties after 1st October, 1937, it is not enough that the judgment-debtor is the owner of the mortgaged properties to entitle him to the benefit of Ss. 19 and 23 of the Act. It must be shown that at the date of his application the judgment-debtor was possessed of other lands to entitle him to be deemed an 'agriculturist' within the meaning of the Act.

Under the proviso to S. 23 notice to the puisne mortgagee is necessary and if he is not impleaded and notice has gone only to the decree-holder auction-purchaser, the terms of the proviso are not complied with.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Ramnad dated 30th March, 1939 and made in E. A. No. 170 of 1938 in E. P. No. 26 of 1937 in O. S. No. 2 of 1936, etc.

K. S. Ramabhadra Aiyar and *N. G. Krishnamachariar* for Petitioner.

Parasurama Aiyar for *T. V. Ramiah* for Respondents.

The Court delivered the following

JUDGMENT.—The first of these petitions arises out of an application under S. 23 of Madras Act IV of 1938, to set aside a sale. The second petition arises out of a connected application by the same judgment-debtors to amend the decree under S. 19 of the Act. The decree in question in both the petitions was passed on a mortgage executed by the defendants 1 to 3. The applicants in the Court below were the legal representatives of the first defendant together with the second and third defendants. The eighth defendant in the mortgage suit was impleaded as puisne mortgagee of items 3 to 9 and 12 out of the 13 items in the hypotheca. He did not prove his mortgage, and no decree was passed in his favour, except that the judgment contained a direction that, in the sale, the items in which he was not

*C. R. Ps. Nos. 1588 and 1589 of 1939. 30th September, 1940.

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interested should be sold first and the other items subsequently in the same sale. The ninth defendant was impleaded in the mortgage suit on the ground that she claimed a charge for maintenance.

On 17th April, 1936, a receiver was appointed, and he continued in possession right up to the time of the sale. A preliminary decree was passed on 28th August, 1936, for a sum of Rs. 6,869 and odd. There was no personal remedy. After a final decree had been passed, a sale was held on 18th October, 1937. At this sale, 12 out of the 13 items of property were sold, and realised a sum of Rs. 4,900 and odd. Item 6 which is the family house was not sold. Part-satisfaction was recorded on 19th November, 1937. Act IV of 1938 came into force on 22nd March, 1938, and the present applications were filed in April, 1938. The only respondent impleaded was the plaintiff-decree-holder, who was also the purchaser at the sale. The only evidence as to the agriculturist status of the applicants appears to relate to the mortgage lands, and the objections seem to have been based on such irrelevant matters as the object for which the money was borrowed, the possession of the lands, etc. In the lower Court, it seems to have been assumed that, if the applicants had a saleable interest in agricultural lands at the time of the sale in October, 1937, they were agriculturists entitled to the benefits of Ss. 19 and 23 of the Act. The lower Court does not discuss the evidence on this part of the case at all, and it appears to me probable that the learned Judge failed to realise the importance of proof that the applicants were agriculturists at the time when they made their application.

S. 23 of the Act starts with reference to a sale on or after 1st October, 1937, of property in which an agriculturist *had* an interest, but it seems to me clearly to require in the later portion of the section that the applicant must *be* a judgment-debtor claiming to be an agriculturist entitled to the benefits of the Act, and that the Court has to be satisfied "that the applicant *is* an agriculturist entitled to the benefits of this Act." These words seem to me to contemplate a state of affairs in which the applicant has a saleable interest in agricultural land at the time when he makes his application. The same words are found in S. 19, "any judgment-debtor who *is* an agriculturist." In the definition of the term "agriculturist" in S. 3, we find that he is a person who *has* a saleable interest. Whatever time

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is contemplated in this definition, it cannot well be anterior to the commencement of the Act. S. 7 also contemplates the scaling down of debts payable by an agriculturist at the commencement of the Act.

S. 23 is really an extension of S. 7 in that it permits an agriculturist to attack a sale held in execution of a decree during the period when the Act was under consideration. But I am not prepared to hold, having regard to the words of this section, that this remedy is open to a person who is not an agriculturist at the time when he makes the application. This is a view of the law which does not appear to have been present in the mind of the Court below, and it may be that the applicants could have proved that they were agriculturists, having regard to the facts existing at the time of their application, even though, so far as their interest in the properties sold is concerned, it cannot be said that they had a saleable interest in those properties at the time when they applied to set aside the sale.

A further difficulty is based on the fact that the applicants took out notice only to the decree-holder-auction-purchaser. The proviso to S. 23 requires that there should be notice to the decree-holder, the auction-purchaser and other persons interested in such sale. The words "other persons interested in such sale" would not, apparently, include all persons who were parties to the suit. The intention appears to be that notice should go to all persons interested in upholding the sale. If there are judgment-debtors who are anxious that the sale should be set aside, they have the right to come in as applicants if they are agriculturists; they are not persons who are interested in upholding the sale.

But the position of the eighth defendant, the puisne mortgagee, seems rather dubious. It was alleged in the Court below that he was a non-agriculturist. I have not been able to find any evidence to this effect. If he was a non-agriculturist, it seems to follow, on the basis of the decision of the Bench to which I was a party, in *Ramier* v. *Srinivasiah*[1], that he is not entitled to the benefit of any scaling down of the decree which may result from the application of the agriculturist judgment-debtors. If so much is conceded, it follows that if the decree is scaled down on the application of the present applicants, the

1. (1940) 2 M.L.J. 872.

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whole of the burden of the balance of the decree amount after the scaling down will be thrown on item 6, the only item not sold, which is one of the items in which the eighth defendant claims an interest. On such facts, if they be correct, it would appear that the eighth defendant is interested in upholding the sale, although he does not claim any title under the court-auction-purchaser. I am of opinion that, if the facts are as alleged, he should have been given notice before the sale was set aside; and, although S. 19 does not expressly require notice to a non-agriculturist judgment-debtor, it is, to my mind, obviously desirable in a case where the result of the application under S. 19 may be to increase the burden of another judgment-debtor, that he should have notice.

In the result, therefore, I allow both these petitions, and remit both the cases to the trial Court which will dispose of the matters afresh in the light of this judgment, after giving notice to the eighth defendant and after recording a finding on such fresh evidence as may be tendered on both sides on the question whether the applicants were agriculturists entitled to the benefits of the Act at the time when their applications were presented. Costs will abide the result.

K. S. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO.

Balavenkatrama Chettiar and others .. *Appellants**

v.

Maruthamuthu Chetty and another .. *Respondents.*

Balavenkatrama Chettiar v. Maruthamuthu Chetty.

Court-Fees Act (VII of 1870 as amended in Madras), Sch. I, Art. 1 and Sch. II, Art. 17-B—Suit on promissory notes—Defendants alleging notes to be executed on behalf of temple—Decrees passed against defendants personally—Second appeals preferred—Personal liability sought to be got rid of—Court-fee payable—Subject-matter whether incapable of valuation.

Three second appeals arose out of three suits on promissory notes in two of which the executants had simply executed the notes in their personal capacity while in the third though there was a reference to a trust in the body of the note the executants had not signed as trustees. In all the three suits the defendants were sued only in their personal capacity and decrees were passed rendering them personally liable. The defendants preferred second appeals and therein pleaded that as the debts were contracted for temple purposes they should not have been made personally liable and

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* S. R. Nos. 28997, 28981 and 28984 of 1938 (subsequently numbered as S. A. Nos. 763, 764 and 765 of 1939). 11th August, 1939.

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that the decrees should have been passed against them as trustees of the temple rendering only the temple properties in their hands liable for the decree debt.

Held, that if the appellants had been sued as trustees and a decree had been passed against them personally and also against the trust property in their hands and an appeal was preferred against the said decree on the ground that they could not be rendered liable personally in the sense that they could not be arrested in execution of the decree, it might be urged that it was not possible to estimate the liability they were seeking to get rid of; but here the appellants were seeking to get rid of their liability to the extent of both their person and property in respect of the amount decreed against them, and therefore it could not be said that the subject-matter of the appeals was incapable of valuation so as to permit court-fee being paid under Art 17-B of Sch. II of the Court-Fees Act, as amended in Madras. Court-fee must therefore be paid *ad valorem* on the value of the decrees.

Jagannath v. *Laxmi Bai*, (1934) I.L.R. 59 Bom. 439 and *Bulaqi Das* v. *Lal Chand*, A.I.R. 1934 Lah. 865, distinguished.

Connected second appeals against the judgments and decrees of the Court of the District Judge, Coimbatore, in A. S. Nos. 290 and 291 of 1937 and A. S. No. 174 of 1938.

The question as to the court-fee payable on the Memoranda of Second Appeals came up in the first instance before the Master who made the following

ORDER OF REFERENCE.

This is a court-fee reference. The second appeals arise out of suits on three promissory notes, in two of which the executants have simply executed the promissory notes in their personal capacity and in the third they executed it as trustees of a temple.* In all the three suits the defendants have been sued on the promissory notes executed by them and only in their personal capacity a decree is sought. The suit temple was a party 13th defendant only in the third suit. The lower appellate Court granted a decree to the plaintiff in all the three suits and second appeals have been preferred by the defendants. Ordinarily it should be expected that where the defendants seek the vacation of the decrees against them, the value of the appeals must be the amount decreed against them. But the contention of the appellants is that the subject-matter of the appeals is incapable of valuation for the reason that the correctness of the amounts due under the promissory notes is not disputed, but that the defendants' grievance is that decrees have been passed against them personally, when decrees ought to have been passed against the trust, namely, the temple. It is contended that in such cases the intrinsic value of the decree is not the mea-

* [It is, however, stated in the judgment, at p. 949 that according to the District Judge though there was a reference to the trust in the body of the third promissory note, the executants did not sign the said note as trustees. Ed.]

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sure of the value of the appeals. Two decisions are cited before me, those reported in *Jagannath* v. *Laxmi Bai*[1] and *Bulaqi Das* v. *Lal Chand*[2]. Those decisions differ from the present cases in the fact that in those cases the decree had been passed both personally against the executants of the documents and also against the properties in their hands as legal representatives. There it was held that where property in the hands of the judgment-debtors is sufficient to satisfy the decree it may not be possible to estimate the value of the personal liability and if it is to be valued, it has been observed, that must be the difference between the decree amount and the value of the property. But in this case, it is quite immaterial that the defendants say that there ought to be a decree against the trust. The trust is not a party to two of the three suits and no decree has been passed against the trust, namely, the temple. Therefore it is not a question of measuring the personal liability according to the decision above quoted. If the contention of the appellants' advocate is correct, then the first Court which came to the conclusion that the monies that had been borrowed under the promissory notes have been utilised for the temple must have passed a decree in favour of the plaintiff against the temple properties in the hands of these defendants as trustees thereof, but it has *dismissed* those suits for the obvious reason that the suits were brought by the plaintiffs as against the defendants personally, as executants of negotiable instruments and the plaintiffs were prepared to stand or fall by the allegations and the case with which they have come to Court. If the Court held that the plaintiff is not entitled to get a personal decree against the defendants, then it is not open to the Court where the temple is not a party and is not represented by anybody to pass a decree against the temple by making the temple properties liable. Therefore under those circumstances, I cannot accept the contention of the appellants that what is sought is only the transference of liability from the defendants against the temple and against the properties of the temple in the hands of the defendants.

I therefore hold that the objection of the appellant cannot be upheld. The office view is correct and the court-fee *ad valorem* ought to be paid.

On this Reference the matter came up for orders before the Court.

B. V. Viswanatha Aiyar for Appellants.

Respondents not represented.

The Court delivered the following

JUDGMENT.—The question for decision in this reference is, what is the correct court-fee payable on the three memoranda

1. (1934) I.L.R. 59 Bom. 439. 2. A.I.R. 1934 Lah. 865.

Bala-venkatrama Chettiar *v.* Marutha-muthu Chetty.

of second appeals preferred against the decrees of the learned District Judge of Coimbatore in A. S. Nos. 290 and 291 of 1937 and 174 of 1938? The suits out of which these second appeals arise were brought on three promissory notes. The main defence was that the appellants were not liable on the notes as the amounts were borrowed for the benefit of Kannika Parameswari Amman Temple of Peria Nagamam by them as trustees thereof and that a decree ought to be passed against the properties of the said temple in their hands. The decision of the learned District Judge was that two of the promissory notes purported to be executed by them in their individual capacity and not as trustees on behalf of the said temple and though there was a reference to the trust in the body of the third promissory note, the executants did not sign the said note as trustees and therefore they were personally liable on all the three notes. The legal effect of this decision of the learned Judge is that the executants are not only liable to be arrested in execution of the decrees against them but also the properties they own and possess are liable to be proceeded against for the satisfaction of the said decrees. Thus they seek to get rid of their liability against their person and property to the extent of the amount that has been decreed against them. On these facts the learned Master took the view that an *ad valorem* court-fee has to be paid on the value mentioned in the memoranda of appeals, that is, the amount of the decrees which have been passed against them.

It is contended by Mr. Viswanatha Aiyar, the learned counsel for the appellants, that the subject-matter of the appeals is incapable of valuation and that the correct court-fee has been paid under Art. 17-B of Sch. II of the Court-Fees Act. He submits that he was not bound to pay the *ad valorem* court-fee because the appellants were not disputing the amount of liability but were only contending that they were not personally liable. He relied on *Jagannath* v. *Laxmi Bai*[1] and *Bulaqi Das* v. *Lal Chand*[2] in support of his contention. Art. 17-B of the Second Schedule to the Court-Fees Act runs thus:

> "Plaint or memorandum of appeal in every suit where it is not possible to estimate at a money value the subject-matter in dispute and which is not otherwise provided for by this Act."

The question therefore is, is it not possible to estimate at a money value the subject-matter in dispute in these appeals?

1. (1934) I.L.R. 59 Bom. 439. 2. A.I.R. 1934 Lah. 865.

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Before a subject-matter in dispute can be said to be incapable of valuation, it must be established that it is not even possible to state approximately what would be the money value of the liability which a person seeks to get rid of by the judicial decision, that is, by no possibility could it be stated approximately what would be the money value of the detriment that a person may suffer by reason of the adverse decision against him. What is really contended for in these appeals is that the appellants ought to have been made liable in the capacity of trustees in which case only the trust property in their hands could be held liable but they are sought to be made liable in their individual capacity which has the result of affecting their individual person and their individual property. As aforesaid, by the appeals they seek to get rid of their liability to the extent of both their person and property in respect of the amount that has been decreed against them. The contention therefore that the subject-matter is incapable of valuation is unsustainable.

Mr. Viswanatha Aiyar relied very strongly on S. 28 of the Negotiable Instruments Act which is to the following effect:

"An agent who signs his name to a promissory note without indicating thereon, that he signs as agent, or that he does not intend thereby to incur personal responsibility, is liable personally on the instrument, except to those who induced him to sign upon the belief that the principal only would be held liable."

He contends that one of the defences of the appellants was that the plaintiff was aware of the fact that the borrowing was made on behalf of the trust, that they were induced to sign the promissory notes in the belief that the temple only would be held liable and that if this defence is upheld in their favour, it would result in the passing of a decree against the trust property and not against them personally and what they are now seeking to do in these appeals is only to get rid of their personal liability. This contention does not appear to me to be sound. If the defence which they have raised is upheld, it would involve the dismissal of the appeal and not the passing of a decree against the trust property in their hands. Even assuming that a decree could be passed against the trust property in their hands, the decree in so far as it negatives their personal liability in that their person and personal property will not be proceeded against is a decree which will be passed in their favour not as trustees but in a different capacity and therefore it can-

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not be said that it is incapable of valuation. If the appellants had been sued as trustees and a decree had been passed against them personally and also against the trust property in their hands and an appeal was preferred against the said decree on the ground that they could not be rendered liable personally in the sense that they could not be arrested in execution of the decree, it may be urged that it is not possible to estimate the liability they are seeking to get rid of. But the case here is different and I do not propose to examine the soundness of this view. Both the cases on which Mr. Viswanatha Aiyar relied are distinguishable on the facts of those cases and it is not necessary to canvass the correctness or otherwise of those decisions. In *Jagannath* v. *Laxmi Bai*[1], a decree was passed against the defendant personally though he was sued as the heir of the original debtor. The defendant did not dispute the liability of the property which came into his hands after the death of the debtor but contended that he was not liable to be proceeded against in the sense that he could not be arrested in execution of the said decree nor the property which he owned and possessed, apart from the property which he inherited from the debtor, is liable to be proceeded against. Murphy, O.C.J., took the view that as the assets in that case were sufficient to enable the decree-holder to recover the full amount due, it was not possible to estimate the money value of the liability which would remain after the exhaustion of the decree-holder's remedy against the said assets. This case therefore is distinguishable from the present appeals. *Bulaqi Das* v. *Lal Chand*[2], is also a similar case where a person admitted his liability in respect of his share in the joint family property but disputed the personal liability in respect thereof.

The view of the learned Master that the appellants should pay *ad valorem* court-fee is sound and I therefore confirm his decision. Time six weeks for payment of court-fee from today.

S. V. V. *Reference answered against appellants.*

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1. (1934) I.L.R. 59 Bom. 439.
2. A.I.R. 1934 Lah. 865.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—LORD ROMER, SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

Radhakissen Chamaria and others .. *Appellants**

v.

Durga Prasad Chamaria and another .. *Respondents.*

P.C.

Radhakissen Chamaria *v.* Durga Prasad Chamaria.

Civil Procedure Code (V of 1908), O. 21, rr. 2 and 53 (3)—Person attaching decree in favour of his judgment-debtor—Whether entitled to adjust the attached decree by accepting a smaller amount—Public Demands Recovery Act (Bengal Act III of 1913), S. 19.

The income-tax authorities having obtained a certificate under the Bengal Public Demands Recovery Act (Bengal Act III of 1913) for arrears of tax attached a decree passed in favour of the assessee and applied under S. 19 of the Act for its execution. The income-tax authorities having previously entered into a compromise with the assessee's judgment-debtors by which they accepted an amount lower than that due under the decree in full settlement, the judgment-debtors applied for entering up satisfaction of the decree. The assessee contended that the attaching decree-holder had no power to adjust the decree by acceptance of any amount less than the exact dues under the decree and that the adjustment was collusive.

Held, an attaching decree-holder is a representative of the holder of the attached decree only by a legal fiction and that too for the purpose of lawfully executing the decree; he is in no sense an assignee of the rights under the decree and hence has power only to enforce the decree by process of the Court and of satisfying his own decree out of the proceeds of such execution. He has no power to adjust the decree so as to cause prejudice to the holder of the attached decree, for example, by accepting a smaller sum than was due under the attached decree.

Anganna Reddi v. *Subbaraya Chettiar*, (1930) 59 M. L. J 225: I.L.R. 53 Mad. 796, approved.

Case-law discussed.

Appeal from the judgment of the High Court, Fort William in Bengal dated 19th April, 1935 (Nasim Ali and Mitter, JJ.) setting aside the order of the Sub-Judge, 1st Court, Howrah, dated 28th January, 1935.

The necessary facts and statutory provisions are set out in their Lordships' judgment.

L. P. E. Pugh and *J. M. Pringle* for Appellants.

W. W. K. Page and *W. Wallach* for Respondents.

3rd June, 1940. Their Lordships' judgment was delivered by

Mr. M. R. Jayakar.

MR. M. R. JAYAKAR.—The question for decision in this appeal is whether the holder of a certificate under the Bengal Public

*P.C. Appeal No. 71 of 1938. Bengal Appeal No. 23 of 1937. 3rd June, 1940.

P.C.

Radhakissen Chamaria v. Durga Prasad Chamaria.

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Demands Recovery Act (Bengal Act III of 1913) who has attached a decree passed in favour of his judgment-debtor and has applied under S. 19 of the Act for its execution, is competent, as the representative of the holder of the attached decree, to adjust such decree with the judgment-debtors thereof for a sum smaller than the amount of the decree. The statutory provisions requiring construction in this appeal are contained in O. 21, rr. 2 and 53, Civil Procedure Code (Act V of 1908) and the said S. 19 of the said Act. O. 21, r. 2 is in these terms:

"(1) Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified, and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly.

(3) A payment or adjustment which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree."

O. 21, r. 53 is in these terms:

"(1) Where the property to be attached is a decree, either for the payment of money or for sale in enforcement of a mortgage or charge, the attachment shall be made, (*a*) if the decrees were passed by the same Court, then by order of such Court, and (*b*) if the decree sought to be attached was passed by another Court, then by the issue to such other Court of a notice by the Court which passed the decree sought to be executed, requesting such other Court to stay the execution of its decree unless and until—(i) the Court which passed the decree sought to be executed cancels the notice, or (ii) the holder of the decree sought to be executed or his judgment-debtor applies to the Court receiving such notice to execute its own decree.

(2) Where a Court makes an order under cl. (*a*) of sub-r. (1) or receives an application under sub-head (ii) of cl. (*b*) of the said sub-rule, it shall, on the application of the creditor who has attached the decree or his judgment-debtor, proceed to execute the attached decree and apply the net proceeds in satisfaction of the decree sought to be executed.

(3) The holder of a decree sought to be executed by the attachment of another decree of the nature specified in sub-r. (1) shall be deemed to be the representative of the holder of the attached decree and to be entitled to execute such attached decree in any manner lawful for the holder thereof.

(4) Where the property to be attached in the execution of a decree is a decree other than a decree of the nature referred to in sub-r. (1), the attachment shall be made by a notice by the Court which passed the decree sought to be executed, to the holder of the decree sought to be attached, prohibiting him from transferring or charging the same in any way; and where such decree has been passed by any other Court, also by sending to

P.C.

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Mr. M. R. Jayakar.

such other Court a notice to abstain from executing the decree sought to be attached until such notice is cancelled by the Court from which it was sent.

(5) The holder of a decree attached under this rule shall give the Court executing the decree such information and aid as may reasonably be required.

(6) On the application of the holder of a decree sought to be executed by the attachment of another decree, the Court making an order of attachment under this rule shall give notice of such order to the judgment-debtor bound by the decree attached, and no payment or adjustment of the attached decree made by the judgment-debtor in contravention of such order after receipt of notice thereof, either through the Court or otherwise, shall be recognized by any Court so long as the attachment remains in force."

S. 19, Public Demands Recovery Act is as follows:

"(1) The attachment of a Civil Court decree for the payment of money or for sale in enforcement of a mortgage or charge shall be made by the issue to the Civil Court of a notice requesting the Civil Court to stay the execution of the decree unless and until: (i) the certificate officer cancels the notice, or (ii) the certificate-holder or the certificate-debtor applies to the Court receiving such notice to execute the decree.

(2) Where a Civil Court receives an application under cl. (ii) of sub-S. (1), it shall, on the application of the certificate-holder or the certificate-debtor, and subject to the provisions of the Civil Procedure Code, 1908, proceed to execute the attached decree and apply the net proceeds in satisfaction of the certificate.

(3) The certificate-holder shall be deemed to be the representative of the holder of the attached decree, and to be entitled to execute such attached decree in any manner lawful for the holder thereof."

Appellants 1 and 2 are brothers and respondent 1 (hereinafter called "the respondent") is their step-brother. Appellant 3 is the mother of appellants 1 and 2. On 21st June, 1923, the respondent brought a suit (No. 61 of 1923) in the Court of the Additional Subordinate Judge of Howrah against the appellants to recover Rs. 11,03,063 odd. On 19th April, 1926, the suit was decreed on a compromise, on terms that the appellants paid to the respondent Rs. 8,61,000, together with interest thereon and certain expenses, out of which Rs. 4,25,000 and a sum of money in the hands of the receiver in the suit were to be paid immediately and the balance in eighteen monthly instalments of Rs. 35,000 each. The payments were made by appellant 3 as agreed, but the respondent, instead of fulfilling the obligation imposed by O. 21, r. 2 (1) of certifying such payments to the Court, applied for execution of the compromise decree, ignoring the payments made up to that time. The appellants thereupon applied to have the said payments recorded as certified under O. 21, r. 2 (2); but the Court, by judgment dated 25th January, 1928, held that the application, save as

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regards three instalments (totalling Rs. 1,05,000) paid within ninety days of the date of the application, was barred by limitation.

In March, 1933, the income-tax authorities found the respondent to be liable for a sum of Rs. 3,86,000 for arrears of income-tax and filed a requisition before the certificate officer of Howrah, under the provisions of the said Public Demands Recovery Act, for the recovery of the said amount. The certificate officer duly issued a certificate against the respondent for the said amount and in execution thereof, on 1st April, 1933, he attached the said compromise decree under the said S. 19, the amount shown on the face of the said decree as being then due to the respondent thereunder being about Rs. 3,32,373. On 17th March, 1934, the Secretary of State for India, respondent 2 herein, to whom the said amount of income-tax was due, applied, under O. 21, r. 53, and under S. 19 of the said Act, to the first Subordinate Judge of Howrah for execution of the compromise decree. The respondent, as the original decree-holder, was joined as a party to such proceedings. The Subordinate Judge thereupon directed notice to issue on the appellants and the respondent to show cause why the execution proceedings should not be carried on as applied for by respondent 2.

On 21st June, 1934, the appellants showed cause by filing the present application, in which they alleged that the major part of the money due under the compromise decree had been already paid, that they had approached the certificate officer for adjustment of the compromise decree and contested before him the amount outstanding under it and made certain submissions in regard to it; that the certificate officer thereupon made inquiries and agreed to adjust the decree and accept Rs. 1,60,000 in full satisfaction of the amount due under it, provided that the money was paid at once, that the appellants forthwith made payment of the Rs. 1,60,000. They therefore prayed that the adjustment and full satisfaction of the compromise decree be recorded and the application of respondent 2 for execution thereof be dismissed.

On 27th June, 1934, the respondent, in pursuance of the notice served upon him as stated above, showed cause in a substantive application, urging certain contentions which gave rise to a case heard together with the present one and decided

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against the respondent in the first Court and not pressed on appeal to the High Court. It is therefore unnecessary to consider this part of the case. On 30th July, 1934, a further petition of objection was filed by the respondent in opposition to the appellants' application for recording the adjustment of the compromise decree. He urged in this application that the amount due under the compromise decree was more than Rs. 3,60,000, that, under the law, an attaching decree-holder had power only to execute the attached decree, but not to adjust it by acceptance of any amount less than the exact dues under the decree and that the adjustment appeared to be a collusive transaction between the appellants and respondent 2.

On 28th January, 1935, the Subordinate Judge gave his judgment. He held that respondent 2 had in fact accepted the sum of Rs. 1,60,000 in full satisfaction of the compromise decree, that the effect of the said S. 19 read with the said r. 53 of O. 21, was to place the attaching creditor in the same position as the decree-holder for all purposes and that respondent 2 was therefore within his rights when he, through his agent the certificate officer, granted full satisfaction of the compromise decree. He further held that the question whether the said adjustment was brought about by collusion, as alleged by the respondent, was outside the scope of the proceedings before him. He therefore allowed the appellants' application and directed that the adjustment and full satisfaction of the compromise decree be recorded and the execution case dismissed as on full satisfaction.

The respondent appealed to the High Court. Nasim Ali and R. C. Mitter, JJ., heard the appeal and, on 9th April, 1937, Nasim Ali, J., delivered the judgment of the Court. He agreed with the Subordinate Judge that respondent 2 had adjusted the compromise decree. The real question for determination was, he said, whether respondent 2, as the attaching creditor of the compromise decree, had the right at law to adjust it at the date of the adjustment in the manner alleged by the appellants. The learned Judge observed that as the compromise decree was not passed in his favour, he was not a "decree-holder" within the meaning of O. 21, r. 2; that on a proper construction of r. 53 of the said order and S. 19 of the said Act, the meaning of the words "representative of the holder of the attached decree," occurring in both these provisions, was limited by the words immediately following and that the rule meant that the attaching

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decree-holder was "deemed to be" such representative for the limited purpose of executing the decree, that is, enforcing it by process of the Court and of satisfying his own decree out of the proceeds of such execution. He was not a representative of the original decree-holder for all purposes. Such a construction of the rule, he thought, would seriously prejudice the original decree-holder by enabling the attaching decree-holder to accept, in satisfaction of the attached decree, a lesser amount than was due under it and thereby keep his claim under his own decree alive to the extent of the balance. The learned Judge further observed that the provisions of S. 146, Civil Procedure Code, did not make any difference. His conclusion was that respondent 2 had no right to adjust, in the manner pleaded by the appellants, the compromise decree attached by him and that the adjustment could not therefore be recorded under O. 21, r. 2. The result was that the appeal was allowed and the appellants' application for recording the adjustment and satisfaction of the decree was dismissed. Mitter, J., agreed with these conclusions. A decree was drawn accordingly.

From this judgment and decree, this appeal has been preferred to His Majesty in Council. In their Lordships' opinion, the question must primarily depend upon the interpretation of cl. 3 of the said S. 19, taken in the light of a similar provision occurring as cl. 3 of O. 21, r. 53. This latter clause is a new provision, introduced for the first time in the present Code of Civil Procedure (Act V of 1908). It was apparently intended to give effect to decisions which arose under the old Civil Procedure Code (Act XIV of 1882) on the interpretation of the term "representatives," occurring in S. 244 (*c*) of that Code. The latter section is the predecessor of S. 47 of the present Code and provides that certain questions mentioned therein, arising between parties to the suit in which the decree was passed and their "representatives," shall be determined by the Court executing the decree and not by a separate suit. The question arose whether an attaching decree-holder was a representative within the meaning of S. 244 (*c*) and in a series of decisions it was held that he was a representative for the purposes of S. 244: *see*, for example, *Sah Man Mull* v. *Kanagasabapathi*[1] and *Krishnan* v. *Venkatapathy Chetty*[2]. It is thus clear from this antecedent history of cl. 3 of r. 53 that the

1. (1892) I.L.R. 16 Mad. 20. 2. (1905) I.L.R. 29 Mad. 318.

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representative character of the attaching decree-holder is limited to matters in execution of the decree.

This is also the inference suggested by the context of cl. 3. Immediately following the words "representatives of the holder of the attached decree," occurring in cl. 3 are the words "and to be entitled to execute such attached decree in any manner lawful to the holder thereof." The words "deemed to be," which occur in the clause, suggest a legal fiction of a two-fold character with regard to the attaching decree-holder: (1) the law regards him as the representative of the holder of the attached decree, and (2) as a consequence of this fiction, the law clothes him with the same rights as the decree-holder has to execute the decree against the original judgment-debtor. Two things are clear from this context, that he is a representative only by a legal fiction and that too for the purpose of lawfully executing the decree, that is, enforcing it by process of the Court and satisfying his own decree out of the proceeds of such execution. Similarly, the clause immediately preceding cl. 3 refers to the right of the attaching creditor to "proceed to execute the attached decree and apply the net proceeds in satisfaction," etc. As the analogy only arises by legal fiction, it must be limited to the purposes indicated by the context, and cannot be given a larger effect.

In their Lordships' opinion, the context as explained above is vital, and indicates that the intention of the Legislature was not to clothe the "representative" with all the rights of the holder of the attached decree in the sense of making him an assignee of such rights. This view gains further support from the other wording of r. 3. It does not say that the attaching decree-holder will be "deemed to be" the "holder of the attached decree." This would certainly have been a simpler way of stating the intention of the Legislature if it was to clothe the attaching decree-holder with all the rights of the holder of the attached decree as if he was his assignee. If the certificate-holder in S. 19 or the attaching decree-holder in r. 53 were intended to be the full assignees of the rights of the certificate-debtor or of the holder of the attached decree, one would not expect to find the latter's rights preserved for certain purposes, as they are in cl. (1) (ii) of S. 19 and cl. (1) (*b*) (ii) of r. 53. These clauses provide for the right of the certificate-debtor or of the holder of the attached decree to intervene and

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apply to the Court to execute its decree, under certain circumstances. Cls. 4, 5 and 6 of O. 21, r. 53 are not reproduced in the provisions of S. 19, Public Demands Recovery Act, and there is in that Act a later section, No. 26, which provides that the balance of the amount recovered by attachment shall be paid to the certificate-debtor.

For all these reasons, it appears to their Lordships that the intention of the Legislature was to make the certificate-holder, by a legal fiction, the representative or agent of the holder of the attached decree for the limited purpose of executing the decree, that is, enforcing it by process of the Court and of satisfying his own decree out of the proceeds of such execution. He was not to be an assignee of the decree, so as to acquire all the rights of the original decree-holder in the decree. Their Lordships are in agreement with the observations in *Anganna Reddi v. Subbaraya Chettiar*[1], where a distinction is drawn between the assignee of a decree and the attaching decree-holder acting as the representative of the original decree-holder under cl. 3 of r. 53.

The view of the High Court below as regards the serious prejudice which will be caused to the holder of the attached decree, if the opposite interpretation were accepted, has considerable force. There is no sound reason shown for placing in the hands of the attaching decree-holder a power to adjust the decree so as to cause prejudice to the holder of the attached decree, for example, by accepting a smaller sum than is due under the attached decree, crediting such sum in partial satisfaction of his own decree and claiming from his own judgment-debtor the balance which may be due. The facts which are beyond dispute in this case illustrate how the prejudice can arise. The amount recoverable under the attached decree was over Rs. 3,60,000. The attaching certificate-holder settled this for a much smaller amount of Rs. 1,60,000 in full satisfaction of that decree and credited only this amount in part satisfaction of his certificate debt of Rs. 3,60,000 retaining his right to claim the balance from the respondent, who, but for the adjustment, was entitled to receive under the attached decree the entire sum of Rs. 3,60,000.

In the course of the appellants' argument, their Lordships' attention was invited to a few rulings which may be briefly

1. (1930) 59 M.L.J. 225: I.L.R. 53 Mad. 796 at 799.

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noticed. They do not support the appellants' contention. In *Unao Commercial Bank, Ltd.* v. *Mohar Gobind Rai*[1], no question arose about the power of the attaching decree-holder to adjust the attached decree to the prejudice of his judgment-debtor. In that case, the simple question was whether the attaching decree-holder was a representative of the original decree-holder (his own judgment-debtor), for recovering out of Court the amount of the decree under the provision of O. 21, r. 1 (*b*). It was argued that the power to receive such payment out of Court resided, under the terms of the said rule, in the decree-holder only. This argument did not prevail and it was held that under cl. 3 of r. 53 of the said Order, the attaching creditor was a representative of the decree-holder and, as such, he was entitled to take the money out of Court and certify payment in the same manner as the decree-holder himself could do.

The facts relating to the case in *Ramcharan Singh* v. *Jangbahadur Singh*[2] do not show that what was called in that case an adjustment of the decree between the attaching decree-holder and the original judgment-debtor was for any amount less than the amount of the attached decree, so as to cause prejudice to the holder of that decree. The only light thrown on this question in the report of the proceedings is in certain remarks of the High Court, when it remanded the case for the purpose of determining whether in arriving at the adjustment there was a conspiracy, as alleged by the holder of the attached decree, between the original judgment-debtors and the attaching decree-holder. There is nothing to show how this issue was subsequently determined. There is no doubt that, as held in that ruling, an adjustment between the attaching decree-holder and the original judgment-debtor does not fall within the prohibition contained in cl. 6 of O. 21, r. 53, but that does not meet the point which has been raised in this appeal.

The ruling next relied upon is *Brojo Nath Saha* v. *Gaya Sundari Dassya*[3]. This case arose under the old Civil Procedure Code of 1882, in which, as stated above, there was no provision like the one contained in the present cl. 3 of O. 21, r. 53. The point which arose in that decision was whether a petition in which the original judgment-debtor agreed to pay towards the

1. A.I.R. 1930 All. 659.
2. A.I.R. 1924 Pat. 696.
3. (1906) 6 C.L.J. 141.

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decree a certain sum to the attaching decree-holder constituted an acknowledgment of liability, which, under S. 19, Limitation Act, operative at that time, gave rise to a new period of limitation. The question whether the compromise between the attaching decree-holder and the original judgment-debtor was a valid one was not agitated in that case. Reliance was placed on the fact that the acknowledgment was not addressed to the holder of the attached decree so as to save limitation. In answer to this contention, it was pointed out that the attaching decree-holder was a representative of the holder of the attached decree for the purpose of the acknowledgment and further, that under the Explanation to S. 19, Limitation Act, it was a sufficient acknowledgment for the purpose of saving limitation, although it was not addressed to the person entitled. The case throws no light upon the point now under consideration.

Similarly irrelevant, is the case in *Sesha Aiyar* v. *Tinnevelly Sarangapani Sugar Mill Co., Ltd.*[1] In that case, the question arose under the Companies' Act (VI of 1882) and it was held that the Court would recognise the attaching decree-holder as a representative of the person holding a decree against the company, for the purpose of proving, in the course of liquidation, for the decretal debt in the name of the decree-holder and receiving and applying the dividends payable to him in satisfaction of his own judgment debt. Certain remarks of Bacon, V.C., in *Chatterton* v. *Watney*[2] were relied upon. But they do not affect the question raised in this appeal. The judgment in that case proceeds to explain the principle adopted in the English Judicature Act and in the Common Law Procedure Act, regulating what are called garnishee orders. The following observations contained in the judgment were relied on:

> "If the judgment-debtor has the means of paying the judgment-debt by getting in debts which are due to him, he shall no longer have the power himself of getting in the debts, but they shall be the property of the judgment-creditor to the extent of the amount for which he has recovered judgment."

The principle underlying these observations has found qualified acceptance in the several clauses of O. 21, r. 53; but there is nothing in these remarks which can lend support to the present contention of the appellants. Reference was made in the argument of the appellants' counsel to the circumstances that

1. (1907) I.L.R. 30 Mad. 533.
2. (1881) 16 Ch. D. 378.

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in this case the attaching decree-holder's claim was larger than the amount of the attached decree. That, in their Lordships' opinion, will make no difference to the principle involved in this case. Their Lordships are therefore in agreement with the view of the High Court that respondent 2 had no right to adjust the attached decree in the manner pleaded by the judgment-debtor and that the adjustment cannot be recorded under O. 21, r. 2. There is, however, one matter in which the view of the High Court requires correction. It was contended before the High Court, that the interpretation which the High Court and the Board have placed on the material sections would have the effect of depriving the judgment-debtor of his right to pay off the judgment-debt amicably out of Court and thereby prevent execution. The High Court appears to have been of opinion that it would have this effect and that the remedy lay in the judgment-debtor paying the decretal amount into Court, under O. 21, r. 1 (a). Their Lordships do not share this view. They are of opinion that the receipt by the attaching decree-holder of the decretal amount out of Court amicably is only a mode of executing the decree. In the conclusion of his argument, the appellants' counsel urged that, irrespective of the merits of their appeal, the payment of Rs. 1,60,000 which was admittedly accepted by the second respondent in partial satisfaction of his claim, ought to be certified by the certificate-holder and recorded by the Court under the provisions of O. 21, r. 2. Under ordinary circumstances, their Lordships would perhaps have taken a strict view of this contention and negatived it on the ground that, in the appellants' petition of 21st June, 1934, which initiated the present proceedings, they asked only for an order recording the alleged adjustment and satisfaction of the decree and the dismissal, on that account, of respondent 2's application for execution. On perusing the appellants' petition, it is clear that it was not their intention to ask the Court to record the payment of the Rs. 1,60,000 as a *pro tanto* payment of the decree. O. 21, r. 2 relates to the certifying and recording of (1) a payment, or (2) an adjustment.

The appellants chose the latter course and did not rely upon the payment of Rs. 1,60,000 as a partial payment of the decree. Their case was that there was a complete adjustment and satisfaction of the entire decree. Although this is the strict view of the appellants' petition construed as a pleading, their Lordships

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cannot ignore the previous conduct of the respondent in omitting to fulfil the obligation imposed by O. 21, r. 2 (1) of certifying payments of very large amounts made by appellant 3, from time to time in satisfaction of the compromise decree. Ignoring these payments, the respondent applied for execution of the decree. Under these circumstances, it appears to their Lordships necessary to protect the appellants from a possible repetition of such behaviour. They will therefore direct that the payment of Rs. 1,60,000 made under the circumstances mentioned in the lower Courts' judgments, should be certified and recorded under the terms of O. 21, r. 2. This order will, of course, be without prejudice to the rights which any party may have in the matter on grounds to which their Lordships' attention has not been called. This direction, however, is in the nature of an indulgence shown to the appellants and will make no difference in the ultimate fate of their appeal.

Their Lordships are therefore of opinion that the appeal should be dismissed and the decree of the High Court confirmed, subject to the direction about certifying and recording the amount of Rs. 1,60,000. The appellants will pay the costs of the first respondent; the second respondent will bear his own costs. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for Appellants: *A. J. Hunter & Co.*

Solicitors for Respondents: *W. W. Box & Co.* and *The Solicitor, India Office.*

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HORWILL.

Mrs. Ida L. Chambers and others .. *Appellants* (Defendants)*

v.

Kelland Huxford Chambers carrying on business at Lecot's Buildings, Errabalu Chetty St., Madras. *Respondent (Plaintiff).*

Ida L. Chambers v. Kelland Huxford Chambers.

Will—Testator making bequests—Amounts in account-books credited to relatives—Gift of movable property when legally completed—Requirements

*O. S. A. No. 29 of 1939. 20th August, 1940.

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of law to be satisfied for creation of a trust—S. 6 of the Indian Trusts Act (II of 1882).

A testator, the head of a big business firm, was not in a position to make gifts in cash but he had large assets, which were represented by land, buildings and stock in trade. What he purported to give to his wife was credited to her name in the books of the company. On the questions (1) whether there was a valid and completed gift of the amount mentioned in the account books and (2) whether, if there was no gift, there was a valid declaration of a trust in respect of this sum,

Held, that a gift of movable property unless it is effected by a registered deed, can only be completed by the delivery of the property to the donee. There is no difference here between Indian and English law.

That the testator in this case had the intention of making a gift was beyond question, but the entries in the books did not complete the gifts and what the law requires for completion was never carried out.

Milroy v. *Lord*, (1862) 4 De G. F. & J. 264: 45 E. R. 1185, relied on.

Heartley v. *Nicholson*, (1874) 19 Eq. 233 and *Mancktershaw* v. *Ardeshir*, (1908) 10 Bom. L.R. 1209, followed.

(2) *Held, further*, that the words of a letter produced in evidence, namely, "This sum is entirely in the nature of a personal gift, etc.," did not create a trust. In fact the letter could only be read as evidencing an intention to create a gift. It could not savour of a declaration of trust and from the evidence there was nothing in the testator's subsequent conduct or acts which could be regarded as showing an intention to create a trust or constitute himself a trustee. For the creation of a trust the requirements of S. 6 of the Indian Trusts Act must be fulfilled.

Case-law discussed.

Appeal from the judgment and order of the Hon'ble Mr. Justice Gentle dated the 28th day of April, 1939 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 75 of 1939.

T. R. Venkatarama Sastri, R. N. Aiyangar and *C. Govindaraja Aiyangar* instructed by *King and Partridge* for Appellants.

O. T. G. Nambiar for Respondent.

The Court delivered the following

Leach, C.J.

JUDGMENTS. *The Chief Justice.*—The appeal arises out of an originating summons issued on the Original Side of this Court at the instance of the respondent. There are two questions involved. The first question is whether there was a valid gift of movable property. The second question is whether a trust was created, if there was no gift. The respondent is the sole executor and trustee of the will and codicil of Ethel Mary Chambers, deceased, who was the first wife of George Alexander Chambers, deceased, who was the sole proprietor of a business known as The Chrome Leather Company. It will be convenient to refer to Ethel Mary Chambers as the testatrix and to

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George Alexander Chambers as the testator. The testatrix died on the 23rd March, 1924 and the testator on the 16th November, 1937. The first appellant is his third wife and she and the second and the third appellants are the executors and trustees of his will and codicil. The fourth appellant is the son of the testator by his second wife, who predeceased him. The Chrome Leather Company had a leather business which was carried on some 12 miles from Madras, and the testator invested a large amount of capital in it. The balance sheet as at the 31st March, 1920 (which for the purposes of this case has been accepted as being correct) showed that the capital stood at Rs. 16,75,892-11-10. Nearly the whole of this amount, however, represented the value of buildings, land, plant, machinery and stock-in-trade. The cash in hand was in fact only Rs. 538-15-2. In the years 1917 and 1919 the testator caused certain entries to be made in the books of the Chrome Leather Company crediting the testatrix, their son (the respondent) and their two daughters, Phyllis Dora Chambers (now Mrs. P. Michell) and Sheila Florence Chambers with certain sums which were debited to his capital account. Separate accounts in the names of the testatrix, the respondent, and the two daughters were opened in the books and in these accounts the credits were entered.

On the 25th July, 1919, the testator wrote to the Chrome Leather Company instructing the firm to make such additions to the amounts standing to the credit of his wife and his children in the books as might be required to place 'the capital at their credit in the firm' at the following figures: The testatrix Rs. 2,00,000, the respondent Rs. 40,000, and the daughters Rs. 40,000 each. The letter proceeded:

"Please note also that as and from 1st April last these sums at their respective credits are to bear interest at 6 per cent. payable half-yearly and when the Chrome Leather Company is converted (either with or without the business of Chambers and Company) into a limited liability company preference shares at 6 per cent. with interest payable half-yearly are to be issued for the sums at their credit as stated above or such larger or lesser sums as may then be at their credit should they so desire. You have hitherto paid interest at 8 per cent. on the Rs. 45,000 which Mrs. Chambers has had with the firm, also on Rs. 15,000 which Mrs. Michell had. These payments may be deducted from the interest due on the 1st October, 1919, on the increased capital bearing interest at 6 per cent."

The business of Chambers and Company also belonged to the testator. In this letter the testator instructed his firm to write to the testatrix, his son and his daughters informing them

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of the amounts standing to their credit in the firm's books. These letters were written and in each it was said:

"This sum is entirely in the nature of a personal gift from Mr. Chambers to yourself and will bear interest at the rate of 6 per cent. per annum payable half-yearly commencing from the 1st of April last, *viz.*, 1919.

We wish you to understand that so long as the Chrome Leather Company remains a private company you will not be entitled to withdraw more than 10 per cent. of the capital. In the event of this company being converted into a limited liability company, either with or without the business of Chambers and Company, you will be issued 6 per cent. preference shares to the value of the amount standing at your credit at that date. These preference shares will be subject to the same restrictions, namely, you will not be permitted to place these shares on the market to a greater extent than 10 per cent. annually."

The testator made similar allocations to other relations but it is not necessary to refer to them. His object in crediting the members of his family with these amounts appears from a letter which he wrote at a later date. The object was to ensure that his relations benefited as the result of his life's work and to prevent the Government of India 'grabbing' death duties on the whole of his estate.

On the 27th September, 1919, the testator instructed the Chrome Leather Company to place a further sum of Rs. 1,00,000 to the credit of the testatrix. This sum was re-transferred to the testator's capital account on the 3rd March, 1924, as the result of a letter which the testatrix wrote to the Company, no doubt written at the behest of the testator. The testatrix was then in the south of France. She sailed with the testator for India shortly afterwards but died at Colombo. Before she died the testatrix was paid in the aggregate the sum of Rs. 83,606-3-6 as interest on the sums standing to her credit in the books of the Chrome Leather Company.

By her will the testatrix bequeathed to her trustees the Rs. 2,00,000 standing to her credit after the re-transfer of Rs. 1,00,000, upon trust for the benefit of her son, her two daughters and their issue. For some months after her death interest on the Rs. 2,00,000 was credited to her account in the books of the firm, but as the result of depression in trade then prevailing the National Bank of India objected to any payment of interest until the overdraft which it had granted had been fully discharged. As the result, no further interest was credited in the accounts in respect of this sum. On or about the 3rd July, 1930, the testator caused to be opened in the books

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of his firm with effect from the 1st October, 1930, separate accounts showing the beneficiaries under the will of the testatrix as creditors and the firm as the debtor in respect of the amounts to which they were entitled according to the will of the testatrix.

In the year 1930 the testator contemplated carrying out a scheme which he had had in mind for many years of transforming the firm into a limited liability Company. When interest had ceased to be paid on the amounts standing to the credit of his relatives in the firm's books the auditors included in their statement a certificate that no interest had been allowed on these amounts and the testator was anxious that the certificate should be one without any qualification as it would affect the chances of a successful flotation of his business. The amounts were shown in the balance sheet as 'deposits' until the balance sheet for the period ending 31st March, 1923. Thereafter they were referred to as 'unsecured loans'. With the object of obtaining a clean certificate the testator sent to the respondent and the beneficiaries under the will of the testatrix draft letters to be signed and returned by them stating that interest on the amounts at their credit had not been paid for some time and waiving any claim for interest until circumstances enabled the company to make further payments. This led to correspondence with the respondent who had not merely his position as a beneficiary under the will of the testatrix to consider, but his position as a trustee under it. The whole of the correspondence which passed between the testator and the members of his family has not been included in the record, but in a letter dated 18th January, 1932, which the testator wrote to his daughter Phyllis, he said that he had been advised that as he had not received consideration for the transfers of his capital there was no legal claim against him. In the course of this letter he stated:

"I do not wish to withdraw from any undertakings I have made or promises I have given but I am certainly determined not to permit if I can prevent it any doubt to exist as to the position of my affairs when my time comes."

The same attitude was taken up by the testator in a letter dated 12th November, 1932, addressed to Messrs. Fraser and Ross, the firm's auditors. The certificate which they had then given did not meet with his approval as the qualifications had not been removed. In his letter to the auditors he said:

"Certain transfers from my capital in our books were made of my own

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free-will and I have no intention of cancelling same, but I have never received any 'loans', and there was never any consideration either given or accepted and as regards payment of interest I am under no obligation to any one."

Some days later the Rs. 2,00,000 was re-transferred to the capital account of the testator. This was, of course, done in assertion of his contention that he was under no legal obligation in respect of the allocations of capital to his relations and to avoid the auditors qualifying their certificate. When the respondent came to know of this he protested as a trustee under the will of the testatrix. The testator having died the respondent instituted the present proceedings in order that the legal position might be determined.

The present appeal is only concerned with the Rs. 2,00,000 which was credited to the testatrix in the books of the Chrome Leather Company. The first question which the Court is called upon to decide is whether there was a valid and completed gift of Rs. 2,00,000 by the testator to the testatrix. If this is answered in the negative the Court is required to say whether there was a valid declaration of trust in respect of this sum. The case was heard by Gentle, J., who held that there was no gift but that a trust had been created. I agree with the learned Judge that there was no completed gift, but I am unable to concur in his conclusion that the testator created a trust of the Rs. 2,00,000.

Before proceeding to state my reasons in detail, I wish to refer to certain of the authorities which have been quoted in argument. In *Milroy* v. *Lord*[1], Turner, L.J., pointed out that in order to render a voluntary settlement valid and effectual, the settlor must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. Lord Justice Turner proceeded:

"He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases I think go further to this

1. (1862) 4 DeG.F. & J. 264: 45 E.R. 1185.

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extent that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust."

These observations were not in complete accord with what had been said in certain earlier cases, but they have since been accepted as correctly stating the law. In that case one Thomas Medley executed a voluntary deed purporting to assign certain of his shares in a bank to one Samuel Lord to be held by him upon certain trusts for the benefit of the plaintiffs. The shares were transferable only by entry in the books of the bank; but no such transfer was ever made. Lord held a general power of attorney authorising him to transfer Medley's shares and after the execution of the settlement, Medley gave him a further power of attorney which authorised him to receive the dividends on the shares. Lord received the dividends for three years, but Medley died without the formalities required for the transfer of the shares having been completed. It was held that as it was not the intention of the settlor to constitute himself a trustee of the shares, but to vest the trust in Lord there was no valid trust of the shares created in the settlor. It was further held that no valid trust of the shares was created in Lord, for although he held a power of attorney under which he might have vested the shares in himself, he did not do so, and was not bound to do so without directions from the settlor, since he held the power only as agent for the settlor.

In *Richards* v. *Delbridge*[1], Jessel, M.R., said:

"The one thing necessary to give validity to a declaration of trust—the indispensable thing—I take to be, that the donor or grantor, or whatever he may be called, should have absolutely parted with that interest which had been his up to the time of the declaration, should have effectually changed his right in that respect and put the property out of his power, at least in the way of interest."

A decision similar to that in *Milroy* v. *Lord*[2] was given in *Heartley* v. *Nicholson*[3]. A person who was the owner of a colliery gave a share in it to his daughter and at a meeting of the shareholders this was sanctioned. Subsequently the dividend on the share purported to have been transferred was paid by the

1. (1874) 18 Eq. 11 at 13.
2. (1862) 4 De G.F. & J. 264: 45 E. R. 1185.
3. (1874) 19 Eq. 233.

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father to the daughter but the formalities required for the transfer of the share so as to give the daughter a legal title to it were not carried through. There was no doubt about the father's intention, but it was not carried into effect before he died. In these circumstances it was held that expressions in letters, the signature of a minute in the books of the company and the gift of the dividend did not amount to a declaration by the testator, nor to proof of an intention and determination on his part, that he would hold the share for the plaintiff. There was the intention to make a gift, but he had failed to carry out that intention.

There is no difference here between Indian and English law. A gift of movable property, unless it is effected by a registered deed, can only be completed by the delivery of the property to the donee. For the creation of a trust of movable property the requirements of S. 6 of the Indian Trusts Act, 1882, must be fulfilled. Before there can be a valid trust the author must indicate with reasonable certainty by words or acts (*i*) an intention on his part to create thereby a trust, (*ii*) the purpose of the trust, (*iii*) the beneficiary, (*iv*) the trust property and must transfer the trust property to the trustee, unless the trust is declared by will or the author of the trust is himself to be the trustee. *Milroy* v. *Lord*[1] was followed by the Bombay High Court in *Manchershaw* v. *Ardeshir*[2]; *Richards* v. *Delbridge*[3] and *Heartley* v. *Nicholson*[4] were there referred to with approval. Sargent, C.J., applied *Richards* v. *Delbridge*[3] and *Heartley* v. *Nicholson*[4], in *Ashabai* v. *Haji Tyab Haji Rahimtulla*[5], where it was held that the fact that the father opened an account in his books in the name of his son to which money was credited did not raise a presumption that the father intended to create a trust in favour of his son of the sums appearing in the account. The Court's attention has also been drawn to *Bai Mahakore* v. *Bai Mangla*[6], where Chandavarkar and Heaton, JJ., differed as to whether there was a trust or a gift, but I do not consider it necessary to pause to examine this case as the facts are in no way analogous to the facts in the present case.

1. (1862) 4 De G. F. & J. 264: 45 E. R. 1185.
2. (1908) 10 Bom. L.R. 1209.
3. (1874) 18 Eq. 11.
4. (1874) 19 Eq. 233.
5. (1882) I.L.R. 9 Bom. 115.
6. (1911) I.L.R. 35 Bom. 403.

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What is manifest in this case is that the testator was not in a position to make gifts in cash of the amounts standing to the credit of his various relatives. He had large assets, but they were represented by land, buildings and stock-in-trade, and what he purported to give was a share in these properties. So far as the land and buildings were concerned the gifts could only be completed by an appropriately worded and duly registered deed. He could vest a part of the stock-in-trade by registered deed or by actual delivery to the donee, but there was no registered deed and there was no delivery. Of course when moneys were paid by way of interest on the alleged gifts those moneys become completed gifts. (See *Adams* v. *Lopdell*[1].) That there was no completed gift of principal was the attitude which the testator himself took up when his right to withhold interest was questioned. That he had the intention of making gifts is beyond question, but the entries in the books did not complete the gifts and what the law requires for completion was never carried out.

On the question of the effect of the book entries the decision of the Privy Council in *Hariram Serowgee* v. *Madan Gopal Bagla*[2] has been quoted. In that case one Brijcomari carried on business on her own account and maintained account books. In 1896 she opened an account in the name of her grand-daughter. This account was continued down to the grand-daughter's death in 1904. In 1901 this account was credited with a sum of Rs. 2,00,000 and in 1903 with a further sum of Rs. 31,000. It was alleged that these were gifts to the grand-daughter by the grandmother. There was no evidence that the grand-daughter ever knew what was done by the grandmother and the account was never operated upon. Whatever was done with regard to the account was done under the direction of the grandmother. The Judicial Committee held that the accounts were themselves mere book entries and did not confer or determine rights. Whatever else they showed they did not show completed gifts to the grand-daughter. In the present case the testator's family knew all about the allocations in the books of his firm and received certain payments of interest and to that extent the cases differ, but it does not follow that the book entries in the present case confer or determine rights. I have indicated that in my opinion they do not.

1. 25 Irish Rep. 311. 2. (1928) 57 M.L.J. 581 (P.C.).

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In holding that a trust had been created the learned Judge says that the testator has used language which, taken in connection with his acts and conduct, shows a clear intention on his part to divest himself of the beneficial interest in the sum of Rs. 2,00,000 and to exercise dominion and control over it exclusively in the character of a trustee. The learned Judge has read the letter of the Chrome Leather Company of the 6th August, 1919, to the testatrix as a declaration of trust and it is evident that it is on this letter that he has largely based his decision. I am unable to read the letter in the same way. In fact, in my opinion, the letter can only be read as evidencing an intention to create a gift. Having said "This sum is entirely in the nature of a personal gift" the testator adds restrictions with regard to realisation of the gift. I cannot see anything in the letter which savours of a declaration of trust and in my opinion there is nothing in the testator's subsequent acts or conduct which can be regarded as showing an intention to create a trust or to constitute himself a trustee. Some of his subsequent acts point positively in the opposite direction. If the transaction represented anything it represented a gift not the creation of a trust, but I have said sufficient to indicate that in my opinion the transaction cannot be regarded as a gift because neither the testatrix nor her beneficiaries ever received the property and there was no registered instrument.

For these reasons I hold that there was no valid gift of the Rs. 2,00,000 to the testatrix and no trust created in respect of this sum. In my opinion the appeal should be allowed with costs here and below and a cértificate for two counsel granted.

Horwill, J.

Horwill, J.—I agree. *Appeal allowed.*

K. C.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE PATANJALI SASTRI.

F.B.

Seeta Ramanjaneyulu v. Ramayya.

Gunturu Seeta Ramanjaneyulu, minor by mother and guardian Seetamma .. *Appellant** (*Petitioner*)

v.

Vishnubhotla Ramayya and others .. *Respondents* (*Respondents*).

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*A.A.A.O. No. 181 of 1938. 30th September, 1940.

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Seeta Ram-anjaneyulu *v.* Ramayya.

Civil Procedure Code (V of 1908), O. 21, r. 90, Proviso 1 (Madras)—Whether ultra vires—*Application for setting aside sale—Order requiring security before admitting application—Necessity for giving opportunity to applicant of showing cause before requiring security.*

The first proviso to O. 21, r. 90, Civil Procedure Code, framed by the Madras High Court as it stood in 1937 was *intra vires* the rule-making powers of the High Court. In re *O. N. R. M. M. Chettiar Firm* v. *The Central Bank of India, Ltd.*, (1937) Rang. L.R. 268 (F.B.), distinguished.

Where a person applies under O. 21, r. 90 for setting aside a sale in execution of a decree on the ground of material irregularity or fraud, an opportunity must be given to the applicant of showing cause before an order, requiring security before admitting such application, is passed against him. The subsequent amendment of O. 21. r. 90, Proviso 1 has put this beyond controversy.

Appeal against the order of the District Court of Kistna at Masulipatam dated 26th January, 1938 and passed in A. S. No. 236 of 1937—E. A. No. 778 of 1937, District Munsif Court, Bandar, in O. S. No. 834 of 1933, District Munsif Court, Gudivada.

B. V. Ramanarasu for Appellant.

A. Lakshmayya for Respondents.

The judgment of the Court was delivered by

Leach, C J.

The Chief Justice.—On the 9th of May, 1934, the first respondent obtained a money decree in the Court of the District Munsif of Masulipatam against the third respondent and his son, the appellant, who is a minor. So far as the appellant was concerned, the decree was limited to his share in the family property and the assets of the estate of his deceased grandfather in his hands. On the 15th of March, 1937, 19·26 acres of land were sold by the Court in execution of this decree. This land had been attached by the decree-holder on the ground that it represented joint family property. The second respondent became the purchaser on the 14th April, 1937. The appellant then filed an application in execution proceedings asking that the sale be set aside. He asserted that the property sold was his self-acquired property, that no notice had been issued to him as required by O. 21, r. 22 of the Code of Civil Procedure and that there had been material irregularity in the publication of the sale, the result of which was that the property had been sold at considerably less than its real value. This application purported to be made under the provisions of Ss. 47 and 151 and O. 21, r. 90 of the Code of Civil Procedure. The Court has not been informed of the reason for invoking S. 151, but it is said that

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S. 47 was invoked because under that section the appellant was entitled to an inquiry into his allegations that the property belonged to him and that the sale was bad by reason of notice not having been issued under O. 21, r. 22. O. 21, r. 90 applied in so far as the appellant sought to obtain the setting aside of the sale on the ground of material irregularity in its publication. The petition was not in order and it was returned to the appellant to remedy the defect. This was done and the petition was re-presented on the 21st June, 1937. On the 26th June, 1937, the Court ordered the appellant to enter into a security bond in the amount for which the property had been sold, namely, Rs. 1,450, and directed that the security bond should be filed by the 6th July, 1937. In requiring security to be furnished the Court acted under the provisions of O. 21, r. 90. It is not disputed that before this order was passed the appellant had an opportunity of being heard. The security was found to be unsatisfactory, and on the 19th August, 1937, the Court ordered the appellant to deposit in Court the amount in cash if he wished to proceed with his application. The appellant failed to deposit the amount within the time allowed by the Court—the time had been extended to the 23rd September, 1937—and in consequence the District Munsif dismissed his application. The appellant then appealed to the District Judge of Kistna. The District Judge, while agreeing with the dismissal of the application for default so far as the application related to O. 21, r. 90, pointed out that the Court should nevertheless have proceeded with the application so far as it came under the provisions of S. 47, but instead of directing the District Munsif to hear and decide that part of the application, the District Judge indicated that the proper course would be for the appellant to file a separate application under S. 47 and limit it to his allegations that the property was self-acquired and that the sale was bad because of the failure to give notice under O. 21, r. 22. The appellant has now appealed to this Court with regard to (*a*) the dismissal of his application for default in making the required deposit and (*b*) the requirement of the District Judge that he should file a separate application in so far as he claims under S. 47.

It has been accepted by the learned advocate for the second respondent, who alone is concerned with this appeal, that the District Judge should not have directed the appellant to file a fresh application under S. 47, and to that extent he agrees that

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the appeal should be allowed. But he says that no second appeal lies from that part of the decree which relates to the dismissal of the application for failure to find security under O. 21, r. 90. That contention must be accepted. A second appeal will not lie on that question, although we think that the present appeal so far as it relates to the provisions of O. 21, r. 90 may be treated as an application in revision, because, if the District Munsif had no power to require security to be given, his insistence on it would amount to a wrongful exercise of jurisdiction. Therefore we will proceed to treat the rest of the appeal as an application for revision.

At the time when the District Munsif required the appellant to furnish security, O. 21, r. 90, as amended by this Court read as follows:

"Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:

Provided that the Court may, before admitting the application, call upon the applicant either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or that realized by the sale, whichever is less, or to deposit such amount in Court;

Provided also that the security furnished or the deposit made as aforesaid, shall be liable to be proceeded against only to the extent of the deficit on a re-sale of the property already brought to sale;

Provided further that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud."

This rule has been amended since then and the nature of the amendment will be indicated presently.

The appellant contends that this rule is *ultra vires* of the powers conferred on this Court by S. 122 of the Code in that it says that the Court hearing the application may, before admitting it, call upon the applicant to furnish security. He would have it held that the decision of the Rangoon High Court in In re *O. N. R. M. M. Chettiar Firm* v. *The Central Bank of India, Ltd.*[1] has application here. In that case a Full Bench of the Rangoon High Court of which I was a member, held that O. 21, r. 90, as framed by the Rangoon High Court, was *ultra vires*. But that rule differed very materially from the corresponding

1. (1937) Rang. L.R. 268 (F.B.).

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rule of this Court. Under the Rangoon rule no application could be heard unless the applicant, on filing his application deposited the amount mentioned in the sale warrant or an amount equal to the sum realized by the sale, whichever was less. If this rule were to be enforced it meant that no one aggrieved by a sale held in execution proceedings could cross the threshold of the Court with an application for an order setting it aside as unlawful for non-compliance with the provisions of the Code, unless he brought with him in cash the amount mentioned in the sale warrant or the amount for which the property had been sold. This Court's rule as it stood even at the time of the sale did not go so far as that. The Court has full power to regulate its procedure, but that does not mean that a man may not be heard at all until security is furnished by him. Under O. 21, r. 90, as originally framed by this Court, security could be required before the application was *admitted*. That did not mean, however, that an order requiring security might be passed without hearing the person affected by the order. In fact it would be wrong of a Court to pass any such order without hearing the applicant. In order to prevent any misunderstanding as to the effect of the first proviso to O. 21, r. 90 this Court has reframed it and the proviso now reads as follows:

> "Provided that the Court may, after giving notice to the applicant, call upon him before admitting the application either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or to that realized by the sale whichever is less, or to deposit such amount in Court."

This puts it beyond all controversy that an opportunity must be given to an applicant of showing cause before an order requiring security is passed against him. Although this amendment was made subsequent to the District Munsif's order in this case, the proviso, as it then stood, should be read as giving a right to the applicant to be heard on the matter of security. That opportunity was given to the appellant and consequently he has no grievance.

His learned advocate has, however, argued that the Court has no power in any circumstances to require security to be furnished. He says that although the filing of an application may be entirely unwarranted, the Court cannot insist on security being furnished. That is an argument which we are not prepared to accept. A person has the right of being heard, but

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once he has been heard, the Court can put him on terms before allowing him to proceed further with such a matter. We hold that the rule as it stood in 1937 was *intra vires* the Court's powers and that therefore the District Munsif had power to pass the orders which he did on the 26th June and on the 19th August, 1937.

The result is that the appeal succeeds so far as it concerns the decree of the District Court requiring the appellant to file a fresh application under S. 47, but it stands dismissed in all other respects. Inasmuch as the second respondent has succeeded on the main question, that relating to the validity of the first proviso to O. 21, r. 90, we consider that he is entitled to his costs.

The District Munsif will now be directed to proceed with the hearing of the petition so far as it concerns the allegations which do not relate to O. 21, r. 90, and security will not be required.

The second petition filed in pursuance of the order of the District Judge is unnecessary and will be withdrawn by the appellant.

K. S. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Aravapalli Viresam .. *Petitioner** (*Respondent-Plaintiff*)

v.

Gurram Adinarayana and others .. *Respondents* (*Petitioners-Defendants*).

Viresam v. Adinarayana.

*Civil Procedure Code (V of 1908), S. 115—Revision—*Ex parte *decree—Setting aside of—Finding not recorded for setting aside of decree—Whether finding required under the Code—Interference in revision whether justifiable.*

Interference in revision under S. 115, Civil Procedure Code, depends on some error pertaining to jurisdiction. If the recording of a finding regarding the presence of sufficient cause for interference is not a mandatory requirement for an order setting aside an *ex parte* decree under O. 9, r. 13, Civil Procedure Code, it cannot be said that such an order is passed without jurisdiction merely because the Judge does not set forth the reasons for passing the order. It is most desirable that a finding on the facts should be given explicitly but the absence of such a finding is not a ground for interference in revision.

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* C. R. P. No. 90 of 1939. 22nd April, 1940.

Viresam v. Adi-narayana.

Venkatarama Aiyar v. *Ramaswami Aiyar*, A.I.R. 1936 Mad. 524, followed.
Vaithi Chetti v. *Govindam Pillai*, (1931) M.W.N. 239, dissented from.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Narasaraopet dated 6th December, 1938 and passed in I. A. No. 177 of 1938 in O. S. No. 2 of 1937.

V. Govindarajachari for Petitioner.

K. Kotayya for Respondents.

The Court delivered the following

JUDGMENT.—The petitioner seeks to revise an order setting aside an *ex parte* decree against the respondents on terms that the respondents should deposit suit costs which deposit was made.

The only contention which might call for interference in revision is that by inference from the terms of O. 9, r. 13, Civil Procedure Code, it is obligatory, upon the Court to record a finding that the defendant who seeks to set aside an *ex parte* decree was prevented by sufficient cause from appearing. In the present case, the respondents filed an affidavit alleging sufficient cause for their non-appearance. There was a counter-affidavit filed by some lawyer acting for the lawyer of the plaintiff denying these allegations. The learned District Munsif does not discuss the truth of the allegations on one side or the other but simply lays down the terms upon which the *ex parte* decree should be set aside. Now, O. 9, r. 13 merely requires the applicant to satisfy the Court that summons was not duly served or that he was prevented by any sufficient cause from appearing. It does not in terms require the Court to record a finding that it is so satisfied. There are two decisions of single judges of this Court taking opposite views on this question whether it is obligatory upon the Court to record a finding. Ananthakrishna Aiyar, J., in the case of *Vaithi Chetti* v. *Govindam Pillai*[1] holds that it is mandatory to record such a finding. The only authority quoted is the decision of the Privy Council in *Tasadduk Rasul Khan* v. *Ahmad Husain*[2], a decision which is not in any way concerned with setting aside *ex parte* decrees, but has to do with setting aside sales in execution for material irregularities. Moreover, I have been unable

1. (1931) M.W.N. 239.
2. (1893) L.R. 20 I.A. 176: I.L.R. 21 Cal. 66 at 67 (P.C.).

to find in the report of that decision the observation upon which the learned Judge relies. I must take it that the decision of Ananthakrishna Aiyar, J., is not based on authority. There is a more recent decision of Stodart, J., in *Venkatarama Aiyar* v. *Ramaswami Aiyar*[1], in which the learned Judge observes that while it is most desirable that the Court should state why it thinks the *ex parte* decree should be set aside, O. 9, r. 13, Civil Procedure Code, does not make it obligatory for the Court to state its reasons and he holds that the failure to record findings on the merits of the case is not a ground for interference in revision. With great respect to the learned Judge who held the contrary view, it seems to me that the view of Stodart, J., is correct. Interference in revision under S. 115, Civil Procedure Code, depends on some error pertaining to jurisdiction. If the recording of a finding regarding the presence of sufficient cause for interference is not a mandatory requirement for an order setting aside an *ex parte* decree it cannot be said that such an order is passed without jurisdiction merely because the learned Judge does not set forth the reasons for passing the order. It is of course most desirable that a finding on the facts should be given explicitly but I am of opinion that the absence of such a finding is not a ground for interference in revision.

The Revision Petition is therefore dismissed with costs.

K. C. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Appellate Jurisdiction.]

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HORWILL.

D. D. Italia and another ... *Appellants** (*Plaintiffs*)

v.

The Official Assignee of Madras and others. *Respondents* (*Respondents*).

Italia v. Official Assignee of Madras.

Presidency Towns Insolvency Act (III of 1909), Ss. 53, 108 and 109—Order for administration of estate of a deceased person in insolvency—Effect on pending attachment in execution against estate of the deceased.

There is no difference between the administration of the estate of an insolvent who is alive and the administration of the estate of a person who dies

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1. A.I.R. 1936 Mad. 524.

*O. S. A. No. 27 of 1940. 12th September, 1940.

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insolvent, but was not adjudicated before his death. The administration in insolvency of a deceased debtor's estate under S. 108 of the Presidency Towns Insolvency Act must necessarily mean that the uncharged assets of the estate are to be utilised for the benefit of the general body of creditors, and, as a mere attachment creates no charge, an attaching creditor against the estate is in no better position than any other ordinary creditor. If he were, there would be little virtue in the provisions of Ss. 108 and 109 of the Act.

Krishnaswami Mudaliar v. *Official Assignee of Madras*, (1903) 13 M.L.J. 278: I.L.R. 26 Mad. 673 (F.B.) and *Manickam Chettiar* v. *Income-tax Officer, Madura South*, (1938) 1 M.L.J. 351: I.L.R. (1938) Mad. 744 (F.B.), followed.

Ananthapadmanabhaswami v *Official Receiver, Secunderabad*, (1933) 64 M.L.J. 562: L.R. 60 I.A. 167: I.L.R. 56 Mad. 405 (P. C.), referred to and explained.

Appeal against the decree of the Hon'ble Mr. Justice Mockett dated 23rd February, 1940 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 115 of 1940 in E. P. No. 19 of 1939 in C. S. No. 154 of 1938.

R. Purushothama Aiyangar and *T. Aravamuda Aiyangar* for Appellants.

T. V. Subramania Aiyar, T. V. Srinivasan and *C. R. Rajagopalachariar* instructed by *King and Partridge* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal raises two questions of law with regard to the administration in insolvency of the estate of a deceased person. On the 15th July, 1938, one S. V. Kannabhiran Pillai died, and by an order of the Original Side of this Court passed on the 18th April, 1939, it was directed that his estate should be administered in insolvency under the provisions of S. 108 of the Presidency Towns Insolvency Act. The appellants are creditors. On the 9th August, 1938, they obtained a decree against the deceased's estate in C. S. No. 154 of 1938. In execution proceedings filed on the 26th January, 1939, they attached the deceased's interests in certain immovable property, which was the subject-matter of another suit, C. S. No. 189 of 1938 and in movable properties, which were in dispute in a third suit, C. S. No. 198 of 1939. The movable properties included a sum of Rs. 483-7-10 which was standing to the credit of the deceased in the books of the Egmore Benefit Society. A garnishee order was issued by the Court in respect of this sum on the 13th February, 1939 and the money was paid into Court on the 27th March, 1939.

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—
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The first question which arises is whether the order of this Court directing the estate to be administered in insolvency puts an end to the execution proceedings and relegates the appellants to the position of ordinary creditors. The second question is whether the appellants' claim to the sum of Rs. 483-7-10 paid into Court by the Egmore Benefit Society stands on a different footing from their claims in respect of the other attached properties.

S. 108 (1) of the Presidency Towns Insolvency Act provides that a creditor of a deceased debtor, whose debt would have been sufficient to support an insolvency petition had the debtor been alive, may present a petition to the Court praying for an order for the administration of the estate of the deceased under the Presidency Towns Insolvency Act. Sub-S. (2) states that, on the prescribed notice being given to the legal representative of the deceased debtor, the Court may, upon proof of the debt, unless it is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in insolvency of the estate. Sub-S. (3) says that a petition of this nature shall not be presented after proceedings have been commenced for the administration of the deceased debtor's estate, but in that event, on proof that the estate is insufficient to pay its debts, the Court may transfer the proceedings to the Court exercising jurisdiction in insolvency under the Act.

S. 109 (1) provides that, upon an order being made for the administration of a deceased debtor's estate under S. 108, the property of the debtor shall vest in the Official Assignee, who shall forthwith proceed to realise and distribute the assets in accordance with the provisions of the Act. Sub-S. (2) of this section says that with the modifications thereinafter mentioned, all the provisions of Part III of the Act, shall, so far as they are applicable, apply to the case of an administration order in like manner as to an order of adjudication under the Act. The only modification is in sub-cl. (3) which makes the proper funeral and testamentary expenses incurred by the legal representative of the deceased debtor a preferential claim payable in full in priority to all other debts. Part III of the Act contains the provisions with regard to the administration of the property of an insolvent and included in this part is S. 53, the first

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sub-section of which reads as follows:

"Where execution of a decree has issued against the property of a debtor, no person shall be entitled to the benefit of the execution against the Official Assignee, except in respect of assets realized in the course of the execution by sale or otherwise before the date of the order of adjudication, and before he had notice of the presentation of any insolvency petition by or against the debtor."

The learned advocate for the appellants has conceded that, if S. 53 applies to an administration of a deceased debtor's estate under Ss. 108 and 109 his clients are out of Court, except as regards the sum of Rs. 483-7-10 paid into Court by the Egmore Benefit Society. This case was decided on the Original Side by Mockett, J., who held that S. 53 is not applicable to proceedings under Ss. 108 and 109 and in this connection relied on the judgment in *Hasluck* v. *Clark*[1]. The learned Judge, however, decided against the appellants on the ground that in this country an attachment confers no title and creates no charge, relying here upon the decision in Re *Prem Lal Dhar*: Ex parte *The Official Assignee*[2] and *Nicholson Town Bank, Ltd., Tanjore* v. *Varadarajulu Naidu*[3].

In Re *Prem Lal Dhar*: Ex parte *The Official Assignee*[2], the Calcutta High Court also held that S. 53 is not applicable to cases of administration under Ss. 108 and 109 and discussed *Hasluck* v. *Clark*[1]. In *Hasluck* v. *Clark*[1], the Court of Appeal said that an order for the administration of the estate of a deceased debtor under S. 125 of the Bankruptcy Act, 1883 (which corresponds to S. 108 of the Presidency Towns Insolvency Act) is not equivalent to a receiving order for the purposes of S. 45 of the Act (which corresponds to S. 53 of the Presidency Towns Insolvency Act) and that a creditor who had proceeded in execution was entitled to retain as against the trustee of the debtor's estate, the benefit of an execution not completed before the date of the administration order. In that case a writ of *fieri facias* had issued. By S. 26 of the Sale of Goods Act, 1893, it was enacted that a writ of *fieri facias* should bind the property in the goods of the execution debtor as from the time when the writ was delivered to the sheriff to be executed. Therefore S. 45 of the Act could not apply. The Calcutta High Court, in following *Hasluck* v. *Clark*[1] on the question of the applicability of S. 53 (1) of the Presidency

1. (1899) 1 Q.B.D. 699. 2. (1917) I.L.R. 44 Cal. 1016.
3. (1938) M.W.N. 1127.

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Towns Insolvency Act, held that an attachment in India only prevents alienation and does not confer any title or create any charge or lien on the property such as attaches in England upon seizure under the writ of *fieri facias*. In these circumstances the attaching creditor in India has merely the right of sharing rateably with the other creditors of the estate.

For the purpose of this appeal it is not necessary to decide whether S. 53 of the Presidency Towns Insolvency Act applies to the administration in insolvency of a deceased debtor's estate, because it is manifest that in any event the appellants are not entitled to succeed, except as regards the sum of Rs. 483-7-10 paid into Court by the Egmore Benefit Society. There are two decisions of this Court, each by a Full Bench, which lay down that in this country an order of attachment does not create any charge. The first decision was in *Krishnaswami Mudaliar* v. *Official Assignee of Madras*[1], where it was said that the effect of an attachment under the Code of Civil Procedure was to prevent alienation and not to confer title. The second decision was in *Manickam Chettiar* v. *Income-tax Officer, Madura South*[2], where it was again contended that inasmuch as an attachment had taken place the petitioner was in the position of a secured creditor. It was pointed out that this question had been decided by this Court in *Krishnaswami Mudaliar* v. *Official Assignee of Madras*[1] and that the Privy Council in *Ananthapadmanabhaswami* v. *Official Receiver, Secunderabad*[3] had not overruled it, as was suggested. The Judicial Committee had refused to go into the question and reserved their decision for a future occasion. The judgments in *Krishnaswami Mudaliar* v. *Official Assignee of Madras*[1] and *Manickam Chettiar* v. *Income-tax Officer, Madura South*[2] conclude the question so far as this Court is concerned. It may be mentioned, however, that the Calcutta High Court gave a similar decision in *Soobul Chunder Law* v. *Russick Lall Mitter*[4], which was also decided by a Full Bench.

As the result of decisions of this Court we must hold that in India no charge is created by an attachment and when the judgment-debtor becomes an insolvent the attachment falls to

1. (1903) 13 M.L.J. 278: I.L.R. 26 Mad. 673 (F.B.).
2. (1938) 1 M.L.J. 351: I.L.R. (1938) Mad. 744 (F.B.).
3. (1933) 64 M.L.J. 562: L.R. 60 I.A. 167: I.L.R. 56 Mad. 405 (P.C.).
4. (1888) I.L.R. 15 Cal. 202 (F.B.).

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the ground, provided, of course, that the attachment has not resulted in a sale. There is no difference here between the administration of the estate of an insolvent who is alive and the administration of the estate of a person who dies insolvent, but was not adjudicated before his death. The administration in insolvency of a deceased debtor's estate under S. 108 of the Presidency Towns Insolvency Act must necessarily mean that the uncharged assets of the estate are to be utilised for the benefit of the general body of creditors and, as a mere attachment creates no charge, an attaching creditor is in no better position than any other ordinary creditor. If he were, there would be little virtue in the provisions of Ss. 108 and 109 of the Act.

The learned Official Assignee has conceded that, if the attachment has resulted in a sale and the sale proceeds are in Court, the attaching creditor is entitled irrespective of S. 53, to the money or so much of it as is necessary to meet his claim. Except as regards the sum of Rs. 483-7-10 paid into Court by the Egmore Benefit Society the attachments have not resulted in the realisation of any of the assets attached. With regard to the Rs. 483-7-10 it has transpired that after the Egmore Benefit Society had paid the money into Court the Master passed an order giving the appellants the right to withdraw it from Court. The matter has gone beyond the interim order stage and in these circumstances the learned Official Assignee has rightly conceded that the appellants are entitled to this money.

The result is that the appeal will be allowed to the extent of this sum of Rs. 483-7-10, but it will stand dismissed in all other respects. As the appellants have in the main failed there will be no order as to costs in the appeal.

K. C. ——— *Appeal allowed in part.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE PATANJALI SASTRI.

F.B.

Venkatappayya v. Ramaswami.

Ponnapalli Venkatappayya and another *Appellants** (*Petitioners-Respondents-Appellants*)

v.

Pushadapu Ramaswami and others .. *Respondents.*

* A. A. A. Os. Nos. 185 and 186 of 1938 and C. M. Ps. Nos. 4171 and 4172 of 1940. 30th September, 1940.

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Mesne profits—Landlord and tenant—Suit for ejectment resisted by tenant claiming occupancy rights—Suit decreed and tenant dispossessed—Tenant ultimately succeeding before Judicial Committee—Claim for mesne profits in restitution—Rent payable for melwaram—*Landlord's right to deduction—Interest on mesne profits—Right to.*

Certain tenants resisted suits for ejectment on the ground that they had occupancy rights. The suits were decreed by the District Munsif and thereupon the landlord entered into possession. The decrees were affirmed on appeal and second appeal. Ultimately however the Judicial Committee reversed the decisions and held that the landlord was only entitled to *melwaram* right, the *kudiwaram* right being vested in the tenants. In applications by the tenants for restitution,

Held, that the tenants were merely entitled to be put in the position which they would have been in had they been enjoying the *kudiwaram* right throughout the period of dispossession. The value of the *kudiwaram* right is represented by the net value of the produce less the portion which must be delivered to the landholder as the holder of the *melwaram* right.

Lakshmi Narasimha Rao v. *Seetharamaswami,* (1916) 3 L.W. 405, overruled.

Golkonda Ramachandrudu v. *Inuganti Venkata Narasimha Rao Garu,* (1923) 44 M.L.J. 486 and *P. C. Tagore* v. *Mathura Kanta Das,* (1937) 41 C.W.N. 1015, approved.

The tenants are entitled to interest on the mesne profits from the date of the order granting restitution to date of payment or realization.

Appeal against the order of the Court of the Subordinate Judge of Tenali dated 31st March, 1938 and made in A. S. No. 51 of 1937 (A. S. No. 201 of 1937, District Court, Guntur) preferred against the order of the Court of the District Munsif of Repalle in E. P. No. 231 of 1936 in O. S. No. 209 of 1922 and petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to scale down the debt in A. A. A. O. No. 185 of 1938, etc.

These appeals, memoranda of objections and petitions for scaling down the suit debt under the Agriculturists' Relief Act, coming on for hearing on 29th August, 1940, the Court (*King, J.*) made the following

ORDER.

The subject-matter of these appeals is a claim by the respondents to mesne profits put forward in the following circumstances. The appellants filed suits in 1922 to eject the respondents from their holdings. The respondents pleaded that they had occupancy rights and could not be ejected. In spite of that plea, decrees were passed in favour of the appellants, and in July, 1923, the appellants took possession of the property concerned. Litigation continued until it finally reached the Privy Council which held in 1929 that the property was part of an estate and that the tenants had occupancy rights. Shortly after this decision was given the tenants

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resumed possession of the land. The tenants then applied for restitution under S. 144, and there is now a decree in their favour for mesne profits with interest from the period when the appellants took possession until the period in 1929 when possession was resumed by the respondents. The appellants in the proceedings in the Courts below raised the contention that they should be allowed credit in the calculation of mesne profits for the rent on the property which would have been due to them during this period if the tenants had remained in possession. That contention was negatived by the Court of First Instance and by the lower appellate Court, and is now the subject-matter of these appeals. There are also memoranda of cross-objections in which the respondents contend that mesne profits should be allowed for a further period of two or three years after 1929.

In regard to the subject-matter of the appeals, the lower appellate Court follows the decision of a Bench of this Court in *Lakshmi Narasimha Rao* v. *Seetharamaswami*[1] and it cannot, I think, be successfully argued that that authority does not apply to the facts of this case. It seems to me to apply in every respect to those facts and, if I were proceeding to dispose of these appeals sitting singly I would feel myself also bound by it. At the same time, with the greatest respect to the learned Judges who decided that case, I am unable to see any principle which would justify that decision in the face of the clear language of S. 144 itself. Sadasiva Aiyar, J., seems to base his decision merely upon the fact that during certain faslis the plaintiff himself was in possession and therefore can claim no rent. S. 144 says:

> "Where and in so far as a decree is varied or reversed, the Court of First Instance shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree."

It seems to me clear that, if a defendant resists a suit for ejectment on the ground that he has occupancy rights and if it is finally determined in appeal that his claim for such occupancy right is good, the result is that the first Court which has granted a decree for ejectment ought to have granted a decree dismissing the suit and the successful appellant is under S. 144 to be put in the same position as he would have occupied had the Court of First Instance dismissed the suit against him. In this case the respondents claimed occupancy rights and of course as a corollary to occupancy rights there is the obligation on the part of the respondents to pay rent to their landlord. If the landlord's suit in the Court of First Instance had been dismissed, the result would be that the posses-

1. (1916) 3 L.W. 405.

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sion of the defendants would have been confirmed and that during the years for which they now claim mesne profits they would have been liable to pay rent. I can see no logical principle upon which the present claim of the appellants that the amount of rent should be deducted from the amount of mesne profits calculated can be resisted, and, with very great respect, I consider that the decision in *Lakshmi Narasimha Rao* v. *Seetharamaswami*[1] requires re-consideration. There is a recent decision of the Calcutta High Court to which my attention has been called which has decided this point in a manner directly opposed to the decision in *Lakshmi Narasimha Rao* v. *Seetharamaswami*[1]. It is *P. C. Tagore* v. *Mathura Kanta Das*[2]. In view of this conflict of decisions and in view of my very strong feeling that the decision in *Lakshmi Narasimha Rao* v. *Seetharamaswami*[1] requires re-consideration, I submit the records in these appeals to His Lordship the Chief Justice with a recommendation that, if he thinks fit, the appeals be posted before a Bench.

These appeals, memoranda of objections and petitions, coming on for hearing this day, the Court delivered the following judgment.

V. Govindarajachari for Appellants.

Y. G. Krishnamurthi for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—These appeals can conveniently be disposed of in one judgment. They arise out of two suits, O. S. No. 209 of 1922 and O. S. No. 212 of 1922 of the Court of the District Munsif of Repalle. The appellants were the plaintiffs. They asked for the ejectment of the respondents from lands which the respondents had held as their tenants, notices to quit having been served upon them. It was the case of the appellants that the notices terminated all right of occupancy. The respondents strongly contested this contention. Their case was that the lands constituted part of an estate within the meaning of the Madras Estates Land Act, 1908. The District Munsif rejected the respondents' plea and decreed the suits. The District Munsif's judgment was concurred in by the Subordinate Judge of Tenali and by this Court in second appeals. The respondents, however, carried the matter to the Privy Council and the Judicial Committee reversed the decisions of this Court and of the Courts below on the ground that the lands did form part of an estate within the meaning of the Act. Consequently the

1. (1916) 3 L.W. 405. 2. (1937) 41 C.W.N 1015.

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appellants were only entitled to the *melwaram* right, the *kudiwaram* right being vested in the respondents.

As the result of the decree passed by the District Munsif the appellants went into possession on the 3rd July, 1923, but by reason of the decision of the Privy Council the respondents were entitled to resume possession, which they did soon after judgment had been pronounced by Judicial Committee. Notwithstanding this the respondents did not apply for restitution until 1936. Having won in the Privy Council they were entitled under the provisions of S. 144 of the Code of Civil Procedure to be placed in the position which they would have occupied but for the decrees passed by the District Munsif. Therefore they were entitled to recover from the appellants what they had lost by being deprived of the *kudiwaram* right. They claimed, however, that they were entitled to the whole of the mesne profits of the lands from the 30th September, 1922, the date on which the suits were decreed, to the date in 1931 when they regained possession, without any deduction in respect of rent. In the course of the hearing of the restitution application before the District Munsif the respondents abandoned their contention that they were entitled to restitution as from the 30th September, 1922, and accepted the 3rd July, 1923, the date on which the appellants went into possession, as being the proper starting point, as it obviously was. The District Munsif held that the period expired in 1929 when the respondents regained possession and not in 1931, but he upheld their main contention that they were entitled to the whole of the profits of the lands without any deduction for rent. In this connection the District Munsif relied on *Lakshmi Narasimha Rao* v. *Seetharamaswami*[1]. The appellants appealed to the Subordinate Judge of Tenali, who also felt himself bound by that decision and therefore concurred in the judgment of the District Munsif. The present appeals are from the decrees of the Subordinate Court. They have been placed before a Full Bench as King, J., before whom the appeals came in the first instance was of the opinion that the decision in *Lakshmi Narasimha Rao* v. *Seetharamaswami*[1] required re-consideration.

In *Lakshmi Narasimha Rao* v. *Seetharamaswami*[1], Sadasiva Aiyar and Moore, JJ., held in similar circumstances that the

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1. (1916) 3 L.W. 405.

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tenants who had been dispossessed as the result of proceedings taken by the landholder were entitled to the mesne profits of the lands for the period for which they were out of possession without any deduction of rent. The basis of this decision was that the expression 'mesne profits' meant 'those profits which the person in wrongful possession of such property actually received.' The learned Judges, however, overlooked the real position. The tenants were only entitled to restitution and therefore they were merely entitled to be put in the position which they would have been in had they been enjoying the *kudiwaram* right throughout the period of dispossession. The value of the *kudiwaram* right is represented by the net value of the produce, less the portion which must be delivered to the landholder as the holder of the *melwaram* right. It is not a matter of the awarding of mesne profits in the sense ordinarily meant. As already indicated the tenants are merely entitled to recover the value of that part of the produce of the land which would have been theirs had they been allowed to remain in possession. We consider that the decision in *Lakshmi Narasimha Rao* v. *Seetharamaswami*[1] is clearly wrong and should be overruled. It may be added that the correct view was taken by another Bench of this Court (Oldfield and Venkatasubba Rao, JJ.) in *Golkonda Ramachandrudu* v. *Inuganti Venkata Narasimha Rao Garu*[2]. A similar decision was given by the Calcutta High Court in *P. C. Tagore* v. *Mathura Kanta Das*[3]. It follows that the appellants are entitled to succeed in their appeals.

The respondents have filed memoranda of cross-objections. They raise two questions. The first one is whether the Subordinate Judge has correctly calculated the yield from the lands. The second one is whether the respondents are entitled to more interest than was granted to them. There is no substance in the first contention. The Subordinate Judge after a detailed examination of the evidence came to the conclusion that the District Munsif was right in the figures at which he arrived. As there was evidence to support the finding of the Subordinate Judge it is conclusive. The first point therefore goes, but there is substance in the second contention. The Subordinate Judge refused to allow the respondents interest on the amounts which they were entitled to by way of restitution after the date of the

1. (1916) 3 L.W. 405.
2. (1923) 44 M.L.J. 486.
3. (1937) 41 C.W.N. 1015.

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institution of the applications. Here he was wrong. It is true that the respondents were guilty of delay, but having succeeded they were entitled to an order requiring the appellants to pay interest from the date of the order to the date of payment or realization.

The two cases will be remanded to the trial Court with the direction to calculate in the light of this judgment the sums to which the respondents are entitled and they will receive interest at the Court rate on the amounts due from the date of the order of the District Munsif on the restitution applications to the date of payment or realization.

The appellants have filed applications for the scaling down of the debts under the Madras Agriculturists' Relief Act. These applications will also be remanded to the trial Court for disposal.

The parties will pay and receive proportionate costs throughout.

K. S. *Appeals allowed and cross-objections allowed in part.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice,* MR. JUSTICE KING AND MR. JUSTICE PATANJALI SASTRI.

Annasami Aiyangar *alias* Ramaswami Aiyangar and others ... *Appellants* (Defendants 2, 6, 7, 10 and L. Rs. of 4th, 9th and 11th Defendants)*

v.

Nithiyapadi Adivarachari and others. ... *Respondents (Plaintiff and Defendants 1, 8, 12 and 13).*

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Annasami Aiyangar v. Adivarachari.

Limitation Act (IX of 1908), Art. 120—Applicability—Lawful holder of hereditary office enjoying emoluments—To be regarded as being in possession of office—Interference with performance of duties of office—Suit to restrain—Art. 120 not applicable.

Where a person is admittedly the lawful holder of an office and he is enjoying its emoluments, he must in law be regarded as being in possession

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*S.A. No. 274 of 1935, 26th September, 1940.

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of the office itself, especially where no one else is performing the duties of the office. He has a right to bring a suit at any time when the performance of his duties is interfered with. Every time there was interference with the plaintiff (the holder of the office of *mantrapushpam*) in the performance of his duties the defendants (the *archakas* of the temple) were guilty of a fresh wrong and the plaintiff is entitled to institute a suit to restrain the defendants whenever he thought fit and Art. 120 of the Limitation Act has no application.

Case-law discussed.

Appeal against the decree of the Court of the Subordinate Judge of Cuddalore in A. S. No. 244 of 1933—O. S. No. 180 of 1930 on the file of the Court of the District Munsif of Chidambaram.

K. Rajah Aiyar for Appellants.

C. Padmanabha Aiyangar and *A. Srirangachariar* for Respondents.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—This appeal came in the first instance before Venkataramana Rao, J, but as the learned Judge was of the opinion that its decision involved the consideration of the judgments of this Court in two cases which seemingly were in conflict he adjourned the hearing in order that the appeal might be placed before a Bench. The two decisions referred to by the learned Judge were decisions of Division Benches and in consequence it was deemed advisable that the appeal should be decided by a Full Bench. The two cases referred to by the learned Judge are *Ponnu Nadar* v. *Kumaru Reddiar*[1] and *Appa Rao* v. *Secretary of State for India in Council*[2]. They will be referred to in detail presently, but as it appears to us that this appeal involves the consideration of facts which are not common to the other two cases it is necessary to set out in some detail what the facts are.

The suit out of which this appeal arises was filed by the first respondent in the Court of the District Munsif of Chidambaram for an injunction restraining the trustee and the *archakas* of the Sri Bhuvarahaswami temple at Srimushnam from interfering with the performance of the duties of his office of the *mantrapushpam* of the temple. The suit was dismissed by the District Munsif, but his decision was set aside on appeal by the Subordinate Judge of Cuddalore and the first respondent was

1. (1935) 69 M.L.J. 739: I.L.R. 59 Mad. 75.
2. (1938) 2 M.L.J. 434.

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held to be entitled to the relief sought by him. The appellants are the *archakas* of the temple. The office of *mantrapushpam* is an hereditary one and the first respondent succeeded to it on the death of his father in 1906. He is also the holder of two other hereditary offices in this temple—the offices of *kaisika puranam* and *arulappadu*. The appeal is only concerned with the office of *mantrapushpam*. The holder of the office of *mantrapushpam* has the right to receive from *archakas* flowers and tulasi leaves for the purpose of consecration, which is performed by the recitation of mantrams by the *mantrapushpakar* while he is holding them. After the consecration the flowers and tulasi leaves are handed to an *archaka* who then proceeds to offer them to the deity. The emoluments of the office of *mantrapushpam* in this temple consist of a ball of cooked rice per diem and twelve annas per month. The first respondent is a Vadagalai and the *archakas* of this temple are all Thengalais; and here we have the cause of the present litigation and incidentally of other suits. The first respondent has never performed the duties of the *mantrapushpam* and the reason why he has not done so is also traceable to the animosity between these two sects. The Subordinate Judge has in fact held that the office of *mantrapushpam* has been in abeyance for over forty years. In 1918 the first respondent decided to take action with the object of preventing interference with the performance of the duties of his office and in that year he filed O. S. No. 66 of 1918 in the Court of the District Munsif, Vriddhachalam. In that suit the respondent asked for an injunction restraining the trustee from interfering with the performance by him of the duties cast upon him as the holder of all the three offices. The District Munsif granted him a mandatory injunction on the 30th June, 1920. The trustee appealed to the Subordinate Judge, but the only result was that the injunction was changed from mandatory to prohibitory in character. In these proceedings the *archakas* were not made parties. In 1922 the first respondent filed O. S. No. 178 of 1922 against the trustee and the *archakas* for an injunction preventing them from interfering with him in the performance of his office of *kaisika puranam* but in this suit he asked for no relief in respect of obstruction in the performance of the duties devolving on him as the holder of the other two offices. The District Munsif granted him an injunction on the 23rd July, 1924, and

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this was confirmed by the Subordinate Judge on appeal on the 22nd October, 1927.

On the 10th January, 1929, the first respondent filed the suit out of which this appeal arises and, as already indicated, there he sought an injunction prohibiting the trustee and the *archakas* from interfering with his performance of the duties of the office of *mantrapushpam*. It was denied by the defendants that this office was hereditary and that the first respondent was entitled to it. It was also contended that the suit as framed was bad, because there was no prayer for a declaration. The further plea that the suit was barred by limitation was also advanced. The District Munsif held that the office was hereditary and that the first respondent was entitled to it, but he upheld the other objections advanced by the defendants. He considered that the suit was bad because there was no prayer for a declaration of right to the office and that it was barred by Art. 124 of the Limitation Act. In his opinion the *archakas* had gained a right to the office by adverse possession. The Subordinate Judge agreed with the District Munsif that the office was hereditary and that the first respondent had a title to it, but he considered that the District Munsif erred in holding that the suit as framed could not be maintained and that it was barred by limitation. With regard to the plea of the defendants that the suit was bad because no declaration was asked for the Subordinate Judge considered that the relief sought did involve a prayer for a declaration. On the question of limitation the Subordinate Judge held that Art. 124 had no application and that there was a recurring cause of action. These are the facts as stated at the Bar and the only question which this Court has been called upon to decide is the question of limitation.

It will be here convenient to refer to the decisions in *Ponnu Nadar* v. *Kumaru Reddiar*[1] and *Appa Rao* v. *Secretary of State for India in Council*[2]. In the first of these cases certain Nadars, in a suit filed in 1923 in the Court of the Additional District Munsif of Tinnevelly, claimed that they and their castemen had a right to pass in procession over a certain route composed of public streets in the village in which they lived. The defendants were other castemen of the village who denied this right. In 1918 two attempts were made by the plaintiffs to

1. (1935) 69 M.L.J. 739 : I.L.R. 59 Mad. 75.
2. (1938) 2 M.L.J. 434.

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take marriage processions along this route. In 1900 the Joint Magistrate passed an order under S. 147 of the Code of Criminal Procedure, directing that no organised procession of Shanars or Christians should pass along these streets until a Civil Court had declared their right to do so. The defendants contended that, inasmuch as the suit had been filed more than six years from the date of the order, it was barred by Art. 120 of the Limitation Act. The Court held that this contention must prevail and that the plaintiffs' community had for ever lost their right to file a suit to establish a right to pass along these streets in procession. The Court also considered the question whether there was here a continuing wrong and decided that there was not. While it may be that the decision to apply Art. 120 in that case is open to question—the Court is not called upon to reconsider the decision here—the facts are so very different from the facts in the present case that we are unable to regard it as having any application.

The second case, *Appa Rao* v. *Secretary of State for India in Council*[1], is also concerned with facts which are very different to the facts in the present case. *Appa Rao* v. *Secretary of State for India in Council*[1], involved the right to land which had formed the beds of certain tanks. It was held that a bare repudiation of a person's title without an overt act would not make it incumbent upon him to bring a declaratory suit. A party had, it was said, the right to elect when he could bring a suit for vindicating his right after there had been successive denials of his title. In that case an adverse order had been passed by the Collector and no action had been taken on it. The persons affected by the order were still in possession of the land and it was held that they could decide when it was necessary for them to take action to vindicate their title. The only common factor in that case and in the one now before us is the possession of the plaintiffs; in that case the plaintiffs were in possession of the land and in this case the plaintiff is in possession of the office. Certain observations in *Appa Rao* v. *Secretary of State for India in Council*[1], could be applied to the present case, but in view of the dissimilarity of the two cases in point of fact we prefer not to base our decision upon it.

1. (1938) 2 M.L.J. 434.

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It has been argued by Mr. Ramaswami Aiyar on behalf of the appellants that the Court should hold that in law the first respondent is not in possession of his office because he has not performed the duties thereof, but he has failed to produce any authority in support of his contention. The first respondent is admittedly the lawful holder of the office and it is common ground that he received the emoluments, month by month, until 1927. The *archakas* admittedly do not claim to be in possession and it is not claimed that they have performed the duties of the office. This has been made quite clear in the judgment of the Subordinate Judge. It seems to us that, where a person is admittedly the lawful holder of an office and he is enjoying its emoluments, he must in law be regarded as being in possession of the office itself, especially where no one else is performing the duties of the office. We do not suggest, however, that the mere performance of the duties of the office by somebody else would constitute the person performing the duties the holder of the office. In our opinion it would not. Art. 124 of the Limitation Act has a bearing here. The article says that for a suit for possession of a hereditary office the period of limitation is twelve years from the time when the defendant takes possession of it adversely to the plaintiff, and the explanation which follows says that an hereditary office is possessed when the profits thereof are usually received or (if there are no profits) when the duties thereof are usually performed. Therefore, so far as the Limitation Act is concerned, the plaintiff has only to show that he has been in receipt of the emoluments.

In support of his argument that the *archakas* must be deemed to be in possession Mr. Ramaswamy Aiyar has referred to *Kamalathammal* v. *Krishna Pillai*[1], *Ambalavana Pandara Sannadhi* v. *Sri Minakshi Sundareswaral Devasthanam*[2], *Suppa Bhattar* v. *Suppu Sokkaya Bhattar*[3] and *Rajagopala Naidu* v. *Ramasubramania Aiyar*[4], but the effect of these cases is that mere possession of the emoluments without the performance of the duties of the office will not give a title by adverse possession. In none of those cases was the Court concerned with the position where the lawful holder of the office is in enjoyment of the emoluments. The first respondent is admittedly the lawful

1. (1910) 20 M.L.J. 781.
2. (1914) 28 M.L.J. 217.
3. (1915) 29 M.L.J. 558.
4. (1935) M.W.N. 503.

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holder of the office and he has been in enjoyment of the emoluments. In these circumstances how can it be said that he has not the right to bring a suit at any time when the performance of his duties is interfered with? Mr. Ramaswamy Aiyar admits that Art. 124 has no application and relies entirely on Art. 120. That article could only apply if the first respondent was bound to take action when in 1921 the *archakas* prevented him carrying out his duties as the *mantrapushpakar*. But he was not bound to take action then if it did not suit him. He could abide his time. The interference which the *archakas* were guilty of did not affect his position as the lawful holder of the office. If the *archakas* interfered on another occasion it would only give rise to another cause of action.

Many other cases have been quoted in the course of the arguments, but the only one which has any bearing is *Jalandhar Thakur* v. *Jharula Das*[1]. That case was decided by the Privy Council. The widow of a shebait of a temple who had succeeded her deceased husband in the office mortgaged certain immovable property together with her interest in the income of the temple. The mortgagee obtained a decree on his mortgage and in the sale held in execution proceedings bought the mortgaged property, of which he got possession in 1892. The widow died in 1900. The suit out of which the appeal arose was filed by the plaintiff for a declaration that he was entitled to receive the share of the temple income as it was inalienable. One defence set up was that the suit was barred by limitation by reason of the provisions of Art. 124. This argument was rejected by the Judicial Committee. The suit was not one for a hereditary office. This office could not be held by a non-Brahmin and the defendant who was not a Brahmin was not competent to become the shebait and had not taken possession of the office. Adversely taking and appropriating to his own use a share of the surplus daily income from the offerings gave him no title to the office and therefore no right to a share in the income. On each occasion on which he received and wrongfully appropriated to his own use a share of the income to which the *shebait* was entitled he committed a fresh actionable wrong in respect of which a fresh suit could be brought against him by the *shebait*. In the same way everytime the *archakas* of the temple with which this suit is

1. (1914) 27 M.L.J. 100: L R 41 I.A. 267 : I.L.R. 42 Cal. 244 (P.C.).

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concerned interfered with the first respondent in the performance of his duties as the *mantrapushpakar* they were guilty of a fresh wrong.

We consider that the Subordinate Judge was quite right in holding that Art. 120 has no application and that the first respondent was entitled to institute the suit whenever he thought fit. The appeal fails and will be dismissed with costs in favour of the first respondent.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE MOCKETT.

Messrs. Trojan & Co. .. *Plaintiffs**

v.

Al. Al. Annamalai Chettiar .. *Defendant.*

Trojan & Co. v. Annamalai Chettiar.

Contract Act (IX of 1872), S. 30—Wager—Dealings in stocks and shares—Agreement to pay differences—Employment of broker—No arrangement between actual buyer and seller—Right of broker to recover moneys due by client—Plea of illegality whether sustainable.

In transactions where a broker intervenes, especially in stock exchange transactions, it is extremely difficult to prove that the two parties to the contract, namely, the buyer and the seller have got any agreement that the transaction in question is in the nature of a gamble. Where the brokers acting on the instructions of the client executed his orders to buy or sell shares in the market and charged a commission for themselves, and the client did not know in any particular transaction who was the party selling to him or buying from him, and the brokers sued to recover moneys due by the client in respect of dealings so entered into,

Held, that in such a case the brokers were entitled to recover the moneys due to them and that the client was not entitled to plead that the transactions entered into by him were gaming transactions within the mischief of S. 30 of the Contract Act.

Thacker v. *Hardy*, (1878) 4 Q.B.D. 685, relied on.

Eshoor Doss v. *Venkatasubba Rau*, (1895) I.L.R. 18 Mad. 306 (F.B.) and *Perosha Cursetji* v. *Manekji Dossabhoy*, (1898) I.L.R. 22 Bom. 899, distinguished.

K. Narasimha Aiyar and *V. N. Shama Rao* for Plaintiffs.

K. Bashyam Aiyangar, *R. Desikan* and *K. Ramanathan Chettiar* for Defendant.

The Court delivered the following

JUDGMENT.—The plaintiffs are a firm of stockbrokers carrying on business in Madras. They are Nattukottai Chetties;

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* C. S. No. 163 of 1937. 12th May, 1938.

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and so is the defendant. The plaintiffs sue for moneys due to them from the defendant arising out of a course of dealings beginning in December, 1934 and ending in March, 1935. The dealings concern Government promissory notes, mill shares and silver. The defence of the defendant is that this money is irrecoverable, it being a gaming transaction and therefore within the mischief of S. 30 of the Contract Act. It seems to me that the first thing that I have to do is to discuss the nature of the transactions and the relations of the parties to each other and find definitely what those relations were and what the transactions were. Personally I have not any doubt in my mind about the true facts. The defendant pleads that he (a resident of Pallathur which is quite near to the village from which the plaintiffs come) entered into an arrangement with them by which dealings should take place in stocks, shares and securities, but that those dealings should be so arranged that the defendant should have to pay differences only and should not be expected to take delivery or what is known as to take up stocks or shares concerned. He says that he arranged that with Mr. Palaniappa Chetty, a partner of the firm. That I may say is denied by Mr. Palaniappa Chetty who wants me to believe that he entered into dealings, and considerable dealings, with the defendant in this case purely on the strength of enquiries he made from persons in Madras, enquiries directed towards the financial state of the defendant. My own view is that that story is not true. I am prepared to accept the defendant's story that there was some arrangement or understanding at least with the plaintiffs as to the course of business between them and my reasons are as follows. I do not believe that a firm such as the plaintiffs' firm would at a few hours' notice enter into transactions with a man about whom they knew nothing. They must have known nothing because the first order is dated 11th December, 1934, and we find them replying the next day, the 12th December, and it is extremely unlikely that satisfactory enquiries would have been possible in such a short time. Moreover, the tone of the correspondence suggests some previous arrangement. A first order usually meets with some form of comment or something to suggest that it was the beginning of dealings and a welcome to a new client. There is nothing of that sort here. I think there was an arrangement between the plaintiffs and the defendant by which the defendant intimated that he did not

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intend to pay anything more than differences, namely, that he was not prepared to take delivery of shares but to pay up differences only. There is another reason why I believe that story. The defendant is obviously a man of very little means but I think he is better off than he thinks he is. According to his own admission he would be good for about Rs. 5,000 at least because he has got a share in a house worth that money and I think it is very probable that it is worth more because his attitude here is to make his means as small as possible. That probabilises the fact that the plaintiffs were prepared to enter into a transaction for differences only. I am afraid I cannot accept that they made enquiries and found him worth half a lakh of rupees. They never found any source for that information and it does not appear to-day that it is possible for them to produce any material before me to show that such information was ever before them. But in my opinion it was totally unnecessary for the plaintiffs to take up this attitude because I think that this was a very ordinary stock exchange transaction. One is entitled sitting here as a judge of fact to have at least as much intelligence as a juryman and one knows perfectly well that there is a great deal of gambling on the stock exchange and that that is not limited to any one particular town or to any one particular country and that, although it is permitted, there is now rather an exceptional amount of it in India. My findings of fact therefore are that the plaintiffs and the defendant understood that these transactions were to be on differences, namely, that the plaintiffs would close any particular transaction by settling day, so that the defendant should not have to pay or receive anything more than the differences in price. The plaintiffs knew quite well that the defendant could not possibly pay cash for these stocks, shares and Government and other securities which he purported to buy, that if he had been called upon he would have been quite unable to do it and that what he was trying to do was to make some money by catching a rise or fall in the market according to whether he was a bull or a bear of shares at a particular time. In other words, I think this case comes almost exactly within the facts decided in the case of *Thacker* v. *Hardy*[1]. My view is that the plaintiffs were acting as brokers, that is, as agents for the defendant. All the cases— and there are many which have been cited in which gambling

1. (1878) 4 Q.B.D. 685.

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transactions have come before the Courts and in which the defence of S. 30 of the Contract Act has succeeded have been, as far as I can see, with the exception of one or two Bombay cases, cases of dealings between principals and principals and they have nearly all been dealings not in stocks and shares but in commodities—cotton and commodities of that description. Now the marked difference in such transactions, is, as pointed out by the Bombay High Court in a decision reported in *Chimanlal* v. *Nyamatrai*[1], this that in transactions where a broker intervenes especially in stock exchange transactions, it is extremely difficult to prove that the two parties to the contract, namely, the buyer and the seller, have got any agreement that the transaction in question should be in the nature of a gamble. Neither are known to the other and it is essential that in these transactions in order to make a gamble there should be two; that one side is attempting to gamble and the other side is not, is not enough. There is ample authority for that. It is put in the headnote of the Bombay case mentioned above as follows:

"The common intention of *both* parties at the time of entering into the contract must be not to call for or give delivery from or to each other. Such intention is a question of fact. There can hardly be any direct evidence of it, and though an agreement in writing may ostensibly be for the purchase and sale of goods deliverable on a certain day, oral evidence is admissible to prove that the intention of the parties was only to pay the differences.. .. .. . Where transactions are entered into through the medium of a broker according to the usage of a particular market, there is a very strong presumption against the existence of a common intention to wager. The presumption can be rebutted by evidence of a common intention to wager, even though the contract was brought about by a broker."

There is no doubt on the correspondence and the bought and sold notes that have been put before me that the defendant was employing the plaintiffs as his agent for the purchase and sale of shares. The very wording of the bought and sold notes shows that:

"We have this day bought by your order and for your account, from selves for principal, the undernoted securities."

"We have this day sold by your order and for your account, from selves for principal, the undernoted securities........"

It is impossible in this case, in my opinion, for the defendant to suggest that the plaintiffs were not his agents. The letter (Ex. A-6) dated the 13th February, 1935, runs thus:

"Please let us have your instructions regarding the above (that is, outstanding purchase of Rs. 50,000 4 per cent. 1960-70) within the 15th instant

1. (1937) 39 Bom.L.R. 1083.

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10-30 A.M. In the absence of any instructions from you, we are carrying over the same to the next settlement. . . . . "

On the 1st February, 1935, the plaintiffs are advising the defendant with regard to the future of Tata Ordinaries. In another letter of the 10th February, 1935 (Ex. A-5) the defendant writes to the plaintiffs: "Please inform me whether it is advisable to hold or to sell $3\frac{1}{2}$ per cent. G. P. Notes." I have had the whole of the books of this firm put before me and it will be seen from Ex. B-2 with regard to Government securities and Ex. B-3 with regard to shares that in practically every case there was definitely another party to the contract, and all these particulars were entered in the plaintiffs' books. To take any one example from Ex. B-2, the buyer in the first place was the defendant and the seller was Padmanabhan, a person unknown to him. In the box he has been quite clear—and it could hardly be otherwise—that he at no time knew who it was from whom these people bought those shares. When their instructions were to buy, they went out into market and they bought from anybody who was a seller; when their instructions were to sell, they sold to anybody who was a buyer. It is impossible in those circumstances to suggest that as between the defendant and any of these numerous persons who he now knows were selling or buying shares to or from him as the case may be, there was any possible agreement that the transaction should be in the nature of a gambling transaction.

I have referred to the case of *Thacker* v. *Hardy*[1]. I will refer also to the case of *Forget* v. *Ostigny*[2], where the Judicial Committee whose advice was delivered by the Lord Chancellor, points out, quoting Cotton, L. J., that:

"The essence of gaming and wagering is that one party is to win and the other to lose upon a future event, which at the time of the contract is of an uncertain nature . . . . But that is not the state of facts here. The plaintiff was to derive no gain from the transaction; his gain consisted in the commission which he was to receive, whatever might be the result of the transaction to the defendant. Therefore the whole element of gaming and wagering was absent from the contract entered into between the parties."

A number of cases have been cited to me, I propose to refer to one or two. There is a decision of this High Court in *Eshoor Doss* v. *Venkatasubba Rau*[3], but it will be seen in that case at p. 309 that, although there was a broker in that particu-

1. (1878) 4 Q.B.D. 685. 2. (1895) A.C. 318.
3. (1895) I.L.R. 18 Mad. 306 (F.B.).

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lar case, there was a direct contract between the plaintiff and the defendant. There was a direct contract between the plaintiff and the defendant because each was making enquiries about whether the other was able or not to pay differences and they emphasize very much the exceptional circumstances where it is possible, when there is a broker, to say that the transaction is a wagering transaction. There is another decision of the Bombay High Court *Perosha Cursetji* v. *Manekji Dossabhoy*[1]. In that case there was unquestionably in the ordinary sense of the word, a gambling transaction because there is no doubt that all that the defendant intended was to make a profit, if possible, on differences between the contract price and the price at the date of settlement. There again it was held that the defendant was no party to the contracts with the third parties with whom the plaintiff entered into contracts in order to satisfy his instructions given by the defendant, and the result was that, whatever may have been the intention of the defendant, it was not a gambling transaction because, as I have said before, it takes two to make a gamble.

I only desire to allude to one more matter in this case. It was suggested, but not very strongly, that the plaintiffs in this case are really principals because of their form of remuneration. Again, taking the first transaction in Ex. B-2, it would be seen that the notes are sold to the defendant at Rs. 97 but actually bought at Rs. 96-15-0 and the difference of one anna is taken by the plaintiffs as their brokerage. That appears to be according to the custom in the stock exchange—personally it is no new matter to me. I think it is quite impossible in view of the books which have been produced to suggest that that incident makes the real principals dealing with the shares the plaintiffs themselves. It will be well in future transactions to define that position more clearly by perhaps exhibiting the real principals on the contracts; but I think an examination of the books and letters show that what actually happened was—and I have not the slightest doubt with regard to this—that the plaintiffs were buying in the market for their client the defendant and that the method of remunerating them was by a small difference in the price. There never was any exception taken to this certainly by the defendant and as far as I know by anybody else and I am quite unable to accede to the suggestion that in these transactions the

1. (1898) I.L.R. 22 Bom. 899.

plaintiffs were really the principals. The books, the letters and all the documents in the case are wholly opposed to that. The position shortly comes to this. This matter comes almost exactly within the decision of *Thacker* v. *Hardy*[1] and on my findings of fact that case *mutatis mutandis* may be applied to this case. The result, therefore, is that the defence must fail and there will be judgment for the plaintiffs with costs for the amount claimed but with interest at 6 per cent. only from the date of demand, which is the 23rd of May, 1935.

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B. V. V. *Suit decreed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE KUNHI RAMAN.

Eswara Krishna Aiyar and another.. *Appellants** (*Defendants 5 and 7*)

v.

Mariya Susai Reddiar and others .. *Respondents* (*Plaintiffs 1 to 3 and Defendants 1 to 4, 6, 8 and 9*).

Krishna Aiyar *v.* Susai Reddiar.

Transfer of Property Act (*IV of 1882*), *S. 60—Mortgagee purchasing a portion of the mortgaged property free of the mortgage—Mortgagee if can claim the whole of the mortgage money from the other properties alone or only* pro rata *debt.*

Where properties are mortgaged by a number of persons to secure repayment of a debt and the mortgagee purchases a portion of the properties from one of them for its full value absolutely and free from the mortgage the mortgage is not thereby split up and the mortgagee is entitled to recover the *whole* of the mortgage money from the other properties,

A mortgage was executed in favour of the fifth defendant by defendants 1 to 3 over two sets of properties situate in villages *O* and *P*. The properties in *O* belonged to 1 and 2 defendants and those in *P* to the third defendant. The properties of defendants 1 and 2 were purchased by the eighth defendant in execution of a money decree subsequent to the date of the mortgage. The mortgage was usufructuary but in 1922 the properties were leased to the mortgagors for five years at an annual rent of Rs. 2,109 and it was found that the lease deed created a charge over the properties for the rent that may be due and that therefore there was a mortgage and a subsequent charge created by the mortgagors on the same properties in favour of the same mortgagee. It was also found that though the lease was in favour of all mortgagors, only one of them—namely, the third defendant—enjoyed

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1. (1878) 4 Q.B.D. 685.

*Appeal No. 298 of 1936. 9th November. 1939.

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the income therefrom. He failed to pay the rent and in 1929 a sum of Rs. 19,700 was due on that account. For Rs. 15,000 out of that amount, the third defendant sold all the lands in village *P* to the fifth defendant (mortgagee) *absolutely free from the mortgage* In 1932 the mortgage was assigned by the latter in favour of plaintiffs 1 and 2, excluding the properties in village *P*. It was contended that as the fifth defendant had purchased a portion of the mortgaged property, the suit mortgage had become split up and that therefore there was a *pro tanto* extinction of the debt and the mortgagors (1 and 2 defendants) were entitled to redeem the suit property on payment of only a proportionate part of the amount apportionable on the properties in village *O*.

Held, that the mortgagors (1 and 2 defendants) are not entitled to such reduction. The last clause of S. 60 of the Transfer of Property Act would not apply so as to entitle them to claim redemption of their property on payment of only a proportionate part of the debt, as the mortgagee had acquired not merely the equity of redemption but also the full ownership in a part of the security by purchasing it free of the mortgage. For the exception to S. 60 to operate, two conditions are necessary,

(*i*) the acquisition must be as a mortgagee, that is, as holder of the mortgage, and

(*ii*) what is acquired should be the share of the mortgagor.

Where a mortgagee purchases (as here) the property free of his mortgage and pays the full value of the property, the substance of the transaction is that the mortgagee gives up his mortgage right and purchases the property as if it were unencumbered property paying the full value therefor. By such release the property ceases to be the subject of the mortgage and the acquisition by the mortgagee would be like an acquisition by a stranger and not *qua* mortgagee.

The Kustea Loan Office, Ltd. v. *Ananda Charan Chackrabartty*, (1922) 27 C.W.N. 763 and other Calcutta cases distinguished on the ground that according to the Calcutta High Court it is not open to a mortgagee to release a portion of the mortgaged property when the rights of third parties intervene but in Madras after *Perumal Pillai* v. *Raman Chettiar*, (1917) 33 M.L.J. 211: I.L.R. 40 Mad. 968 (F.B.), he can release his right over any portion and proceed for the entirety of the debt against the rest of the property.

Appeal against the decree of the District Court of South Arcot dated 25th September, 1936, in O. S. No. 5 of 1935.

T. M. Krishnaswami Aiyar and *K. V. Ramachandra Aiyar* for Appellants.

V. V. Srinivasa Aiyangar, T. E. Ramabhadrachariar, K. Rama Aiyangar and *C. Padmanabha Aiyangar* for Respondents.

The judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.—This is an appeal from the judgment of the learned District Judge of South Arcot in a suit to enforce a mortgage dated 29th November, 1919, executed by defendants 1 to 3 in favour of the fifth defendant. This deed of mortgage Ex. A was assigned by a deed of assignment Ex. C

dated 9th January, 1932, in favour of the third plaintiff who was a benamidar for plaintiffs 1 and 2. The fourth defendant is the son of the first defendant; the sixth defendant is the fifth defendant's wife; the seventh defendant is the undivided son of the fifth defendant; and the eighth defendant is a purchaser in Court auction of the suit properties in execution of a money decree against defendants 1 and 2 subsequent to the date of the mortgage. The ninth defendant is the Official Receiver who was added as a party since the date of the suit as the representative of the first defendant who was adjudged an insolvent. The sum sought to be recovered in the suit was Rs. 20,000 which is the amount secured under the said mortgage. The main defence of the eighth defendant who became the purchaser of the right, title and interest of the first defendant in the suit properties in execution of a money decree was that the plaintiffs were not entitled to recover a sum of Rs. 20,000 but only Rs. 11,111-1-9. The defence of defendants 5 to 7 was that they were not liable for the suit claim. To understand the plea of the eighth defendant a few facts are necessary. The mortgage Ex. A comprises two sets of properties: (1) the properties situate in the village of Orathur which belonged to defendants 1 and 2, and (2) the properties in Perumbakkam village which belonged to the third defendant. The mortgage is usufructuary and provided that the mortgagee should enjoy the properties in lieu of interest and there is a clause which provides for redemption to this effect:

"We shall pay the said sum in any month of Chitrai when you may choose to ask for the amount, or when we desire to pay the amount and redeem the properties. In default, we agree that the amount may be received by process of Court."

On the 25th November, 1922, by a registered lease the said properties were leased to the mortgagors for a period of five years stipulating an annual rent of Rs. 2,109. In default of payment of rent it was provided in the deed that the lessor was entitled to recover the balance of the amount due and payable with interest at one per cent. per mensem from the lessees personally and also from and out of the properties leased, but by a later clause the personal liability of the second defendant and the fourth defendant was excluded and it was stipulated that only the properties would be liable. There can be no doubt that this document creates a charge over the properties leased, that is the properties mortgaged under Ex. A, for the rent that may be due and payable thereunder. It is also stated that an inter-

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mediate charge was created over the property in favour of the fifth defendant's son-in-law benami for the fifth defendant but it does not appear from the record what the nature of that charge was and when it was redeemed, and for the purpose of this appeal we have to proceed upon the footing that on the same properties there was a mortgage and a subsequent charge created by the mortgagors in favour of the same plaintiff under the said lease. Any decision that we give here will be without prejudice to the rights and obligations that may be enforceable under any such intermediate charge if any subsisting. It appears that although the property was leased to all the mortgagors only the third defendant enjoyed the income from the mortgaged property. But he failed to pay the rent and on the 27th September, 1929, there was a sum of Rs. 19,700 due and payable. For a sum of Rs. 15,000, part of the said sum of Rs. 19,700, the third defendant sold all the lands in Perumbakkam village by a sale deed Ex. I dated 27th September, 1929, mortgaged under Ex. A to the fifth defendant absolutely. The operative portion of the said deed runs thus:

"Deducting the balance due to you is Rs. 19,700. Out of this amount you have agreed to give credit to a portion, namely, Rs. 15,000. As I have received the said sum in that manner I have in lieu thereof hereby sold to you absolutely the undermentioned properties belonging to me and in my possession and have delivered possession. You shall hold and enjoy the undermentioned properties from this day forwards with rights of alienation such as gift and sale. To this effect have I executed this deed of absolute sale with consent."

On a perusal of the deed there can be no doubt that the third defendant conveyed the said property to the fifth defendant free from encumbrances to be enjoyed by the fifth defendant will full powers of alienation. What the effect of this conveyance on the rights of the parties is we shall consider later. On the 9th January, 1932, the sixth defendant, the wife of the fifth defendant purchased from Maria Susai Reddiar and his son, the first and second plaintiffs herein, certain properties for a sum of Rs. 35,000. Part of the consideration, namely, a sum of Rs. 15,000 was paid by way of execution of a promissory note by the fifth defendant in favour of the vendors. In regard to the balance of Rs. 20,000 the consideration was said to have been paid thus:

"I have also received Rs. 20,000 in respect of the assignment of the usufructuary mortgage debt bond for Rs. 20,000 executed this day by your husband Eswara Krishna Aiyar in favour of my wife Rose Mary Ammal at

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my instance—the said usufructuary mortgage debt bond having been executed on 29th November, 1919, by Orathur Duraiswami Reddi and others in the name of your husband for Rs. 20,000."

It is conceded that the sixth defendant was only a benamidar for the fifth defendant. The usufructuary mortgage in favour of the fifth defendant was assigned in favour of the wife of Susai Reddi as part of the consideration Rs. 20,000. This was effected by a deed of assignment Ex. C bearing the same date. In the deed of assignment it is clearly stated that the properties in Perumbakkam were excluded and the operative portion of the assignment deed ran thus:

"I have assigned to you the undermentioned usufructuary mortgage bond and have given to you my rights under the said usufructuary bond as per its terms excepting the properties in Perumbakkam village........ You shall yourself enjoy the undermentioned properties from this day forward."

It is on the strength of Ex. C that the present suit was filed. The contention of the eighth defendant that he is not liable to pay the sum of Rs. 20,000 is thus stated by him in paras. 5 and 6 of his written statement:

"5. Since the fifth defendant under whom the present plaintiffs claim a right to the suit mortgage has purchased a portion of the mortgaged property as stated in para. 4 above even before the date of the alleged assignment, the suit mortgage as well as the mortgage referred to in para. 3 have become split up and portions of the mortgage debts (in proportion to the value of the properties purchased by the fifth defendant) have become extinguished."

"6. On the date of the suit mortgage, and on the date of the mortgage referred to in para. 3 above, items 1 to 89 were worth Rs. 20,000; 4/9th of the suit debt became therefore extinguished and so only 5/9th of the amount, namely, Rs. 11,111-1-9 only can be recovered out of items 1 to 89 in Sch. II-A. In any event irrespective of the question as to whether any portion of the debt became extinguished since the mortgage has split up for the reasons stated in para. 5 above, the plaintiffs will not be entitled to recover the whole amount from items 1 to 88 only. The plaintiffs can recover from these items only the proportionate amount of the debt, namely, 5/9th which amounts to Rs. 11,111-1-9."

In effect the substance of the contention is that by the fifth defendant purchasing the Perumbakkam properties the integrity of the mortgage was broken up and there was a *pro tanto* extinction of the debt and the mortgagors, defendants 1 and 2, were entitled to redeem the suit property only on payment of a proportionate amount, namely, Rs. 11,111-1-9. The learned District Judge has given effect to this contention and given a mortgage decree against the suit properties only for a sum of Rs. 11,000 and odd and in respect of the balance he gave a decree against the fifth defendant on the ground that there was a covenant for title under Ex. C in and by which he covenanted

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that Rs. 20,000 was recoverable from the suit properties and as there was a breach of that covenant the plaintiffs were entitled to get the balance from the fifth defendant. This appeal is preferred by defendants 5 and 7.

Two contentions have been advanced by Mr. T. M. Krishnaswami Aiyar their learned counsel: (1) the purchase by the fifth defendant under Ex. I of the Perumbakkam properties from the third defendant was a purchase for full value of the entirety of the property free of the mortgage under Ex. A and not merely of the equity of redemption and therefore the last clause of S. 60 of the Transfer of Property Act would not apply so as to entitle defendants 1 and 2 to claim redemption of their property on payment of only a proportionate part of the debt and the plaintiffs would therefore be entitled to recover the entire amount of the mortgage from the suit properties; and (2) the decree against the fifth defendant is wrong because there was no covenant for title given by him under the assignment Ex. C. In regard to the first contention Mr. Krishnaswami Aiyar put his case thus: where the mortgagee does not acquire merely the equity of redemption but acquires the full ownership in a part of the security, whether its full value or part thereof is or is not utilised for the reduction of the mortgage debt, the part security having fetched its full value from the mortgagee-purchaser the remedies of the mortgagee as such regarding the balance due are not affected at all either as regards the mortgage amount that may remain payable or the entirety of the remainder of the properties left as security against which he may proceed; S. 60 has no application to such cases. He also urged that it is open to the mortgagee to release his mortgage right over any portion of the security and the substance of the transaction evidenced by Ex. I must amount to a release of the mortgage right under Ex. A and purchase of the property free of that mortgage right in full satisfaction of a debt which is common to both the mortgagors and whatever rights of contribution defendants 1 and 2 may have in respect of Perumbakkam properties the rights of the mortgagee and therefore of his assignee to proceed against the properties of defendants 1 and 2 cannot be affected by the fifth defendant's purchase. The contention of Mr. V. V. Srinivasa Aiyangar on behalf of the eighth defendant is that a right of partial redemption conferred under the last clause of S. 60 of the Transfer of Property Act is separate altogether from any question about

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the amount on the payment of which alone such partial redemption could be obtained and the moment in any manner or by any means a share in the equity of redemption becomes vested by acquisition in the mortgagee, the mortgagor or any one of the mortgagors gets the right of asking for and obtaining partial redemption.

Before dealing with the soundness of these contentions it will be necessary to examine the scope of the last clause of S. 60 of the Transfer of Property Act which runs thus:

"Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only on payment of a proportionate part of the amount remaining due on the mortgage, except only where a mortgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired in whole or in part the share of a mortgagor."

This clause is based on the principle that a mortgage is indivisible and it has to be redeemed entirely or not at all. Where there is a mortgage for an entire sum and properties belonging to one or several owners are secured thereunder, it is not open to a mortgagor or one of several mortgagors to redeem an item or his share only on payment of a proportionate part of the debt because there is only "one mortgage, one debt and one entire right against all," whether against persons or properties. The only exception provided by the clause is where a mortgagee acquires the share of the mortgagor. Two conditions are necessary for the exception to operate, namely:

(1) the acquisition must be as a mortgagee, that is, as holder of the mortgage, and

(2) what is acquired should be the share of the mortgagor.

The question is what is meant by the words "share of the mortgagor". In the context it can only mean the interest of the mortgagor outstanding after the creation of the mortgage, that is, the ownership of the property minus the interest vested in the mortgagee and according to legal phraseology it would be the equity of redemption, that is, a right to redeem a particular mortgage. The equity of redemption is a relative term and will vary according as there are one or more mortgages of the same property. Thus according to the plain meaning of the language of the clause there must be an acquisition of the equity of redemption in the mortgaged property or part thereof by a mortgagee *qua* mortgagee. In the case of such acquisition

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the clause provides that a person interested in a share of the mortgaged property can redeem his share on payment of a proportionate part of the debt. Here the question arises who is meant by a person interested in a share of the mortgaged property? Again, the plain meaning of the clause suggests that it is only applicable to cases where the mortgaged property is owned or become absolutely owned by several co-sharers or owned in distinct and separate ownerships by more than one mortgagor. In the case of a single mortgagor where rights of third parties do not intervene whether it is a single individual or a group of individuals constituting an entity the application of the clause presents no difficulty. It is only in the former class of cases questions really do arise in regard to the rights in the mortgaged property becoming vested in more than one person. It may be necessary in this connection to examine the reason why an exception is made to the general rule that the redemption must be of an entirety of the property in cases where the mortgagee acquires a share of the mortgagor. When the mortgagee acquires the equity of redemption he steps into the shoes of the mortgagor in respect of the property purchased subject to the mortgage in his favour. There is thus a fusion of interests of both the mortgagor and the mortgagee and the mortgage becomes extinguished. The result of the extinguishment is that the mortgage debt over that property is wiped out, though every parcel of the mortgaged property so far as the mortgagee is concerned is liable for the entire mortgage debt but as between the mortgaged properties they are liable to contribute rateably to the debt (S. 82 of the Transfer of Property Act). This principle would apply as between the mortgagors *inter se*. As the mortgagee by purchase of the equity of redemption becomes a mortgagor in respect of the property purchased, the principle would apply also against him by virtue of his taking the character of a mortgagor in respect of a portion of the property. The extent of the debt that is wiped out will be proportionate to the relative value of the property purchased. In the case of a single mortgagor or where there is more than one mortgagor, with their consent, when the mortgagee purchases the equity of redemption in an item or a part of the property, no question of partial or piecemeal redemption would arise because the rest of the property would still be owned by the mortgagor or mortgagors

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and it would be liable for the remainder of the mortgage debt. It may be said that the rest of the property is "the share of the mortgagor" within the meaning of the section. It does not matter whether the equity of redemption is purchased in execution of a decree against a mortgagor or by private treaty. The principle applicable would be the same in both cases. [Vide *Bisheshur Dial* v. *Ram Sarup*[1] (execution sale), *Ponnambala Pillai* v. *Annamalai Chettiar*[2] (execution sale) and *Mutty Lal Pal* v. *Nandu Lal Neogi*[3] (private treaty).] Where a person interested in the mortgaged property is not the mortgagor alone and before the purchase of equity of redemption portions of the mortgaged property become vested in third parties or where the mortgagee purchases from a co-sharer his share or an item of property from an owner who held it in distinct ownership, not only is the debt *pro tanto* extinguished but the owners of different items will be entitled to redeem the properties on payment of the proportionate part of the debt. There is no doubt about the applicability of this rule. The same principle would apply in whatsoever manner the equity of redemption is acquired by the mortgagee, that is, by inheritance—*Hamida Bibi* v. *Ahmad Hussain*[4],—or by devise.

The next question arises in the case of a mortgagee purchasing the entire interest in the mortgaged property free of the mortgage. Mookerjee, J., in *Mir Eusuff Ali Haji* v. *Panchanan Chatterjee*[5], expressed the opinion that if the sale was of the property, free of the mortgage and the intention of the parties was that the mortgagee should hold the portion transferred to him free from the mortgage debt and the purchase money should be applied in redemption of his dues, it would obviously be erroneous to maintain that the mortgagee was still bound to apportion the debt. There he was dealing with a case where the purchase was by the mortgagee from the mortgagor when the rights of no third parties intervened. Applying the principle which he enunciated he remarked thus.

"In the case before us it is clear from the conveyance executed by the mortgagors in favour of the mortgagee that the price paid by the latter was intended to represent the value of the entire interest and not merely of the equity of redemption. It was further intended that this purchase money

1. (1900) I.L.R. 22 All. 284 (F.B.).
2. (1920) 38 M.L.J. 239: I.L.R. 43 Mad. 372 (F.B.).
3. (1908) 12 C.W.N. 745.
4. (1909) I.L.R. 31 All. 335.
5. (1910) 15 C.W.N. 800.

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should be applied in reduction of the debt and that the mortgagee should hold the property purchased free from the mortgage lien. It is not open to the mortgagors therefore to claim credit for a larger amount than what was fixed as the purchase money and as between the mortgagors and the mortgagee, the latter is entitled to hold the property exempt from the mortgage lien. The appellants who are purchasers of the interest of the mortgagors in the other properties stand in no higher position; they have consequently no legitimate ground for complaining that the mortgagee seeks to throw the burden of the remainder of the mortgage debt upon the properties in their hands."

No doubt in that case the agreement between the mortgagor and the mortgagee was that the purchase money should go in the reduction of the mortgage debt. It was open to the mortgagor and the mortgagee to come to any agreement in regard to the satisfaction of the debt. Therefore where the transaction is solely between the mortgagor and the mortgagee it may be there is no scope for the apportionment of the debt as the matter rests on contract between the parties. But the question is, can the principle enunciated by Mookerjee, J., be extended even to a case where the matter does not rest between the mortgagor and the mortgagee and third parties such as co-mortgagors or purchasers of the equity of redemption of a portion of the mortgaged property are interested in the mortgaged property? When a mortgagee purchases the property free of his mortgage and pays the full value of the property, the substance of the transaction is that the mortgagee gives up his mortgage right and purchases the property as if it were an unencumbered property paying the full value therefor. The acquisition by the mortgagee in such a case would be not as a mortgagee. If the acquisition is viewed as an acquisition by the mortgagee in the character of a mortgagee it would mean that the mortgagee was also purchasing his own interest. Therefore the transaction can only be viewed as a release of his mortgage right and then a purchase by him. Mookerjee, J., in *Mir Eusuff Ali Haji* v. *Panchanan Chatterjee*[1], was inclined to the view that when the rights of third parties intervene, it is not open to a mortgagee to give up his mortgage right over any portion of the mortgaged property. But our High Court has taken a different view. In the Full Bench decision in *Perumal Pillai* v. *Raman Chettiar*[2], it was definitely ruled that it is open to a mortgagee to release his right over any portion of the mortgaged property and proceed against the rest of the mortgaged property

1. (1910) 15 C.W.N. 800.
2. (1917) 33 M.L.J. 211: I.L.R. 40 Mad. 968 (F.B.).

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for the entirety of the debt though the effect of such a release would not affect the right of contribution which the owners of several portions of the mortgaged properties will have under the law, and the fact that third parties are interested in the property would not affect the right of the mortgagee to do so. It was conceded at the Bar that it is open to a mortgagee to release his right in respect of an item or part of the property and some time later become a purchaser of that item or part in which case no question of *pro tanto* extinguishment of the debt would arise at all. The principle is that once the right of the mortgagee is released, the property ceases to be the subject of the mortgage and the acquisition by the mortgagee would therefore be just like an acquisition by any other stranger acquiring the property. In *Sesha Aiyar* v. *Krishna Aiyangar*[1], there was a purchase by a second mortgagee of a portion of the mortgaged property held in distinct ownership by more than one mortgagor in execution of a decree on a prior mortgage over the said property. It was held that by such acquisition the integrity of his mortgage was not broken. In the course of the judgment it was observed thus:

"It being granted that the plaintiffs (second mortgagee) with regard to their purchase at the sale of Rangayya Goundan's decree (first mortgage) must be treated as strangers and that the whole property free from encumbrance and free from plaintiffs' right of redemption was put up for sale and bought, we can see no ground for holding that their claim under their mortgage is in any way impaired."

The learned Judges explain the principle thus:

"The cases in which the property has been sold and bought subject to the mortgage which it is sought to enforce are clearly distinguishable from the present case in which the purchasers, though they happened to be mortgagees must be taken to have paid the full value of the unencumbered property."

No doubt it may be contended that when a purchase is made in execution of a first mortgage and when all the persons interested in the mortgaged property are parties to it, the sale will be of the entire interest in the property, namely, not only the first mortgagee's interest in the property but also the interest of the mortgagor which was outstanding on that mortgage which would include also the rights of the second mortgagee who must be taken to stand in the shoes of the mortgagor so far as the first mortgage is concerned. The purchase may in effect be said to be in derogation of the second mortgagee's right and not

1. (1900) 10 M.L J. 383: I.L.R. 24 Mad. 96.

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as second mortgagee. But if the section were to be interpreted literally as contended for by Mr. V. V. Srinivasa Aiyangar, the second mortgagee must be deemed to have acquired the share of the mortgagor within the meaning of the section. Therefore the principle underlying the decision shows that it is not in every case a purchaser acquiring the mortgaged property or a portion thereof must be deemed to be acquiring the share of the mortgagor within the meaning of S. 60 but it is only in cases where the mortgagee in the character of a mortgagee acquires the equity of redemption outstanding in the mortgagor. Therefore if before or at the time of acquisition the mortgagee renounces his character of mortgagee and purchases the property, the last clause of S. 60 would have no application. The principle enunciated by Mookerjee, J., need not be confined only to cases where the agreement between the mortgagor and the mortgagee is that the amount paid should go in satisfaction of the mortgage debt. It would be open to the mortgagor to agree that the amount paid for the purchase might go in reduction of any debt due to the mortgagee unconnected with the mortgage. *The Kustea Loan Office, Ltd.* v. *Annada Charan Chackrabartty*[1] is a case in point. In that case a certain property was acquired by Government under the Land Acquisition Act and the compensation money was deposited into Court. With the consent of the mortgagors the amount was allowed to be appropriated in respect of their unsecured debts and Ghose, J., in the course of the judgment explained the substance of the transaction thus:

"Before any third person had acquired any interest in any portion of the mortgaged property the mortgagees were entitled, if they so desired, to pay the whole amount of the compensation money to the mortgagors. They would thereby have reduced their own security and the interest of no other person would have been affected in any way. What happened in this case practically amounts to this that the mortgagees made over a part of the compensation money to the mortgagors and the mortgagors paid it back to the mortgagees in satisfaction of their unsecured debts."

In effect what the learned Judge says is that the mortgagees must be deemed to have released their rights over the mortgaged property and received the compensation money from the mortgagors. No doubt Ghose, J., says that this could not be done where third parties are interested because the view of the Calcutta High Court as already stated is that it is not open to

1. (1922) 27 C.W.N. 763.

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the mortgagee to release a portion of the mortgaged property when the rights of third parties intervene. But as that is not the law so far as this Presidency is concerned the principle of the decision would apply without any qualification suggested by Ghose, J. No doubt the mortgagee in possession of the property as owner thereof would not be in a position to resist a suit for contribution at the instance of a co-mortgagor or a person owning other portions of the mortgaged property. But that would not affect the right of the mortgagee to recover the entirety of the debt from the rest of the mortgaged property and if he can do so there is nothing to prevent him assigning that right and the assignee by virtue of the assignment recovering the entirety of the debt from the rest of the mortgaged property. If the mortgagee sues, a claim for contribution by way of set off may be open against him.

Having regard to these principles the question in this case will have to be dealt with. Under Ex. I there can be no doubt that the fifth defendant purchased the property free from encumbrances from the third defendant. The purchase was in effect free not only of the mortgage under Ex. A but also free of the charge under the lease. Fifth defendant must therefore be deemed to have released his right under Ex. A over the said property. No doubt his liability for contribution as owner of the Perumbakkam property to defendants 1 and 2 as owners of Orathur property will remain unaffected. But the fifth defendant's right as mortgagee to release the entirety of the debt from the Orathur property cannot be questioned and whatever rights he had under Ex. A he assigned them under Ex. C. In our opinion therefore the assignee the third plaintiff would be entitled to recover and realise the entire amount of Rs. 20,000 from the Orathur property. We are also of the opinion that if the mortgaged property be found insufficient, the third plaintiff would be entitled to realise the balance personally from defendants 1 to 3. Though the fifth defendant has given up his right over the Perumbakkam village, still the right of the third defendant to personally pay the mortgage money under Ex. A has not been released and he will be bound to pay the balance. In this view it is unnecessary now to consider the extent of the obligations of the fifth defendant under Ex. C. Our decision in this case would leave unaffected the right of defendants 1, 2 and 8 to claim contribution from the fifth defendant by reason

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of his being the owner of the Perumbakkam properties. All these matters will have to be adjudged in a separate suit. We are of the opinion that it is not open to defendants 1 and 2 to claim redemption by paying only a proportionate part of the debt nor for the eighth defendant who has purchased their right and interest to resist the plaintiffs' claim for the recovery of the entire sum from the properties in his possession.

We accordingly allow the appeal, set aside the decree against defendants 5 and 7 and modify the decree of the learned District Judge against defendants 1 to 3 and 8 by granting a mortgage decree against them for the amount claimed in the plaint, but in the circumstances of this case we are not inclined to allow any costs to the appellants.

S. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Guru Subramania Chetty .. *Petitioner* (Accused).*

Subramania Chetty, *In re.*

Criminal procedure—Arrest without warrant and release on bail—Appearance in pursuance of summons after filing of charge-sheet—Objection to jurisdiction of magistrate on the ground of illegality of arrest—Maintainability.

On a complaint for criminal breach of trust committed within the jurisdiction of the Sub-Magistrate, Saidapet, the petitioner was arrested within Bangalore cantonment. The arrest was illegal as there was no warrant. But the petitioner was released on bail and after the charge-sheet was filed a summons was issued for his appearance without reference to the prior proceedings. He appeared and took objection to the competency of the Sub-Magistrate to try the case on the ground that the arrest was illegal.

Held, the petitioner appeared of his own accord and the propriety of his earlier arrest had no bearing on the proceedings initiated by the summons. Even otherwise the want of legality in regard to the arrest cannot affect the jurisdiction of the Sub-Magistrate to inquire into the offence committed within his jurisdiction.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Stationary Sub-Magistrate of Saidapet dated 29th April, 1940, and passed in C. C. No. 935 of 1940.

A. S. Nataraja Aiyar for Petitioner.

A. S. Sivakaminathan for *The Public Prosecutor* for the Crown.

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*Crl. R. C. No. 368 of 1940. 17th October, 1940.
Crl. R. P. No. 357 of 1940.

Subramania Chetty, *In re.*

The Court made the following

ORDER.—The petitioner was a resident of Tiruvattiyur and a complaint of criminal breach of trust was received against him. He was arrested by the Sub-Inspector of Tiruvattiyur at Bangalore (Civil and Military Station) without a warrant on 27th December, 1939, and produced before the First Class Magistrate there on 28th December. The Magistrate remanded him to the custody of the Sub-Inspector for production before the Sub-Magistrate of Saidapet on 30th December, and he was produced before the Sub-Magistrate of Saidapet on 30th December. The Sub-Magistrate remanded him for ten days to enable the police to complete the investigation, and an application for bail was moved the next day. The petitioner was released on bail on 31st December, and he returned to Bangalore. The charge-sheet was filed on 5th March, 1940, and a summons was issued for the appearance of the petitioner on 20th March. The petitioner appeared on 20th March and the case was adjourned to 30th March for inquiry as it stood posted to 20th March only for apprehension of the petitioner. The case was then adjourned to 3rd April and objection was taken on that day to the competency of the Sub-Magistrate to try the case on the ground that the arrest of the petitioner at Bangalore on 27th December was illegal. The objection was overruled and hence this petition.

The arrest of the petitioner on 27th December was undoubtedly illegal, but the petitioner was released on bail on 31st December and he returned to Bangalore thereafter. The charge-sheet was filed on 5th March and a summons was issued for the appearance of the petitioner on 20th March without reference to the prior proceedings. The petitioner appeared of his own accord on that day and the propriety of his arrest on 27th December has no bearing on the present proceedings. Even otherwise it cannot affect the jurisdiction of the Sub-Magistrate to inquire into the offence under S. 406 of the Indian Penal Code committed by the petitioner within his jurisdiction—vide *Emperor* v. *Vinayak Damodar Savarkar*[1] and the objection was rightly overruled.

The petition therefore fails and is accordingly dismissed.

K. S. *Petition dismissed.*

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1. (1910) I.L.R. 35 Bom. 225 (F.B.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE BURN AND MR. JUSTICE LAKSHMANA RAO.

Gampala Subbigadu *alias* Damasagadu .. *Petitioner** (*Appellant Accused*).

Subbigadu, *In re.*

Criminal trial—Charge of murder—Plea of self-defence—Onus of proof—Clear evidence that accused inflicted the fatal wound—Absence of explanation by prosecution witnesses as to how accused came by his wounds—Effect—Severity of wounds received by accused—If reason for mitigating punishment.

Where the accused in a murder trial sets up a plea of self-defence, the burden lies on him under S. 105 of the Evidence Act to prove it and in the absence of proof it is not possible for the Court to presume the truth of the plea of self-defence. When the evidence is clear that it was the accused who inflicted the fatal wounds upon the deceased it is not possible to reject that evidence merely because the prosecution witnesses do not explain how the accused himself came by his injuries. The severe injuries which the accused himself received cannot be a reason for mitigating his punishment.

Trial referred by the Court of Sessions of the Cuddapah division for confirmation of the sentence of death passed upon the said prisoner in C. C. No. 1 of 1940 on 8th February, 1940 and appeal by the prisoner against the said sentence passed upon him in the said case.

P. Sivaramakrishnayya for Accused.

The Public Prosecutor for the Crown.

The judgment of the Court was delivered by

Burn, J.

Burn, J.—The appellant has been convicted by the learned Sessions Judge of Cuddapah and sentenced to death for the murder of one Bitti Chennugadu *alias* Laddugadu on the 19th August, 1939.

Bitti Chennugadu was undoubtedly murdered on the 19th August at Buggalapalli where he lives. According to the evidence for the prosecution, P. Ws. 3, 4 and 5 and the accused were engaged at about noon in skinning a cow by the side of the Cuddapah-Rayachoti road. At that time Chennugadu, it is said, came and objected to their skinning the cow in that place because it was stinking and because it would provoke the anger of any inspecting officer who might come. He threatened to go and report the matter to the Village Munsif and so saying he turned away. When he had gone a few steps, the accused is said to have run after him and stabbed him in the back with the

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* R. T. No. 36 of 1940. (Cr. A. No. 174 of 1940). 9th April, 1940.

Subbigadu, *In re.*

Burn, J.

knife which he was using to skin the carcass. Chennugadu ran a few yards further away but the accused pursued him and stabbed him twice in the back and twice in front. The evidence of the doctor who made the *post mortem* examination the next day (P. W. 1) shows that one of the stabs inflicted from the front penetrated his heart and must have caused death instantaneously.

Besides the evidence of P. Ws. 3, 4 and 5 there was the evidence of P. W. 2 a brother of the deceased. He said that he was standing near a shop belonging to one Adam Sab which is close to the scene of the offence. He said that he saw two stabs inflicted. The Village Munsif was informed by one Dhollavadu (he lives half a furlong away). The Village Munsif took a statement (Ex. B) from P. W. 2 at about 2 P.M. and reported the occurrence to the police station at Cuddapah which is about 4½ miles away. The Sub-Inspector of Police reached the village by 7-30 P.M. and held an inquest the same night.

The accused in the Sub-Magistrate's Court said that he knew nothing about the matter and in the Sessions Court also said that he had never seen the deceased and P. W. 2 but he filed a statement in writing in which he said that the deceased Chennugadu, Venkatasubbadu and others beat him with stones and sticks and, being unable to bear that, he himself had beaten to protect himself. It was a fact that the accused was very severely injured on the same day. The Village Munsif found him lying unconscious in front of his own house when he, the Village Munsif, was coming towards the scene of the crime. The investigating officer (P. W. 14) found him lying still in the same place when he reached the village. He made arrangements to send him to the hospital and the Resident Medical Officer (P. W. 6) examined him the next day. He had four lacerated wounds on his head, an incised wound on his left ear and abrasions on his shoulder and side. He was unconscious at the time the Doctor saw him and the doctor says that he remained unconscious for 2 or 3 days. He was suffering from concussion of the brain and his own life was in danger for a considerable time. He was not discharged from the hospital till the 7th October, 1939. The mother of the accused preferred a complaint to the Sub-Inspector the same night on behalf of her son against P. Ws. 2 and 3 others. The Sub-Inspector says that after investigation he referred that complaint and it does

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Burn, J.

not appear that any further proceedings were taken on it by the mother of the accused.

The prosecution witnesses do not explain these injuries on the person of the accused and learned counsel has invited us to discard the evidence of the prosecution witnesses for that reason. It is clear, he says, that they have not given a full or wholly truthful account of what happened and therefore they ought not to be believed. This plea however cannot be accepted in the face of the accused's own statement that he caused the injuries on the person of the deceased in self-defence. Having set up the plea of self-defence the burden lay on him under S. 105 of the Evidence Act to prove it and in the absence of proof it is not possible for the Court to presume the truth of the plea of self-defence. One witness was examined for the defence (the District Medical Officer of Cuddapah). He apparently was examined because some attempt was made in the Sessions Court to show that the accused was not in his right mind. The doctor's evidence however did not show that he was insane either at the time the offence was committed or at the time the trial took place. P. W. 3 when questioned about the injuries on the person of the accused said: "Later on I saw the accused fallen near his dayadi's house. He had injuries. I do not know how they were caused. I heard that he got them subsequent to the murder. I did not go near the accused." As the learned Sessions Judge has pointed out, this is not itself evidence that the accused received his injuries after he had murdered the deceased. But it is not at all improbable that that was the case. When the evidence is clear that it was the accused who inflicted the fatal wounds upon the deceased, it is not possible to reject that evidence merely because the prosecution witnesses do not explain how the accused himself came by his injuries. The accused has been properly convicted of the offence of murder and we cannot consider that the severe injuries which he himself received are a reason for mitigating his punishment. The attack upon the deceased was deliberate and was pursued to a fatal end.

We confirm the conviction for murder and also the sentence of death and dismiss this appeal.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATARAMANA RAO AND MR. JUSTICE ABDUR RAHMAN.

Chimalakonda Ramasubbaraya Sastri and others — *Appellants (Plaintiffs Nos. 3, 4 and 5)*

v.

Ganapathiraju Venkata Appalanarasimharaju and others. — *Respondents (Defendants Nos. 1 to 14, 16 to 33, 35, 36 and 38 to 49 and 2nd Plaintiff).*

Ramasubbaraya Sastri *v.* Venkata Appalanarasimharaju.

Hindu Law—Joint family—Suit by a member to set aside alienations by manager and for recovery of his share therein—If operates as a division in status—Such a suit if a suit for partition—Alienation by a member of his share in whole of joint family property or part thereof—If makes him a divided member.

A coparcener can become separate in estate by an unambiguous declaration of his intention to separate himself from the family and the intention to become separate may be evidenced in many different ways either by explicit declaration or by conduct. The institution of a suit for partition by a member of the joint family against the other members will be a manifestation of such intention. But where a suit is in substance not one for partition but to set aside an alienation by the father or a managing member other than the father and for recovery of possession of the plaintiff's share in the property alienated, the inference of an unequivocal intention to separate from the family which a suit for partition in the technical sense of the term in Hindu law gives rise to cannot follow.

An alienation by a member of his share in the whole of the joint family property or in any part thereof would not sever his status from the family and make him a divided member in respect of the property alienated.

Lakshmi Achi v. *Narayanaswami Naicker*, (1929) 57 M.L.J. 746: I.L.R. 53 Mad. 188, not followed in this respect.

Appeal against the decree of the Court of the Subordinate Judge (Principal) of Rajahmundry in O. S. No. 31 of 1929.

P. V. Vallabhacharyulu for Appellants.

The Advocate-General (Sir A. Krishnaswami Aiyar) and *P. Satyanarayana Raju* for Respondents.

The judgment of the Court was delivered by

Venkataramana Rao, J.

Venkataramana Rao, J.—This is an appeal from the judgment and decree of the learned Subordinate Judge of Rajahmundry dismissing the plaintiffs' suit for possession of a half share in certain immovable properties described in Sch. B to the plaint. The said property admittedly belonged to one Suryanarayanaraju and his son Venkatapatiraju. It is the

* A. S. No. 61 of 1936. 25th August, 1939.

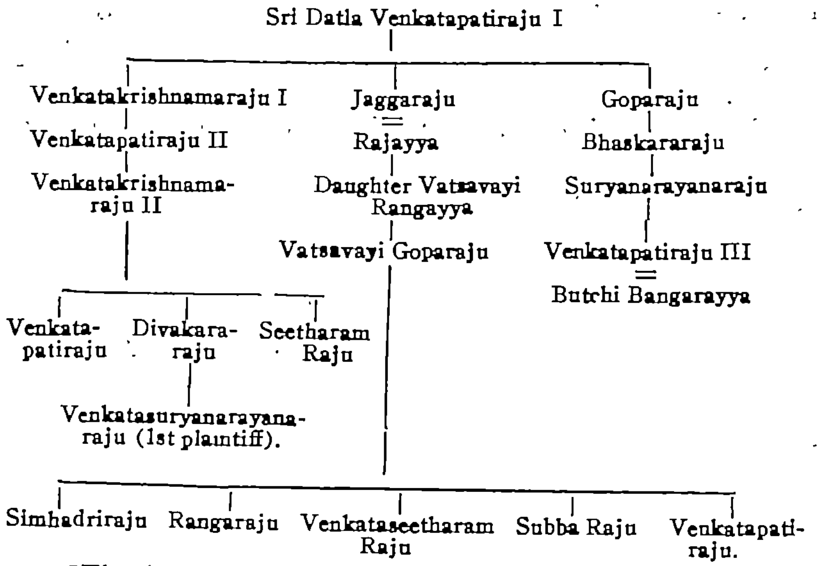
Rama-subbaraya Sastri v. Venkata Appala-narasimha-raju. — Venkata-ramana Rao, J.

plaintiffs' case that the said property was leased in 1868 by Suryanarayanaraju as the father and head of the joint family consisting of himself and his son Venkatapatiraju for a period of fifty years, that subsequent to the said lease the said Suryanarayanaraju and Venkatapatiraju became divided in status, that Venkatapatiraju was entitled in severalty to a half share in the said property, and that on the death of his widow Butchi Bangarayya on 21st January, 1927, the first plaintiff became entitled to the said property as the next reversioner. The defendants trace their title to the entirety of the said property to the father Suryanarayanaraju who alienated the reversion in the said lands. Their case is that there was no division in status between the father and the son and on the death of the son the whole property survived to the father by survivorship and he was competent to alienate the same and confer a good title upon them. They also deny the relationship of the first plaintiff to Venkatapatiraju. Two questions fell to be decided by the lower Court (1) whether the first plaintiff was the next reversioner to Venkatapatiraju and (2) whether there was a division in status between Venkatapatiraju and his father Suryanarayanaraju. On the first question the learned Subordinate Judge held that the first plaintiff had not made out his title as the next reversioner; but on the second question the learned Subordinate Judge held that there was a division in status between Venkatapatiraju and his father Suryanarayanaraju by reason of the judgment and decree in O. S. No. 8 of 1878 on the file of the District Court, Godavari. As an adverse finding on either of the issues entailed a dismissal of the plaintiff's suit, the learned Subordinate Judge dismissed the suit.

The first plaintiff died during the pendency of the suit. Plaintiffs 2 and 3 are alienees of a portion of the suit property from the first plaintiff subsequent to the death of Butchi Bangarayya. Plaintiffs 4 and 5 were brought on record as the legal representatives of the first plaintiff. This appeal is by plaintiffs 3, 4 and 5. There is also a memorandum of objections by the alienee defendants objecting to the finding as to division in status.

The main point urged by Mr. Vallabhacharyulu on behalf of the appellants is that the learned Judge in the Court below in arriving at the finding regarding relationship has not given due

effect to two important documents in the case, namely, Exs. AA and Z-11. He contends that the oral and documentary evidence were not properly appreciated by the learned Judge. The plaintiffs have filed a pedigree which we give herein:



[The learned Judges discussed the evidence and held that Venkatakrishnamaraju I and Goparaju were brothers, that therefore the first plaintiff's title as the next reversioner to the properties of Venkatapatiraju III on the death of Butchi Bangarayya was made out and set aside the finding of the Court below on this point.]

The learned Advocate-General who appeared for the alienees did not advance any argument which would enable us to come to a different conclusion on this matter but he contended that apart from this finding if he could show that the son died undivided from his father, the plaintiffs would be out of Court and that, the finding of the learned Judge that the decree and judgment in the prior litigation operated as a severance in status was wrong. We are inclined to think that this contention is well founded. It is now settled law that a coparcener can become separate in estate by an unambiguous declaration of his intention to separate himself from the family. It is enough for us to refer to the latest decision of the Privy Council in *Ram Narain Sahu* v. *Musammat Makhana*[1], where Sir George Rankin cites with approval the following passage from the

1. (1939) 2 M.L.J. 569: I.L.R. (1939) All. 680 (P.C.).

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judgment of Sir George Lowndes in *Bal Krishna* v. *Ram Krishna*[1]:

"It is now settled law that a separation may be effected by a clear and unequivocal intimation on the part of one member of a joint Hindu family to his co-sharers of his desire to sever himself from the joint family. This was laid down in *Suraj Narain* v. *Iqbal Narain*[2]. The question was further examined in *Girja Bai* v. *Sadashiv Dhundiraj*[3] and the principle was re-affirmed."

In *Girja Bai's case*[3], after pointing out that a separation involving the severance of joint status is distinct from the *de facto* division into specific shares of the joint property their Lordships proceeded to explain that

"The former was a matter of individual decision, the desire on the part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status."

Thus the test laid down is the intention to *sever oneself from the joint family*. The question we have therefore to determine is, did the son intend to sever himself from the father? As pointed out in *Girja Bai* v. *Sadashiv Dhundiraj*[3], the intention to become separate may be evidenced in many different ways, either by explicit declaration or from conduct. If it is an inference drawn from conduct it will be for the Court to determine whether it was unequivocal and explicit. The institution of a suit for partition by a member of a joint family against the other members has always been taken to be a manifestation of an unequivocal intention to separate himself from the other members of the family. As pointed out in *Kawal Nain* v. *Budh Singh*[4], the commencement of a suit for partition would effect a separation from the joint family. Their Lordships found in that case that by the plaint the plaintiff claimed a fifth share in the joint family property and that the claim amounted to an intimation to the co-sharers of the plaintiff of an unequivocal desire for separation from the joint family. Therefore a suit must in substance be a suit for partition with a desire on the part of the plaintiff to hold his share in severalty without being subject to the obligations of the joint status. Having these principles in view, we have to see whether the prior litigation was a suit for partition and the

1. (1931) 61 M.L.J. 362: L.R. 58 I.A. 220 at 224: I.L.R. 53 All. 300 (P.C.).
2. (1912) 24 M.L.J. 345: L.R. 40 I.A. 40: I.L.R. 35 All. 80 (P.C.).
3. (1916) 31 M.L.J. 455: L.R. 43 I.A. 151: I.L.R. 43 Cal. 1031 at 1047 (P.C.).
4. (1917) 33 M.L.J. 42: L.R. 44 I.A. 159: I.L.R. 39 All. 496 (P.C.).

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decree and judgment therein operated as severance in status. The prior litigation was commenced by a suit by Venkatapati-raju in the District Court of Godavari in 1878 (O. S. No. 8 of 1878). A copy of the plaint was not filed in the lower Court because an authentic copy was not available but as a printed copy of the said plaint in the said suit which came up in appeal before this Court was available, we had it marked in this appeal. A reference to the plaint shows that the plaintiff sought to set aside several alienations made by his father including the leases which were executed on 1st and 2nd October, 1868, in favour of the second defendant and the father of third and fourth defendants in that suit. The plaint was confined only to the property alienated. No doubt there was an assertion made in the plaint that the alienations comprised the entire joint family property but that was not a correct statement of fact, since there was other property which was not alienated but was subsequently alienated by the father or the son subsequent to the date of suit. The plaint alleged that the plaintiff demanded all the defendants to make over his half share in each of the properties and they refused to do so and therefore he claimed possession of a half share therein. The demand for delivery of possession of a half share could only be on the alienees because the father was admittedly out of possession and there was no evidence of any demand made on the father prior to the said litigation. The plaint does not mention whether there was any movable property belonging to the family or whether there were liabilities of the family and it was not framed in the way a plaint in a suit for partition would have been framed. In answer thereto, the defendants contended that it was not open to the plaintiff to recover his half share without suing for a partition. The judgment in that suit confirmed all the alienations including the leases and set aside only two gifts of the joint family property made by the father, one made in favour of the plaintiff's sister and the other, in favour of the Guru of the family. The actual decree in the suit was that the plaintiff as a coparcener with the first defendant be put in possession of a half share of the lands gifted away and in regard to the rest of the properties the suit was dismissed. There was no declaration as in a partition suit that the plaintiff and the first defendant were entitled to equal shares in all the joint family properties and that in regard to lands covered by leases the plaintiff will be entitled to recover possession of a half share on the termination

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of the leases. No account of joint family property was directed to be taken nor an account of any liabilities and no declaration was given in regard thereto, whereas, if it was intended to be a suit for partition, the Court would have raised an issue as to the assets and liabilities of the joint family and ascertained what they were and effected a division thereof. The case was carried in appeal and the appellate Court confirmed the above decision except in regard to a small item. It is thus clear that the said suit was not a suit for partition. Where a suit in substance is not one for partition but to set aside an alienation by the father or a managing member other than the father and recovery of possession of the plaintiff's share in the property alienated, the inference of an unequivocal intention to separate from the family which a suit for partition in the technical sense of the term as understood in Hindu Law gives rise to, cannot follow. But it is contended by Mr. Vallabhacharyulu that an alienation by a member of his share in the joint family property operates as a severance in status and he becomes a divided member of the family from the date of alienation and if the alienation relates to a share in a particular item, in respect of that item. A suit for recovery by the plaintiff of his share from the alienee would according to him be a clear indication on his part to hold his share in severalty when recovered; and the first plaintiff must therefore be deemed to have become divided in status from his father by suing to recover his share. Before examining the soundness of this contention it may well be stated that the father did not purport to alienate his share in any item but purported to alienate the entirety of the items including the son's share therein as the father and the managing member for family necessity and no question of any severance of status would result from such alienations, assuming that an alienation would entail the legal consequence of division in status as contended for. But in our opinion an alienation by a member of his share in the whole of the joint family property or in any part thereof would not sever his status from the family and make him a divided member in respect of the property alienated. The preponderance of judicial opinion in this Court has been in favour of this view. In *Ayyagari Venkataramayya* v. *Ayyagari Ramayya*[1], Bhashyam Aiyangar, J.,

1. (1902) I.L.R. 25 Mad. 690 at 717 (F.B.).

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expressed himself thus:

"An undivided member of a family, though he may alienate either the whole or any part of his undivided share will continue to be an undivided member of the family with rights of survivorship between himself and the remaining members in respect of all the joint family property other than what he has transferred."

In the learned Judge's view he would be an undivided member even in respect of the shares of the other members in the property alienated. This is in accord with the strict theory of Hindu Law which does not recognise alienation as a mode of severance of a joint family. The notion that it would operate as a severance was based on the analogy of English law where a joint tenancy would be disrupted by an alienation of his share by the joint tenant. But the concept of a joint tenancy and the legal incidents attaching thereto are not the same as in the case of a joint Hindu family. It is wrong therefore to infer the same legal consequences from an act which operates differently under different systems of law. A Bench of this Court in *Lakshmi Achi* v. *Narayanaswami Naicker*,[1] has taken the view that a member would become divided in respect of the property alienated by him and Mr. Vallabhacharyulu relies on the observations of Ramesam, J., in that case. Referring to the observations of Bhashyam Aiyangar, J., in *Ayyagari Venkataramayya* v. *Ayyagari Ramayya*[2], Ramesam, J., remarks as follows:

"If a member of an undivided family sells the whole of his share in some of the family properties or part of his share in such properties but not in other properties, it may be that he continues undivided with the other members in respect of the properties other than those in which the whole or part of his share has been transferred and this is all that the observation at p. 717 amounts to. It almost implies that so far as the properties in which the whole or part of the member's share is sold, are concerned, he must be regarded as divided from the other members."

With all respect to the learned Judge, the interpretation placed by him on the observations of Bhashyam Aiyangar, J., does not appear to be correct. In support of his view Bhashyam Aiyangar, J., referred to *Gurlingapa* v. *Nandapa*[3]. On a reference to *Gurlingapa* v. *Nandapa*[3], it will be seen that the following observations of the Chief Justice in that case are directly against the view of Ramesam, J.:

"It seems to follow from it that the sale of a coparcener's interest in joint family property cannot affect the position of such coparcener in the

1. (1929) 57 M.L.J. 746: I.L.R. 53 Mad. 188 at 195.
2. (1902) I.L.R. 25 Mad. 690 (F.B.) 3. (1896) I.L.R. 21 Bom. 797.

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joint family or alter the rights of the several coparceners *inter se*...... Basappa's (alienating coparcener's) rights to succeed to his brother's share by survivorship were not therefore affected by the sale of his interest in the last item of joint family property to Gurpadappa so long as the purchaser did not proceed to work out his rights by partition" (p. 303).

There is a definite pronouncement that an alienating coparcener continues undivided even in respect of the share of the other members in the property alienated so that on the death of any member he will succeed to his share by survivorship along with the other members. In *Kandaswami Udayan* v. *Velayutha Udayan*[1], a view different from that of Ramesam J. was expressed by Devadoss, J.:

> "When a coparcener brings a suit for a declaration that an alienation by another coparcener is not binding on him and for his share of the property alienated the Court gives him a decree for his share, if it finds that the alienation is not binding on the plaintiff. But his share does not become absolutely his for the alienating coparcener still continues a member of the joint family, and on a suit for partition by him the property alienated may fall to his share in which case the alienee would be entitled to get it..... When a member of a joint Hindu family sues to set aside an alienation made by another coparcener that suit is not for partition and does not involve necessarily the status of division between him and the other members of the joint family."

The view of the learned Judge appears to be that the fact that the alienating coparceners recover their share would not *ipso facto* effect severance in status in respect of the property alienated because at a final partition the share alienated may be set apart for the alienor's share which would be taken by the alienee. There is authority for the view that the mere recovery by the coparcener of his share in the property alienated would not prevent the alienee from bringing a suit for a general partition and have the property alienated allotted to his share. (Vide *Hanmandas Ramdayal* v. *Valabhdas*[2]). We do not think it necessary to examine the soundness of this view. If the correct principle is that alienation *per se* by a member of his share or part thereof in joint family property does not operate as a severance in status in respect of the property alienated the mere recovery of their shares by the other members would not alter the status of the family. It would therefore rest on them to signify their intention unequivocally to hold the said shares separate from the alienor. In the absence of such expression of intention, the presumption would be that they intend to hold

1. (1926) 51 M.L.J. 99 at 104.
2. (1918) I.L.R. 43 Bom. 17.

the shares as joint family property. And the same legal consequences do not therefore follow from a suit by a plaintiff to set aside an alienation by his coparcener of a certain item of property as not being binding on him and to recover the plaintiff's share therein as would follow from a suit for partition without more. If the institution of such a suit should be taken as evidence of an explicit declaration by the member to hold the share which he seeks to recover in severalty there must be a clear indication to that effect in the plaint or there must be some other evidence to show that it was his intention to so hold the share which he seeks to recover. The Court will have to determine if there was any such intention expressed in the plaint and come to a conclusion on the point. In its absence the conduct of the parties either during the course of the litigation or subsequent thereto will have to be considered in determining this question of intention. The decree in this case provides that the plaintiff as coparcener with the first defendant should recover the share. It would seem to indicate that no severance in status between the plaintiff and his father was effected. The judgment of the learned District Judge in O. S. No. 8 of 1878 was pronounced on the 30th September, 1879. One of the alienations which have been set aside by the judgment as already observed was a gift made by the father in favour of his daughter Venkayya the plaintiff's sister. On the 23rd June, 1880, Venkayya executed a mortgage with possession (Ex. XI) in favour of one Ramayya and this document was attested both by the plaintiff and his father. Therefore though the alienations were set aside the plaintiff confirmed the alienation. The appellate judgment in the case is Ex. N dated 26th October, 1880. On the 30th August, 1882, the plaintiff in O. S. No. 8 of 1878 by Ex. DD effected a sale of the joint family property which was not included in the suit. In that sale the recital is "the house site which has been acquired by our ancestors and which is continuing in our possession", thus clearly indicating the jointness of the family. In O. S. No. 8 of 1878 as the decree of the learned District Judge confirmed the leases and dismissed the suit as against the lessees, costs were awarded against the plaintiff. The lessees were executing the decree for costs against the son Venkatapatiraju but before execution was completed he died. Thereupon the father Suryanarayanaraju was brought in as his legal representative under the description of 'undivided father'. In

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execution the reversion in the suit property was sought to be attached. The objection taken by the father was that as the entire interest of the son devolved on him by survivorship the property could not be attached. This objection was upheld and the execution petition was dismissed. Thus the lessees were unable to recover costs. These proceedings probablise the contention of the defendants that the prior litigation did not effect a partition, that the son and the father were undivided in status and that the persons whose interest it was to assert that they were divided did not do so. It would be hardly likely that if the son was divided in status from the father, the son's widow would not have been brought on record and the son's separate interest would not have been attached and the money due to the lessees for costs would not have been recovered. In 1890 the father effected an alienation of the reversion in the land but no objection was taken by the widow though she lived up to 1927. The conduct of the widow from the date of the death of her husband up to 1927 for a period of over 40 years in not asserting any claim to succeed to her husband's interest renders probable that the son and the father were undivided in status. Ex. III dated 28th November, 1894, lends support to this view. It is a deed of relinquishment executed by the son's widow in favour of one Ramaraju, an alienee from the father of one of the items which was covered by the suit O. S. No. 8 of 1878. What was relinquished under the said document was the 'maintenance right' owned by her. Further there is evidence in the case on behalf of the defendants that the father and the son continued to live and mess together. We see no reason why we should not act on that evidence as the evidence is consistent with the testimony afforded by the documentary evidence. On a consideration of the entire evidence we have come to the conclusion that by the litigation in the prior suit the father and the son did not become divided in status and that Suryanarayanaraju after the death of the son, was competent to alienate the reversion in the lands.

In this view the plaintiffs' suit fails and the appeal is dismissed with costs.

The memorandum of objections is dismissed. No costs.

S. V. V. — *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice*, MR. JUSTICE KING AND MR. JUSTICE PATANJALI SASTRI.

In the matter of Sri A. Ramanuja Ayyangar. First Grade Pleader, Vellore.

F.B.

In the matter of Ramanuja Ayyangar.

Legal Practitioners Act (XVII of 1879), Rules framed under—R. 16—Failure to maintain accounts required by—Professional misconduct.

Failure to keep accounts of all moneys received and disbursed by a pleader in connection with each suit in which he is engaged as a pleader, is professional misconduct. Even if a vakil has not much work he is bound to keep accounts for whatever work he may have.

The Notice under Ss. 13 and 14 of the Legal Practitioners' Act having been issued to Sri A. Ramanuja Ayyangar, First Grade Pleader, Vellore, calling upon the said Sri A. Ramanuja Ayyangar to show cause why he should not be dealt with under the disciplinary jurisdiction of the High Court in that, he, on his own admission, contained in his letter dated 21st November, 1939, to the District Munsif of Vellore in answer to a communication of Court, had not maintained any accounts in respect of his professional work as a vakil, and therefore had rendered himself liable to be dealt with under S. 13 (*f*) of the Legal Practitioners' Act, 1879:

K. Umamaheswaran for *The Advocate-General* in support of the Notice.

Respondent not represented.

The judgment of the Court was delivered by

Leach, C.J.

The Chief Justice.—The respondent is a First Grade Pleader practising at Vellore. He has been charged with professional misconduct in that he has failed to maintain accounts in respect of his professional work. R. 16 of the rules framed under the Legal Practitioners' Act states that it is the duty of every pleader to keep regular accounts of all moneys received and disbursed by him in connection with each suit in which he is engaged as a pleader. The rule goes on to say that the failure to keep such accounts will be treated as a reasonable cause for suspension of certificate within the meaning of S. 13 (*f*) of the Legal Practitioners' Act, 1879.

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*Referred Case No. 16 of 1940. 23rd September, 1940.

F.B.

In the matter of Ramanuja Ayyangar.

Leach, C.J.

In answer to the charge the respondent sent by post a communication to the District Munsif of Vellore who had framed the charge, stating that, as he had no legal work worth mentioning, there was no necessity to maintain any accounts, and that he was under the *bona fide* belief that he need not keep any accounts under the circumstances. He admitted that he had committed an error and asked to be excused. The enquiry into the charge framed against the respondent was fixed for the 16th and 17th of April of this year. On each occasion the respondent failed to put in an appearance. We agree with the District Munsif that, even if a Vakil has not much work, he is bound to keep accounts for whatever work he may have, and in failing to keep accounts the respondent has been guilty of professional misconduct. The respondent is at present under suspension by an order of this Court dated the 17th of October, 1939 passed in another case in which he was charged with professional misconduct. The suspension in that case does not expire until the end of the summer vacation of the District Court of North Arcot in 1941. It is necessary that the respondent should be punished for this further act of misconduct and we direct that he be suspended from practice on the present charge from the end of the summer vacation of the District Court of North Arcot in 1941 until the end of that year.

K. S. —— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR ALFRED HENRY LIONEL LEACH, *Chief Justice* AND MR. JUSTICE HORWILL.

Mayandi Chettiar ... *Appellant** (*Plaintiff*)

v.

The Madura Municipality through its Commissioner. *Respondent* (*Defendant*).

Mayandi Chettiar v. Madura Municipality.

Madras District Municipalities Act (V of 1920), Ss. 216 and 338—Building commenced and completed before application for permission granted by Municipality—Notice under S. 338, compelling demolition of building and compliance with notice—Legality of action under S. 338—Proper procedure was under S. 216 and not under S. 338.

The plaintiff applied to the Madura municipality for permission to put up a building but before permission was granted he commenced and completed the building. The Special Officer of the Municipality issued a notice

*S. A. No. 562 of 1937. 19th September, 1940.

directing the plaintiff to demolish the building within four days under S. 338 of the Act as no licence had been obtained. On plaintiff's refusal to accept the notice the building was demolished by the Special Officer. In an action by the plaintiff for damages, Mayandi Chettiar *v.* Madura Munici-pality.

Held, that a special provision should prevail against a general provision and the Special Officer ought to have issued notice under S. 216 (which specially relates to construction of buildings) to show cause why the building should not be demolished and the action taken under S. 338 (which was a general provision relating to cases of absence of license, permission, etc.) was illegal and high-handed and the plaintiff was entitled to damages.

Appeal against the decree of the Court of the Subordinate Judge of Madura dated 21st January, 1937 and made in A. S. No. 17 of 1936, preferred against the decree of the Court of the District Munsif of Madura Taluk dated 8th May, 1935 and made in O. S. No. 217 of 1933.

T. L. Venkatarama Aiyar for Appellant.

C. S. Rama Rao Saheb for Respondent.

The judgment of the Court was delivered by

The Chief Justice.—By an order dated the 10th August, 1931, the Provincial Government superseded the Madura Municipal Council and appointed a Special Officer to carry out the functions of the Council for a period of one year from the 14th August, 1931. This order was passed under the provisions of S. 41 (1) of the Madras District Municipalities Act, 1920. On the 7th June, 1932, the Special Officer caused a building belonging to the appellant to be demolished. Thereupon the appellant filed in the Court of the District Munsif, Madura Town, the suit out of which this appeal arises for the recovery of damages. The suit was subsequently transferred for hearing to the Court of the District Munsif, Madura Taluk, who held that the appellant's contention was well founded and gave him a decree for Rs. 100 with costs. The respondent council appealed to the Subordinate Judge of Madura, who reversed the decree of the District Munsif on the ground that the Special Officer had acted within the law. The appellant now appeals to this Court and asks for the restoration of the decree of the Court of the District Munsif. Leach, C.J.

Before referring to the sections of the Madras District Municipalities Act, 1920, which have application, it will be convenient to state the facts. On the 25th June, 1931, the appellant applied to the council for sanction to erect a building for the purpose of storing therein oil manufactured by him and submitted plans, as was required by the building regulations.

On the 17th July the Sanitary Inspector reported that he had no objection to the erection of the building, but without waiting for the sanction of the Executive Engineer the appellant commenced to build and completed the work. On the 20th July, 1931, the Executive Engineer called upon the appellant to submit a plan of the lay-out of the whole survey number. This lawful requirement was, however, not complied with until the 9th May, 1932. After the Executive Engineer had on the 20th July, 1931, called for a plan of the lay-out of the whole survey number no further communication was addressed to the appellant until the 5th May, 1932, when the Special Officer issued a notice, purporting to be pursuant to Ss. 338 and 339, by which he required the appellant to demolish his building within four days on the ground that it had been erected 'without municipal licence'. This notice was tendered to the appellant, but he refused to accept it, although four days later he sent the plan of the lay-out as required by the Executive Engineer. On the 7th June, 1932, the Special Officer sent men to the site for the purpose of demolishing the building and this work was carried out in the presence of officials of the municipality and the Circle Inspector of Police. These facts are not in dispute.

The case for the appellant is that the local authority had no power to demolish his building without taking the steps contemplated by S. 216 of the Act. The case for the respondent council is that the Special Officer had full authority to do what he did by reason of the provisions of Ss. 338 and 339. The appellant's reply is that S. 216 is a section which applies in the case of a breach of the building regulations and that S. 338 only applies when no special procedure is laid down. We consider that there is great force in the appellant's contention.

The building regulations are contained in Chap. X of the Act. This chapter comprises Ss. 191 to 217. At the time when the appellant applied for sanction to his plans the executive authority was the Chairman, but he was displaced by the Special Officer as the result of the order of the Provincial Government of the 10th August, 1931. S. 197 states that if a person intends to construct or reconstruct a building, other than a hut, he shall send to the executive authority an application in writing for the approval of the site, together with a site plan of the land, and an application in writing for permission to execute the work, together with a ground plan, elevations and sections of the

building, and a specification of the work. S. 198 prohibits the executive authority granting permission until the approval of the site has been accorded and S. 199 says that construction shall not be begun until the executive authority has granted permission for the execution of the work.

S. 216 states the procedure to be followed where the executive authority is satisfied:

"(*i*) that the construction of a building (*a*) has been commenced without obtaining the necessary permission, or (*b*) is being carried on, or has been completed otherwise than in accordance with the plans or particulars on which the permission was based, or (*c*) is being carried on or has been completed in breach of any of the provisions of the Act, rule or by-law or of any lawful direction or requisition, or

(*ii*) that any alterations required by a notice issued under S. 205 have not been duly made, or

(*iii*) that any alteration of or addition to a building or work has been commenced or is being carried on or has been completed in breach of S. 215."

In any of these cases the executive authority may make a provisional order requiring the owner or builder to demolish the work done, or so much of it as has been unlawfully executed, or to make such alterations as may be necessary to bring the work into conformity with lawful requirements. These are the provisions of sub-S. (1) of S. 216. Sub-S. (2) directs the executive authority, when he has made a provisional order under sub-S. (1), to serve a copy of it on the owner of the building, together with a notice requiring him to show cause within a reasonable time why the order should not be confirmed. Sub-S. (3) says that if the owner fails to show cause to the satisfaction of the executive authority, the executive authority may confirm the order with any modification as he may think fit and that order shall then become binding on the owner. If an order under sub-S. (3) becomes effective it can be enforced by virtue of the provisions of S. 339.

S. 338 on which the respondent council relies is in these words:

"If, under this Act, or any rule, by-law or regulation made under it, the licence or permission of the council or executive authority or registration in the municipal office is necessary for the doing of any act, and if such act is done without such licence or permission or registration or in a manner inconsistent with the terms of any such licence or permission, then—

(*a*) the executive authority may by notice require the person so doing such act to alter, remove, or, as far as practicable, restore to its original state the whole or any part of any property, movable or immovable, public or private, affected thereby, within a time to be specified in the notice; and further,

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(*b*) if no penalty has been specially provided in this Act for so doing such act, the person so doing it shall be liable on conviction before a magistrate to a fine not exceeding fifty rupees for every such offence."

S. 339 which is the section which gives power to enforce default, reads as follows:

" (1) Whenever by any notice, requisition, or order under this Act, or under any rule, by-law or regulation made under it, any person is required to execute any work or to take any measures or do anything a reasonable time shall be named in such notice, requisition or order within which the work shall be executed, the measures taken, or the thing done.

(2) If such notice, requisition, or order is not complied with within the time so named the executive authority may cause such work to be executed or may take any measures or do anything which may, in his opinion, be necessary for giving due effect to the notice, requisition or order as aforesaid; and further,

(3) if no penalty has been specially provided in this Act for failure to comply with such notice, the said person shall be liable on conviction before a magistrate to a fine not exceeding fifty rupees for every such offence."

Ss. 338 and 339 are in Chap. XVI which is headed "Procedure and Miscellaneous".

The provisions of the Act with regard to licences are to be found in Chap. XII within which fall Ss. 244 to 285. Licenses are required for the keeping of animals (S. 245), for the use of premises for certain trades (S. 249), for the keeping of a slaughter-house (S. 255), for the carrying on of a milk business (S. 258), for the carrying of the trade of a butcher, fish-monger or poulterer (S. 259), for the keeping of a private market (S. 262), for the use of a place for the disposal of the dead (S. 279), and for the carrying on of the occupation of a grave-digger (S. 285). Permission of the local authority is required in certain cases such as the digging of a well, tank, pond or fountain (S. 233), and the construction of a factory in which it is proposed to employ steam-power, water-power or other mechanical power or electrical power (S. 250). Registration may be required in respect of carriages let out for hire and for bicycles and tricycles kept within the municipal area (S. 104) and for the keeping of carts (S. 105). The Act does not direct any special procedure to be followed for remedying breaches of the law with regard to licences, permissions and registrations, apart from that to be found in the chapter relating to building regulations. Therefore, except in the case of buildings, direct action may be taken under Ss. 338 and 339. The Subordinate Judge did not consider that S. 216 applied to a case where a person had completed a building without sanc-

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tion, but this opinion is obviously untenable. I have already stated the circumstances in which the executive authority can take action, and the completion of a building, as well as the commencement of a building, are within the scope of the section. As a matter of fact, Mr. Rama Rao Saheb has not attempted to support this part of the Subordinate Judge's judgment.

In our opinion the maxim *generalia specialibus non derogant* applies in this case. The effect of this maxim is concisely stated in Halsbury's Laws of England, Hailsham edition, Vol. 31, p. 526 in these words:

"Where in the same or a subsequent statute a particular enactment is followed by a general enactment, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment is operative, and the general enactment is taken to affect only those other parts of the particular enactment to which it may properly apply."

S. 338 cannot be properly applied here because S. 216 specifically provides what shall be done when there is an infringement of the building regulations. The fact that the word 'may' is used in sub-S. (1) of S. 216 does not leave it to the option of the executive authority to proceed under S. 216 or S. 338. In S. 338 the word is also 'may'. The executive authority may not deem it necessary to take any action, but if he does he must proceed according to S. 216. Therefore the Special Officer's order was unlawful and his action in demolishing the appellant's building without calling upon him to show cause was highhanded. It is true that the appellant had broken the law. He had built without having had his plans sanctioned by the executive authority and he had not complied with the requirement of the executive authority that he should submit a plan of the lay-out of the whole survey number. He was greatly in fault, but it has not been suggested that the building which he erected was in any way contrary to the regulations of the respondent council. This Court asked Mr. Rama Rao Saheb what was the explanation which the Special Officer had to offer for the disregard of the provisions of S. 216 and he was unable to give one. The fact that the appellant had himself disregarded certain provisions of the Act, blameworthy though it was, did not, as Mr. T. L. Venkatarama Ayyar has remarked, make him an outlaw. The action taken by the Special Officer in this case so far as the Court is able to gather from the record and the statements of fact made by counsel (which are in no way in conflict) cannot be supported on any ground. There was no

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request for an explanation and if the building did in fact comply with the regulations—there is no evidence that it did not—the punishment was out of all proportion to the offence. But the main consideration is that the building ought not in any event to have been pulled down without the procedure set out in S. 216 being followed.

It has not been suggested that if the Special Officer's action was unlawful, which in our opinion it certainly was, the respondent council should not be called upon to pay damages. The appellant has suffered damage and his loss has been assessed by both the lower Courts at Rs. 100. Therefore the quantum of damages is not open to argument in this Court, and the respondent council must pay the amount.

The appeal succeeds and the decree of the District Munsif will be restored. The appellant will have his costs in the Subordinate Court and in this Court based on the amount of his decree.

K. S. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PANDRANG ROW AND MR. JUSTICE ABDUR RAHMAN.

K. M. Sr. K. Lankaram .. *Appellant* (5th Defendant)*

v.

O. K. S. Sundaragopala Aiyar and others *Respondents (Plaintiffs, Defendants 1 to 4, 6 to 14, 16 and 17).*

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Civil Procedure Code (V of 1908), O. 21, r. 83 and S. 64—Attachment in execution of money decree—Mortgage of some items of attached property and payment of proceeds towards decree—Sale in Court auction of an item of mortgaged property for balance—Judgment-debtor obtaining before confirmation of sale permission under O. 21, r. 83 and selling the item privately and satisfying the decree—Validity and enforceability of the mortgage as against the purchaser—Mortgage if affected by lis pendens—*Purchaser if entitled to equitable lien or charge on the mortgaged item of property in his lands.*

In execution of a decree for Rs. 14,000 and odd the decree-holder attached some items of the judgment-debtors' property on 13th December, 1920. On 29th July, 1921, some items of the attached properties were mortgaged to X by the judgment-debtors for Rs. 9,000 out of which Rs. 7,500 was paid towards the decree. As the decree was not wholly satisfied the execution was proceeded with and an item of the mortgaged properties was sold in Court

* Appeal No. 245 of 1938. 3rd September, 1940.

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auction on 25th October, 1921, for over Rs. 16,000. Before confirmation of sale the judgment-debtor applied for and obtained permission to sell that item as well as some others privately with a condition to deposit the amounts realised in Court. A certificate was granted under O. 21, r. 83 (2) and the judgment-debtors executed a sale deed of the item sold in Court auction in favour of *K* for Rs.22,500 of which Rs. 17,200 was deposited in Court and the decree was completely satisfied. The balance was deposited towards another decree against the judgment-debtors in the same Court. Simultaneously with the sale deed the judgment-debtors executed another agreement in favour of *K* under which they agreed to mortgage certain other properties in consideration of his paying off *inter alia* the mortgage debt in favour of *X*. No money having been paid under the agreement, a suit on the mortgage was filed. The suit was resisted by the legal representatives of *K*.

Held, (*i*) the sale to *K* in pursuance of the certificate granted under O. 21, r. 83 was a private one and not by or under the orders of the Court. Such a purchaser could not be brought within the ambit of S. 64 of the Code of Civil Procedure and held to have a claim enforceable under the attachment. The mortgage in favour of X is not void on account of the attachment.

Narayana Goundan v. *Appavu Goundan*, (1934) 67 M.L.J. 741: I.L.R. 58 Mad. 392, considered.

Shivlingappa v. *Chanbasappa*, (1905) I.L R. 30 Bom. 337, approved.

(*ii*) The attachment and continuance of the execution proceedings cannot be deemed to be a *lis* pending between the purchaser and judgment-debtor. Consequently S. 52 of the Transfer of Property Act would have no application to the facts of the case and cannot affect the validity of the mortgage in favour of *X*. Case-law considered.

(*iii*) As *K* deposited the sale proceeds into Court in pursuance of the condition mentioned in O. 21, r. 83, Civil Procedure Code, only for his own benefit and not on behalf of the mortgagee there can be no equitable charge or lien in favour of *K* who was aware of the mortgage and had entered into an agreement to discharge the same. Case-law discussed.

(*iv*) *X* was a *bona fide* mortgagee for value and although if the attachment had continued and the sale confirmed the mortgage would have been infructuous as against the attaching creditor, the mortgagee had a prior title as against *K*.

Appeal against the decree of the Court of the Subordinate Judge (Principal) of Madura dated 15th January, 1938, and made in O. S. No. 16 of 1936.

B. Sitarama Rao for *A. Narasimhachari* for Appellant.

K. Rajah Aiyar, O. V. Baluswami, C. Venugopalachari and *W. S. Krishnaswami Naidu* for Respondents.

The judgment of the Court was delivered by

Abdur Rahman, J.

Abdur Rahman, J.—This appeal arises out of a suit instituted in the Court of the Subordinate Judge at Madura on the basis of a mortgage deed (Ex. A) executed by or on behalf of defendants 1 to 4 on the 29th July, 1921, in the plaintiffs' favour.

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The only points for decision in this appeal relate to the enforceability of this mortgage deed and to the lien claimed by the appellant, who was the fifth defendant in the suit, on account of a payment made by his father in satisfaction of a money decree passed in O. S. No. 135 of 1920 against the defendants 1 to 4.

The facts which have led to this litigation may be briefly stated. A decree for a sum of Rs. 14,130-11-2 was passed against the defendants 1 to 4 on the 11th November, 1920, in O. S. No. 135 of 1920. The decree-holder made an application for execution and attached various items of property including the one (item No. 3 in those proceedings and the first item in the present suit) with which we are concerned in this appeal. The attachment was made on the 13th December, 1920. During the continuance of this attachment, seven items of property including the first item, were mortgaged by the judgment-debtors with the plaintiffs for a sum of Rs. 9,000 on the 29th July, 1921 (Ex. A). Out of this money, a sum of Rs. 5,000 was deposited by the judgment-debtors on the 1st August, 1920, towards the decree passed in O. S. No. 135 of 1920 and an application (Ex. V) was made by them at the same time for the grant of a month's time for paying the balance of the decretal amount by alienating the properties under attachment. This application was accepted and in accordance with his undertaking contained in the mortgage deed Ex. A the plaintiffs deposited two more sums of Rs. 1,050 and Rs. 1,450 on the two following days (that is, on the 2nd and 3rd August, 1921). The lodgment schedules on the record show that all these three items of Rs. 7,500 were deposited in Court towards the amount of the decree passed in O. S. No. 135 of 1920. The balance was partly deducted by the plaintiffs towards their own dues and partly paid by them on behalf of the judgment-debtors. The decree was not wholly satisfied and the Court, after the lapse of the time granted by it in pursuance of Ex. V proceeded to execute the decree. The proclamation of sale is not in evidence and we are not, for that reason, in a position to know the amount for which the sale was ordered. But having regard to the fact that Rs. 7,500 were paid towards the decree passed in O. S. No. 135 of 1920, we must presume that this sum must have been duly credited in partial satisfaction of that decree. Anyhow the execution took its course and the third item of that suit was sold in auction on the 25th October, 1921, for a sum exceeding

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Rs. 16,000. Before the sale was confirmed, the judgment-debtors applied to the Court on the 25th November, 1921, for permission under O. 21, r. 83, Civil Procedure Code, to sell the third item privately and also to alienate three more properties (items 4 to 6—Ex. IV) in the same manner. This was granted on the same day but the Court imposed a condition, as required by that rule on the judgment-debtors that the whole of the sale proceeds or other amounts raised by creating an incumbrance should be deposited by them in Court. A certificate was granted under the provisions of the same r. 83 (2) and the judgment-debtors executed a sale deed of the third item of property on the very next day in favour of Kuppuswami, the father of defendants 5 and 6 for a sum of Rs. 22,500 (Ex. I). Out of this amount a sum of Rs. 17,200 had been deposited by Kuppuswami in Court along with the judgment-debtor's application, Ex. IV, on the 25th November, 1921, that is a day before the sale deed was executed and the balance of Rs. 5,300 was deposited on the 10th December, 1921. Ex. III which is a copy of the lodgment schedule, however shows that this latter sum of Rs. 5,300 was paid towards the decree passed against the same judgment-debtors in another suit (O. S. No. 40 of 1921). Since the third item of property which the fifth defendant's father had purchased under Ex. I had been auctioned in execution of the decree in O. S. No. 135 of 1920, it may be fairly presumed that the sum of Rs. 17,200 was deposited by him in the execution of that decree. On payment of this money into Court, the decree in O. S. No. 135 of 1920 was completely satisfied, the sale by the Court was set aside and the attachment made on the 13th December, 1920, deemed to be withdrawn. The sale in Kuppuswami's favour was subsequently confirmed by the Court under the provisions of O. 21, r. 83, Civil Procedure Code. It may be mentioned here that on the same date on which the sale deed in Kuppuswami's favour was executed that is on the 26th November, 1921, the judgment-debtors executed another agreement Ex. H in Kuppuswami's favour under which they agreed to mortgage certain other properties with him in consideration of his paying a few other debts including the one which they had taken from the plaintiffs under the mortgage deed Ex. A. The original of this document has not been produced but the lower Court has found that it must have been in the possession of the fifth defendant and this

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finding has not been challenged before us. No money was paid in pursuance of Ex. H to the plaintiffs and they brought the present suit on the basis of their mortgage deed Ex. A. This was resisted by the appellant and his sister (the fifth and sixth defendants in the suit) on several grounds. The validity of the mortgage deed Ex. A was first of all questioned for the reason that it was executed by the judgment-debtors during the pendency of the attachment. It was contended that although the properties attached in this execution were not sold through Court, yet the private sale effected by the judgment-debtors after a certificate had been granted by the Court under O. 21, r. 83 (2) and after it was duly confirmed under the provisions of that section must be regarded to be a substitute for a sale through Court and the attachment effected before the mortgage Ex. A must enure to the benefit of the person who purchased the property with the sanction of the Court. It was conceded by Mr. Sitarama Rao that an alienation of a property effected by a judgment-debtor even after it was attached is not void against the whole world; but it would be so, he said, against any person who dealt with the property under the orders of the Court, meaning thereby that as the sale of the third item of property to his client was made by reason of the attachment under what he calls to be the Court's order, it would be void as against him.

The second objection raised by learned counsel for the appellant against the validity of the mortgage deed Ex. A was that of *lis pendens.* It was urged that in so far as the mortgage Ex. A was effected after attachment and during the continuance of the execution proceedings in which the appellant's father purchased the property, it fell within the mischief of S. 52 of the Transfer of Property Act.

The third and the last point raised on behalf of the appellant was in regard to an equitable lien which he claimed on the property (the third item in those proceedings) as the auction sale of this item was set aside in consequence of the payment made by his father and this would, it was argued, give a priority to the appellant over the plaintiffs. This contention was supported by learned counsel for the appellant on more or less the same principle as that on which salvage liens are granted or recognised by Courts in maritime cases or immovable property of one person is, by operation of

law, made security for the payment by another. The last of these points was not raised specifically in the pleadings or before the lower Court. Nor was any specific ground taken when the appeal was preferred to this Court; but as it raised a point of law, and the objection on behalf of the respondents was raised almost when the arguments on this point were being concluded by learned counsel for the appellant, we permitted the arguments to be continued.

The objections raised by the appellant and his sister were overruled by the trial Court and a decree was passed in favour of the plaintiffs. Aggrieved by this decree, the fifth defendant appeals.

From what has been said it would be clear that the mortgage deed Ex. A came into existence after the third item of property had been attached and put to sale by the Court although it (that is the sale) was not confirmed and eventually set aside. There can also be no doubt that the sale to the appellant's father was made with the permission of the Court under O. 21, r. 83, Civil Procedure Code, and all the formalities mentioned in that rule were complied with. The points for determination in regard to the first objection of the appellant are:

1. What was the nature of the sale to the appellant's father?

2. Is the claim in respect of the sale to the appellant's father covered by the expression 'claims enforceable under the attachment' used in S. 64, Civil Procedure Code?

3. Was the mortgage to the plaintiffs consequently void as against the appellant's father?

To decide the first point it would be necessary to examine the provisions of O. 21, r. 83, Civil Procedure Code. It contemplates an application by a judgment-debtor after an order for the sale of immovable property is made but before a sale is actually held. This is so because the order that can be passed on an application under that rule is for the postponement of the sale of the property comprised in the order for sale and not one for the postponement of the confirmation of sale. But the sale had in execution of the decree in O.S.No. 135 of 1920 been, as pointed out before, already held, although not actually confirmed. How could then an application be made to the Court within the terms of this rule? An application under O. 21, r. 89

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was competent but this could not have helped the appellant's case. Let us suppose however that the application under r. 83 was entertained, as it seems to have been done, how could the Court agree to sell the property to the fifth defendant's father when it had been actually sold to someone else and the sale was not set aside? Another sale by the Court was, in the circumstances, out of question. Was the sale to the appellant's father then being made, as contended, under the orders of the Court? Or was it simply being done with the sanction of the Court? That there is a great deal of difference between the two is obvious. The Court is not, in the latter case, being approached to order any sale of the property. It could not have done so. It simply authorised the judgment-debtors at their request to deal with the property privately, if they could. But the judgment-debtors were not compelled to alienate the property privately. They might have, in spite of the sanction, done nothing or might not have been able to find a suitable purchaser or alienee. In view of what we have said the answer to the first question is quite clear; but let us examine the provisions of O. 21, r. 83 even if they are supposed to be applicable to the facts of this case. The terms of the first sub-clause indicate clearly that it would apply only when the judgment-debtor wishes to pay off the decree passed against him 'by the mortgage or lease or private sale of such property' as has been ordered to be sold by the Court. The first two modes of alienation, that is, the mortgage or lease, can be available only to an owner of the property (that is, to the judgment-debtor) and not to a Court. If a judgment-debtor does not wish to part with his property permanently and is willing and able to alienate it temporarily and is desirous of raising the money in that manner, he may be allowed to do so by a mortgage or lease of his property. This method of dealing with the property cannot be held to be under or by reason of the attachment. When we come to the third mode that is, to the sale by which the money could be raised, we find the word 'private' prefixed, thereby leaving no room for doubt that the contemplated sale is a private sale and not one by the Court. Moreover the language of the sub-clause shows that the judgment-debtor's power is not restricted to sell or otherwise alienate his property which was under attachment or ordered to be sold, but that he may satisfy the decree by the alienation of a property which is wholly different from the one that was being sold by

the Court would also show that the alienation contemplated by this clause is one by a private treaty only and the Court's sanction is only sought to stay its hands so that the property which was ordered to be sold may not be put to sale and the operation of S. 64, Civil Procedure Code, avoided.

During the course of his argument Mr. Sitarama Rao placed reliance on sub-cl. 2 of r. 83. It provides for the grant of a certificate to a judgment-debtor authorising him to make the aforesaid mortgage, lease or sale and this in spite of the provisions contained in S. 64, Civil Procedure Code. Under that section any private alienation of the property attached by a Court would be void as against all claims enforceable under the attachment. But sub-cl. 2 of r. 83 provides that the certificate granted by the Court would authorise a judgment-debtor to make the alienation in spite of that provision. In other words, the sale, mortgage or lease as the case may be, would be taken to have been authorised by the Court not in pursuance of an attachment but in spite of the attachment and this despite a possible opposition by the decree-holder. The mere fact that a certificate is granted cannot be taken as showing that the judgment-debtor when alienating his own property was doing so on behalf of the Court. The attachment cannot be said to have divested the judgment-debtor of his title to the property or to have vested any title in the Court. It only restrains the judgment-debtor from alienating his property and that is all. The grant of certificate to the judgment-debtor removes the bar or impediment and he becomes authorised to alienate it on the condition that all moneys in respect of such an alienation are deposited into Court and not retained by the judgment-debtor. The condition of deposit is thus substituted in place of the absolute prohibition and the rigidity of the order of attachment released. A subsequent alienation by the judgment-debtor could not he held to have been made either under or by reason of the attachment.

It was next contended that in so far as the alienation authorised by the Court under r. 83 could not become absolute until it was confirmed by the Court and as the provision contained in O. 21, r. 92 in regard to the confirmation of sales held by Courts is similar to the one found in the second proviso to the second sub-clause of r. 83, it must be held that the sales authorised by this section are also made under

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the orders of Court. The language of the second proviso to the second sub-clause in r. 83 does, it is true, bear a close resemblance to that employed in r. 92; but this is simply because the Court has to satisfy itself in either case that the proceeds of alienation made either through Court or privately have been deposited in Court. Since the result to be achieved in either case is the same, there is nothing surprising that the language of the two sections is also similar in that respect but this does not show that the acts by which the same result is proposed to be achieved are necessarily similar in character themselves. A sale by the Court in pursuance of an attachment cannot be said to be the same thing as a sale by a judgment-debtor independent or in spite of the attachment. Title in the first case is conveyed by operation of law and any alienation by the judgment-debtor, if contrary to the attachment is void against all claims enforceable under the attachment, while title in the other is conveyed by the judgment-debtor himself, who cannot derogate from his grant even if made after the attachment. The correctness of the decision by the Division Bench of this Court in *Narayana Goundan* v. *Appavu Goundan*[1] was not questioned by learned counsel for the appellant, but it was attempted to be distinguished on the ground that the sale in that case was not actually confirmed by the Court. The actual reason for the decision given by our learned brother King, J., was, we take it, contained in the following sentence:

"We entirely fail to see how the sub-section (sub-cl. 2 of O. 21, r. 83) can possibly refer to an attachment made subsequent to the issue of the certificate or affect any claims enforceable under that subsequent attachment."

Other observations in regard to the effect of a want of confirmation on "a hypothetical mortgagee", as our learned brother King, J., puts it, must be in the nature of an *obiter*. What the decision in that case would have been if the sale was actually confirmed by the Court under O. 21, r. 83, Civil Procedure Code, in spite of an attachment of the same property by another Court, it is unnecessary to guess. The Division Bench was not called upon to answer that question and any general observations cannot be, although entitled to great respect, regarded as authoritative. A Division Bench of the Bombay High Court in *Shivlingappa* v. *Chanbasappa*[2] has taken the

1. (1934) 67 M.L.J. 741: I.L.R. 58 Mad. 392.
2. (1905) I.L.R. 30 Bom. 337.

view which has appealed to us and we find ourselves in respectful agreement with the same. We have, for the above reasons, no hesitation in holding that the sale under O. 21, r. 83 is a private one and cannot be held to be a sale either by or under the orders of the Court.

Having decided the nature of the sale made to the fifth defendant's father, the answer to the second point does not present any difficulty. The plaintiffs' mortgage shall be, to use the language of S. 64, Civil Procedure Code, void only when the sale to the fifth defendant's father can be said to be a claim enforceable under the attachment made on the 13th December, 1920. The point to decide is if it is so. Can the claim by the fifth defendant be said to be enforceable under the attachment if the sale to his father was a private sale made by the judgment-debtors not in pursuance of, but in spite of the attachment? It cannot be so as the fifth defendant's father acquired the judgment-debtors' rights only by means of a contract and not independently of the judgment-debtors' will—as he would have done if he had purchased the property after it was attached and sold by the Court. It cannot be denied that if the decree-holder were otherwise satisfied and the attachment had, in consequence, become ineffectual, any private alienation by the judgment-debtors would have been, even if made during the continuance of the attachment, valid and binding. This is only because an alienation by a judgment-debtor is not, after attachment, wholly void but only voidable at the option of those at whose instance the attachment was effected or in whose interest it was continued and that also to the extent that those claims were enforceable under the attachment and no further. On account of attachment an auction-purchaser of a property in a sale *in invitum* has a superior title and may have a better one than the judgment-debtors possessed on the date of the sale but this is the result of the provisions contained in S. 64, Civil Procedure Code. A private purchaser under O. 21, r. 83 could not be brought within the ambit of S. 64 of the Code of Civil Procedure and held to have a claim enforceable under the attachment. An attachment and a subsequent order for sale may have been the cause of the alienation in favour of a private purchaser but inasmuch as a private sale with the Court's sanction is absolute against all claims enforceable under the attachment it cannot itself be regarded as a claim enforceable under the attachment.

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In fact the moment the whole of the decretal amount is paid and the decree satisfied, the attachment ceases to exist under O. 21, r. 55, Civil Procedure Code, not because the object of the attachment has been achieved by its exercise but because the subsistence of the attachment has been rendered unnecessary. It is impossible for us to extend the scope of S. 64 and to hold the same to be applicable to *private* sales as well. We must for the above reasons hold that the expression 'claims enforceable under the attachment' does not cover the claim in respect of the sale made by the judgment-debtors to the appellant's father. In view of our decision on the first two points, it necessarily follows that the plaintiffs' mortgage cannot be in our opinion held to be void on account of the attachment in December, 1920.

The next objection raised to the validity of the mortgage deed Ex. A is that of *lis pendens*. The appellant's contention is that a '*lis*' came into existence as soon as the third item of property was attached in proceedings in execution of the decree and in so far as the whole of this item of property became liable to be sold in these proceedings it could not have been otherwise 'transferred' or 'dealt with' 'except under the authority of the Court' 'so as to affect the rights of any other party' such as, according to learned counsel for the appellant, his client is. By accepting the mortgage from the judgment-debtors, the plaintiffs, according to Mr. Sitarama Rao, stood in their shoes and by purchasing the whole of the attached property with the sanction of the Court, his client's father stood in those of the decree-holder. It was urged that the order of the Court sanctioning the sale was binding on the judgment-debtors and their alienees the present plaintiffs and since the mortgage was executed by the judgment-debtors during the pendency of the proceedings in execution, the rights of the appellant's father remained unaffected.

The right to a property cannot be said to be 'directly and specifically in question' after its attachment in execution of a money decree. (*See* decisions in *Sarup Singh* v. *Narsingh*[1] and *Mahadeo Saran Sahu* v. *Thakur Prasad Singh*[2].) This would be particularly so in cases where the attachment remains undisputed by a judgment-debtor or any other person. But if an attachment can be said to give rise to a *lis* at all, it could only be

1. A.I.R. 1929 All. 846. 2. (1910) 14 C.W.N. 677.

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in respect of the liability of the property to be sold in execution and for nothing else. This is not the point that arises for consideration in this case. The question here is whether a *lis* can be said to have come into existence simply because the judgment-debtors made an application under O. 21, r. 83, Civil Procedure Code and if so what that *lis* was. The only order that could be passed on that application was either to grant time to the judgment-debtor for the purposes stated in that rule or not so to do. The Court could not grant permission to the judgment-debtors to mortgage, sell or lease the attached property free of any subsequent encumbrance, which they might have created after the attachment and in the absence of any such order, it would be incorrect for the appellant to contend that he purchased the property free of the encumbrance created by the judgment-debtors in favour of the plaintiffs. Since the essence of S. 52 of the Transfer of Property Act is that a transaction entered into during the pendency of a suit or proceeding cannot prejudice the interests of a party to the suit or proceeding who is not a party to the transaction, let us ascertain whether the mortgage to the plaintiffs affected the rights of 'any other party' within the meaning of the expression used in that section. It has been already held by us that the sale by the judgment-debtors in favour of the appellant's father—in spite of a certificate and subsequent confirmation by the Court—was of a private nature. We are unable to see how the appellant's father can be said to be standing in the decree-holder's shoes. It may be that the necessity for a certificate and subsequent confirmation arose on account of the attachment made at the decree-holder's instance; but this would not make the private vendee a representative of the decree-holder. The contention, therefore, that the appellant's father was the decree-holder's representative is untenable and both the plaintiffs and the appellant's father must be held to be standing in the shoes of the judgment-debtors alone who mortgaged the property first to the former and sold it subsequently to the latter. If that be the correct position and we take it to be so, S. 52 of the Transfer of Property Act would have no application to the facts of this case. The alienation mentioned in S. 52 must be such as 'to affect the rights of any *other* party thereto' and not the rights of the person who dealt with the property or of those who stand in his shoes. The judgment-debtors are, it cannot be denied,

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bound by the mortgage which they created in the plaintiffs' favour. Having mortgaged the property to the plaintiffs, it was no longer in their power to derogate from the grant which had been made to the plaintiffs and they could not, in the circumstances, alienate anything more than the equity of redemption. The decree-holder's right in execution was only to bring the property to sale and had the property been sold through Court, the purchaser would have bought the judgment-debtors' right, title and interest as it existed on the date of the attachment regardless of any alienations that might have been made during the continuance of the attachment. But this would be so in virtue of the provisions contained in S. 64 of the Civil Procedure Code and not on account of any doctrine of *lis pendens*. The contention that every alienation by a judgment-debtor during the pendency of an execution application would be hit by the provisions of S. 52 of the Transfer of Property Act was repelled by Sir John Wallis in *Chamiyappa Tharagan* v. *Rama Aiyar*[1] in the following words:

"If this contention were well-founded, an attachment would be unnecessary as the mere filing of the execution petition would be sufficient to prevent alienation."

With great respect to the learned Chief Justice, as he then was, we find ourselves in complete agreement with his observation and feel that the observation by Pakenham Walsh, J., in *Velayuda Mudali* v. *Co-operative Rural Credit Society, Ulakottai*[2], was too general and, in view of the fact that the properties although sold as free of encumbrance were found to be subject to a prior mortgage, perhaps unnecessary. Reference was made in the course of his arguments by learned counsel for the appellant to the decisions of their Lordships of the Privy Council in *Suraj Bunsi Koer* v. *Sheo Persad Singh*[3] and *G. Anantapadmanabhaswami* v. *Official Receiver of Secunderabad*[4], but it is unnecessary in this case to decide the question whether a charge was created by the attachment in favour of the attaching creditor or whether the judgment-debtor's interest had been brought by attachment under the control of the Court for the purpose of executing the same so as to preclude the

1. (1920) 40 M.L.J. 65: I.L.R. 44 Mad. 232.
2. (1933) 66 M.L.J. 90: I.L.R. 57 Mad. 426.
3. (1879) L.R. 6 I.A. 88: I.L.R. 5 Cal. 148 (P.C.).
4. (1933) 64 M.L.J. 562: L.R. 60 I.A. 167: I.L.R. 56 Mad. 405 (P.C.).

accrual of title by survivorship in the event of the judgment-debtor's death. Even if a charge is assumed to have been created in favour of the attaching creditor, it could not possibly help the appellant as long as he is not found to be a representative of the attaching creditor and the property is not found to have been sold in pursuance of the attachment. We have already found that the appellant's father was not a representative of the decree-holder and know for a fact that the property was not sold by the Court in pursuance of the attachment. Indeed the attachment must be deemed to have come to an end as soon as the decree was satisfied and the moment the attachment ceased to exist, the private alienation of the property during the continuance of the attachment would take effect and have priority over the subsequent alienation when both the alienations were made by the same persons. The decision in *Venkatachalapathi Rao* v. *Venkatappayya*[1] does not help the appellant as the attachment was found to have been effected in that case before a stranger had purchased the property pending execution and it was held that he was bound by the decision of the Court regarding the subsistence of attachment although he was not a party to the same. Since the orders passed in the course of execution proceedings adjudicating on the rights of the parties are *res judicata* and could not be called in question by the parties or their representatives' the ground on which the decision was based can be well understood but this would not advance the appellant's case.

We must, for the above reasons, hold that there is no merit in the contention that the alienation to the plaintiffs was void on account of *lis pendens.*

The third and the last question which awaits to be decided is that of the equitable lien or charge claimed by the appellant on the ground that it was his father's money which had satisfied the attaching creditor's decree, that but for this payment, the sale of the property held by the Court would have been confirmed and the mortgage in favour of the plaintiffs-respondents would have had no effect at least so far as the third item of the property was concerned. An equitable charge or lien is therefore claimed to have come into existence by operation of law and this, it is urged, would rank higher than the mortgage in

1. (1931) 62 M.L.J. 302: I.L.R. 55 Mad. 495.

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favour of the plaintiffs-respondents. In order to appreciate this contention, we must not lose the sight of the facts of this case. It would be recalled that the appellant's father, when he purchased the property, was cognisant of the mortgage in favour of the plaintiffs and had in fact agreed to discharge the same on execution of another mortgage in his favour (Ex. H). It is true that the property was attached at the time when it came to be mortgaged with the plaintiffs, but the money paid by them had, as we have already pointed out in the beginning, gone to discharge the attaching creditor's claim to some extent at least. It would thus be clear that the appellant's father was to become a complete owner of the third item of property not only when he paid the price of the property purchased by him into Court, but after he discharged the plaintiffs' mortgage. Had he carried out the terms of both his contracts, he would have got the whole of the property free from attachment and of the plaintiffs' mortgage. But he failed to carry out his contract contained in Ex. H and the question for decision now is whether the appellant is entitled to a prior charge or security on the property purchased by his father in preference to plaintiffs' prior mortgage.

In view of the fact that the appellant's father had purchased the property from the judgment-debtors who had obtained the Court's sanction under O. 21, r. 83, Civil Procedure Code, to sell it privately on the condition mentioned in the rule, it was incumbent on him to deposit the entire sale proceeds into Court and he did so. Did he then make that payment for the benefit of the plaintiffs or did he do so to discharge the liability which he had undertaken in consideration of the sale deed to be executed by the judgment-debtors in his favour and for his own benefit? By getting the auction sale set aside and by procuring the withdrawal of the attachment, was the property being saved by the appellant's father for the plaintiffs or for himself? The answer to these questions can only be that he had done all this for his own benefit and not for that of the plaintiffs. How can the plaintiffs then be held liable for the payment or payments made by the appellant's father? As it is difficult to conceive an equitable charge in favour of the appellant's father in the absence of a personal right of re-imbursement, let us cast a glance in passing, at the provisions of the Indian Contract Act. S. 69 of the Act would have no application as the plaintiffs

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were not bound to pay the balance of the attaching creditor's claim which he could realise by the sale of the property. S. 70 cannot be held to apply as the appellant's father did not pay the decretal amount into Court for the plaintiffs but for the judgment-debtors who were liable to discharge the decree passed against them and were not free to alienate the third item of property on account of the attachment unless they complied with the condition as to deposit of the sale proceeds into Court. Let us now go to the Transfer of Property Act and see if the third item of property could be, by operation of law, held to be security for the payment made by the appellant's father.

Reliance was placed by learned counsel for the appellant in this connection on the line of cases where it was held that if one of two or more co-sharers owning an estate subject to the payment of revenue to Government paid the whole revenue in order to save, and so did save, the estate from liability to be sold by the Government for realising the arrears of revenue, he would be, by operation of law, entitled to a charge upon the share of each of his co-sharers for the realisation of the latter's share of revenue as between the co-sharers (vide *Rajah of Vizianagaram* v. *Raja Setrucherla Somasekararaz*[1] and *K. Chengalroya Reddi* v. *Udai Kavour*[2]). But it must be remembered that the payments in those cases were not made by persons who were under any obligation to discharge their liabilities under personal covenants while the appellant's father was, in the present case, under the terms of his sale deed liable to do so. Varadachariar, J., in the latter case observed at p. 760 as follows:

> "If he had come to the conclusion that the plaintiff's agent made the deposit in pursuance of an enforceable contract of loan between the plaintiff and the defendant 2, it might be doubtful if the plaintiff could have sustained her claim for a charge on the properties, on the analogy of the doctrine of salvage or on equitable grounds, cf. *Yourell* v. *Hibernian Bank*[3]."

This would show that according to the learned Judge the appellant's father could not, in view of his undertaking to deposit the price into Court, claim a charge or lien.

Salvage lien can be claimed by a person if he incurs any expense or makes any payment for saving a ship or its cargo from loss by wreck, fire or capture. Due to the exigencies of

1. (1902) 13 M L J. 83: I.L.R. 26 Mad. 686 (F.B.).
2. A.I.R. 1936 Mad. 752.
3. (1918) A.C. 372 at 390, 391, 394 and 401.

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the situation that may arise on the high seas when it was impossible to communicate with the owner of the ship or its cargoes, this exception was engrafted in maritime law on the general principle which was to the effect that a person is not ordinarily entitled to recover any payment voluntarily made or expense voluntarily incurred by him on behalf of another unless a request to do so could be, from the circumstances inferred or some other principle such as contained in Ss. 69 and 70 of the Indian Contract Act attracted. This principle was held by their Lordships of the Judicial Committee in *Nugenderchunder Ghose* v. *Sreemutty Kaminee Dossee*[1] and in *Dakhina Mohan Roy* v. *Saroda Mohan Roy*[2] to be applicable to India and although having regard to the decision in *Falcke* v. *Scottish Imperial Insurance Co.*[3] several High Courts in India have latterly taken a different view, yet so far as this Court is concerned, it has stuck to the view that this principle is still applicable to this country. We have been able to find no authority, however, and none was cited to us at the bar that this principle would be applicable to cases where a person makes a payment for his own benefit to save a property which belongs to him or when he was under a personal covenant which he was bound to carry out. The appellant's father cannot be said to have paid any money with the object of getting any priority over the plaintiffs, but in order to get the property which belonged to his vendors at the time of the sale. Since they (that is, the judgment-debtors) had already executed a mortgage in favour of the plaintiffs of which the appellant's father had full knowledge, he can only be taken to have purchased the right, title and interest which was owned by his vendors at the time of sale. This sale still holds the field and the plaintiffs do not challenge it or want it to be set aside although it is true that if the plaintiffs' claim happens to exceed the value of the property, the appellant or his sister may lose the entire property or not be able to recover anything out of its sale proceeds. This is, however, a different matter. The decisions in *Dakhina Mohan Roy* v. *Saroda Mohan Roy*[2] and *Mollaya Padayachi* v. *Krishnaswami Aiyar*[4] have no application as the payment in those cases were made by persons who

1. (1867) 11 M.I.A. 241.
2. (1893) L.R. 20 I.A. 160: I.L.R. 21 Cal. 142 (P.C.).
3. (1886) 34 Ch. D. 234.
4. (1924) 47 M.L.J. 622.

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were not the owners of the estate or were adjudged not to have been so finally and not for their own benefit.

Moreover, the charge on a property as held in *Vyraperumal Mudaliar* v. *Alagappa Maniagarar*[1], "which springs into existence" on a certain date in consequence of payment "can only avail against that property as it stood on the date of payment and cannot avail retrospectively against prior mortgagees and others who have in good faith or without any suspicion that such a charge may come into future existence advanced money on the property." There is not the slightest doubt in our minds that the plaintiffs were *bona fide* mortgagees for value and although if the attachment had continued and the sale confirmed, their mortgage would have been infructuous as against the attaching creditor, yet they have a prior title as against the appellant's father, who did not only appear on the scene much later but who knew of the plaintiffs' mortgage and had entered into an agreement to discharge the same. The appellant's contention that an equitable charge be declared in his favour cannot be, for the above reasons, upheld.

The result is that the appeal fails and is dismissed with costs of plaintiffs-respondents.

K. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH AND MR. JUSTICE PATANJALI SASTRI.

S. Ramaswami Aiyar .. *Petitioner** (*Respondent-Plaintiff*)

v.

Komalavalli Ammal .. *Respondent* (*Petitioner-4th Defendant*).

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Madras Agriculturists' Relief Act (IV of 1938), Ss. 3 (2) and 23—Person owning agricultural lands outside municipality in addition to other lands within the municipality—If excluded from the definition of "agriculturist"—Sale in execution of judgment-debtor's property—Expiry of 30 days without application for confirmation of sale—Debtor if still has saleable interest in the property to apply under S. 23 of Act IV of 1938.

A person who claims to be an agriculturist should have a saleable interest in agricultural land situate outside a Municipality and if he has such

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1. (1931) 62 M.L.J. 31: I.L.R. 55 Mad. 468.

* C. R. P. No. 324 of 1939. 14th October, 1940.

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interest it is wholly immaterial whether or not he also owns agricultural lands within a municipality.

A judgment-debtor whose property is sold in execution does not cease to be its owner capable of selling it effectively under certain conditions so long as he can apply to have the sale set aside, that is to say, till the expiration of 30 days from the date of sale.

After the expiry of such period for an application to set aside the auction sale, the auction purchaser can effectively sell the property purchased even in the absence of a confirmation of the sale by the Court, and the judgment-debtor ceases to have any saleable interest in that property.

Case-law discussed.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the Subordinate Judge of Mayavaram dated 14th November, 1938 and made in E. A. No. 238 of 1938 in O. S. No. 5 of 1933.

N. Ramanatha Aiyar for Petitioner.

C. A. Seshagiri Sastri for Respondent.

The judgment of the Court was delivered by

Patanjali Sastri, J.

Patanjali Sastri, J.—This is a petition to revise an order of the Subordinate Judge of Mayavaram whereby the sale held on 17th March, 1938, in execution of the decree in O. S. No. 5 of 1933 on the file of that Court was set aside under S. 23 of the Madras Agriculturists' Relief Act on the application of the respondent.

The petitioner obtained the decree on foot of a mortgage executed in his favour by the respondent's brothers. The mortgage comprised in addition to certain other properties the six items of immovable property here in question to which the respondent claimed title under a will of her deceased father which is marked Ex. A in these proceedings. The respondent was impleaded as the fourth defendant in the suit and her claim to have these properties exonerated from liability failed as she was held estopped from setting up her own title to them by reason of having attested the mortgage, thereby leading the mortgagee to believe that the mortgagors had the right to mortgage the properties.

Three objections to the maintainability of the respondent's application under S. 23 of the Madras Act IV of 1938 were raised by learned counsel for the petitioner. The first was that out of the six items of property now in question, four were situated within the limits of Mayavaram Municipality and that

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therefore the respondent was not an agriculturist within the meaning of the definition in S. 3 (*ii*) of the Act. The other two items are admittedly agricultural lands situated outside the Municipality. The definition so far as it is material here says:

"'Agriculturist' means a person who (*a*) has a saleable interest in any agricultural or horticultural land in the Province of Madras not being land situated within a Municipality."

This provision, it was said, means that any person who owns an agricultural land situated within a Municipality is not an agriculturist although he has such land outside the Municipal limits. This construction is clearly wrong. All that the definition requires is that the person who claims to be an agriculturist should have a saleable interest in an agricultural land situated outside a Municipality, and if he has such land, it is wholly immaterial whether or not he also owns agricultural lands within a municipality. Indeed, learned counsel for the petitioner did not seriously press this contention.

It was next argued that all that the respondent obtained under the will (Ex. A) was a mere right to enjoy the properties during her lifetime without any power of alienation, and that she had no saleable interest in them such as would bring her within the definition. Learned counsel laid stress on the words "hold and enjoy during her lifetime" used in connection with the disposition in favour of the respondent while the word 'get' was used in the grant to the respondent's male issue, and argued that this indicated that the testator's intention was to confer upon the respondent nothing more than a right of enjoyment. It was also urged that this construction should be adopted as it would give effect to the restraint imposed on the respondent's powers of alienation which otherwise would be defeated as being void for repugnancy. We are unable to construe the will in the manner suggested. We do not consider that the testator used the words "hold and enjoy" in deliberate contradistinction to the word 'get' with a view to make clear that he was not conveying an estate in these properties to his daughter. The latter word is used in the disposition in favour of the respondent's daughter which is also made subject to the same condition restraining alienation. We are of opinion that the testator intended to confer the same kind of estate on the respondent as he conferred upon her daughter, namely, a life estate in the properties, and that the condition absolutely

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restraining the disponees from alienating their interest in the properties is void as being repugnant to the nature of the estate granted. It follows that the respondent derived a saleable interest in these properties under her father's will Ex. A.

The last contention, which was also the main contention before us, was that inasmuch as the properties were sold on 17th March, 1938, that is, a few days before the commencement of the Act, the respondent ceased to have any saleable interest in these lands at the commencement of the Act or at the time of her application under S. 23, and was therefore disentitled to claim the benefit of that provision. This contention was not raised in the Court below and the respondent had no opportunity to show that, apart from the properties sold in Court auction, she owned other agricultural lands and was thus entitled to apply under the section. The point was however allowed to be raised as petitioner's learned counsel agreed that if his contention was accepted, the case might be remitted to the lower Court for ascertaining whether the respondent owns other agricultural lands.

It has to be observed that though the respondent's properties were sold in Court auction before the commencement of the Act, the sale had not been confirmed when the respondent applied on 20th June, 1938, under S. 23 of the Act, though the period of 30 days prescribed for an application under the Civil Procedure Code to set aside a sale in execution of a decree had expired, and no such application it was said had been made. The question for consideration, therefore, is whether in these circumstances the respondent can be held to have a saleable interest in the properties at the time when she instituted the proceedings out of which this revision petition has arisen.

It was argued for the petitioner that when a judgment-debtor's property is sold in Court auction and no application to set aside the sale has been made within 30 days under O. 21, rr. 89, 90 and 91, he has no saleable interest left in the property, as it must be deemed to have passed under the sale to the auction purchaser. It was pointed out that confirmation by Court is a mere ministerial act as the Court is bound to confirm the sale in such circumstances under O. 21, r. 92. There are no doubt, indications in the provisions of the Civil Procedure Code that an auction purchaser at a Court sale does not obtain title to the property immediately on his purchase.

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O. 21, r. 92 (1) provides:

"Where no application is made under r. 89, r. 90 or r. 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute."

Under S. 316 of the old Civil Procedure Code of 1882, the title to the property vested in the purchaser only from the date of the sale certificate while under S. 65 of the present Code, when the sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute. Again under O. 21, r. 89 a judgment-debtor whose property has been sold has been held entitled to apply to set aside the sale as the person "owning such property" in spite of the sale. In *Pandurang Laxman* v. *Govind Dada*[1], the judgment-debtor effected a private sale of the property sold in Court auction before such sale was confirmed, and the position was held to be not essentially different from a case where there is nothing more than an agreement for sale between the parties, as the conveyance, in such circumstances, could not operate unless the auction sale was set aside. In *Sundaram* v. *Mamsa Mavuthar*[2], a Full Bench of this Court had to consider the question whether a judgment-debtor who after the sale of his property in Court auction sold it privately to a third party was entitled to apply under O. 21, r. 89. All the learned Judges proceeded on the view that after a Court sale, the judgment-debtor continues to be the owner of the property, though they expressed somewhat different opinions as to his position when he effects also a private sale of such property after the Court sale. Wallis, C. J., was of opinion that the private sale being valid as between the parties though it would operate only subject to the auction sale being set aside, the judgment-debtor could no longer be regarded as the owner of the property but was entitled to apply as a person holding an interest in the property by virtue a title acquired before the Court sale. Oldfield and Kumaraswami Sastri, JJ., took the view that the judgment-debtor, in such circumstances, continued to be the owner notwithstanding the Court sale and the private sale. It is thus clear that a judgment-debtor whose property is sold does not cease to be its owner capable of selling it effectively under certain conditions, so long as he can apply to have the sale set

1. (1916) I.L.R. 40 Bom. 557.
2. (1921) 40 M.L.J. 497: I.L.R. 44 Mad. 554 (F.B.).

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aside, that is to say, till the expiration of 30 days from the date of sale. But, what is the position after that period? Can he still dispose of the property so as to pass an effective title to the transferee against the auction-purchaser? In other words, has he a 'saleable interest' in the property? Whatever could be said in support of an affirmative answer to this question if the matter were *res integra,* we consider that the decision of the Privy Council in *Zamindar of Polavaram* v. *Maharajah of Pittapur*[1], requires that it should be answered in the negative. In that case a decree-holder having purchased certain properties of his judgment-debtor at a Court sale in execution of a mortgage decree entered into a compromise with the judgment-debtor's guardian under which one of the properties purchased was to be left to the judgment-debtor in consideration of the latter agreeing to pay a certain sum and to abstain from raising objections to the sale of the properties. The compromise was sanctioned by the Court which confirmed the auction sale with the exception of the property which was agreed to be left to the judgment-debtor, and issued a sale certificate covering the other properties. A mortgage of that property subsequently executed for the sum agreed to be paid under the compromise having turned out to be inoperative for want of due attestation, the question arose whether the compromise amounted to a sale by the decree-holder purchaser in respect of which a vendor's lien for unpaid purchase money could be claimed. In upholding the claim and overruling the objection that there could be no sale by the auction-purchaser to the judgment-debtor as the title to the property in question never passed to the former under the auction sale which was not confirmed in respect of that property, their Lordships observed:

"That village, along with other mortgaged property, was, as stated, sold to the plaintiff on 28th October, 1920; and the period within which the judgment-debtor could apply to the Court for setting aside the sale was thirty days from the date of the sale. During that period no such application was made by him, and *the title of the auction-purchaser became unimpeachable.* . . . . . *It is obvious that, after the expiry of the statutory period for setting aside the sale, there was no person who could question the title of the auction-purchaser,* and a certificate of sale granted by the Court would in such case be a formal document of title. In the absence of an order setting aside the sale the Court is bound to confirm it, and the law does not prescribe any special period for an application for an order of confirmation." (Italics ours.)

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1. (1936) 71 M.L.J. 347: L.R. 63 I.A. 304: I.L.R. 59 Mad. 910 (P.C.).

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These observations are, in our view, decisive of the point now under consideration. They show that after the expiry of the period for an application to set aside an auction sale, the auction-purchaser can effectively sell the property purchased even in the absence of a confirmation of the auction sale by the Court or, in other words, that he has a 'saleable interest' in the property. If he has acquired such interest, it is difficult to see how the judgment-debtor can also be said to have a saleable interest in the same property, there being no question here of subordinate interests carved out of the property being owned by different persons.

It was urged by Mr. Seshagiri Sastri for the respondent that the abovementioned decision must be taken to have been based upon the rules made by the Local Government for the administration of the Agency tracts of the Madras Presidency as the property there in question lay within those tracts and it was pointed out that those rules do not provide for confirmation by Court of an auction sale or for issue of a sale certificate and that, on the other hand, title to the property vested under the rules in the purchaser immediately on his purchase. Our attention was drawn to the argument of the learned counsel for the appellant before this Court where this aspect was emphasised. (See *Zamindar of Polavaram* v. *Maharajah of Pittapuram*[1].) The decision could, no doubt, have been based on the provisions of those rules, but it is plain that the case was throughout dealt with on the footing that the Civil Procedure Code was applicable. The original auction sale was in fact confirmed and a sale certificate was also issued, though in respect of the other properties, and the discussion relevant to the present issue both in the judgment of this Court (see *Zamindar of Polavaram* v. *Maharajah of Pittapuram*[1]) and in that of the Privy Council proceeded having the provisions of the Civil Procedure Code in view, as the reference to confirmation by Court and sale certificate clearly shows. Indeed in the arguments of counsel before the Board as reported, no reference was made to the Agency Rules, while the relevant provisions of the Code were cited. We cannot therefore regard the decision of their Lordships as inapplicable here.

Mr. Seshagiri Sastri placed reliance on *Raja Raghunandan Prasad Singh* v. *Commissioner of Income-tax, Bihar*

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1. (1930) 60 M.L.J. 56: I.L.R. 54 Mad 163 at 166 and 172.

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and Orissa[1] as showing that the title of a purchaser in Court auction becomes complete only on confirmation by Court. The case related to an income-tax assessment and the question was when the assessee, a money-lender who had purchased certain properties of his judgment-debtor in execution for the amount payable to him under a decree, could be said to have realised his debt. It was held that the interest on the debt could be deemed to have been realised only when the sale was confirmed. Their Lordships did not have to consider the position of a judgment-debtor in relation to the property sold in Court-auction after the expiry of the period prescribed for setting aside the sale where no confirmation follows, and the decision is no authority for the view that he has, in such circumstances, a saleable interest in the property.

It was said that apart from O. 21, rr. 89, 90 and 91, the Court can set aside auction sales under S. 47 on other grounds (*see* the cases collected in Mulla's Civil Procedure Code, Tenth Edition, p. 185) and can also refuse to confirm such sales under its inherent powers (*Raghavachariar* v. *Murugesa Mudaliar*[2] and *Govinda Padayachi* v. *Murugayya Chettiar*[3]) and that therefore it cannot be said that the auction-purchaser acquires an indefeasible title before confirmation. These cases proceed on the ground that the sale was either a nullity or was tainted by fraud on Court to which the purchaser was privy, and have not, in our opinion, much bearing upon the narrow point arising for consideration before us.

In the result, the order of the Court below is set aside and the case is remitted to that Court for disposal after enquiry as to whether the respondent had a saleable interest in other agricultural lands apart from the properties sold in Court auction, and also whether in fact no application for setting aside the sale had been made before the proceeding under S. 23 of the Act was instituted, no finding having been recorded on these points. Both parties will be at liberty to adduce fresh evidence. Costs in this Court will abide and follow the result.

K. S. —— *Petition allowed.*

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1. (1933) 64 M.L.J. 544: L.R. 60 I.A. 133: I.L.R. 12 Pat. 305 (P.C.).
2. (1923) 44 M.L.J. 680: I.L.R. 46 Mad. 583.
3. (1933) 64 M.L.J. 586.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE LAKSHMANA RAO.

Guruswami Chettiar and others .. *Petitioners** (*Accused*).

Guruswami Chettiar, *In re.*

Criminal Procedure Code (V of 1898), Ss. 195 and 476—Applicability—Inquiry under Legal Practitioners' Act against A*—Use by* A *of a receipt found to have been forged by* B *and attested by* C *and* D*—Prosecution—Complaint by Court—Whether necessary.*

Where a complaint was that in the course of proceedings under the Legal Practitioners' Act against *A*, *A* made use of a receipt which was found to have been forged by *B* and attested by *C* and *D* and also that *B*, *C* and *D* swore to the truth of the document in the proceedings,

Held, that a complaint of the Court was not necessary for prosecuting the accused for offences under Ss. 403 and 467 of the Indian Penal Code.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying that the High Court will be pleased to revise the order of the Court of the Town Sub-Magistrate of Coimbatore dated 5th March, 1940 and made in R. C. No. 2 of 1940.

Dr. V. K. John and *D. Noronha* for Petitioners.

The Public Prosecutor (*V. L. Ethiraj*) for the Crown.

The Court made the following

ORDER.—The complaint against the first accused is only under S. 403 of the Indian Penal Code and accused 2 to 4 were not parties to the proceedings under the Legal Practitioners' Act. A complaint of the Court is not necessary for prosecuting these accused for an offence under S. 467 of the Indian Penal Code nor does any question of evading the provisions of S. 195 of the Code of Criminal Procedure arise as in *Appadurai Nainar*, In re[1]. The Court was moved to make a complaint against them and the making of a complaint by the Court for an offence under S. 193 of the Indian Penal Code was considered unnecessary as accused 2 to 4 could be prosecuted for the graver offence under S. 467 of the Indian Penal Code without a complaint of the Court. There is therefore no ground for interference and the revision petition is dismissed.

K.S. *Petition dismissed.*

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* Cr. R. C. No. 227 of 1940. 8th August, 1940.
(Cr. R. P. No. 218 of 1940).

1. (1935) 69 M.L.J. 812: I.L.R. 59 Mad. 165.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WADSWORTH.

Tumuluru Sitaramayya .. *Petitioner** (*2nd Petitioner-2nd Defendant*)

v.

Tumuluru Sreeramaiya and another. *Respondents* (*Counter-Petitioner and 1st Petitioner-Plaintiff and 1st Defendant*).

Sitaramayya *v.* Sree-ramaiya.

Madras Agriculturists' Relief Act (IV of 1938), S. 14 (b)—Suit against agriculturist and non-agriculturist—Scaling down of debt in favour of agriculturist debtor—Full amount as scaled down made recoverable from agriculturist—Validity of order.

Where the suit is against an agriculturist and a non-agriculturist defendant the Court which scales down the debt at the instance of the agriculturist debtor cannot direct him to pay the full amount of the decree as scaled down. Under S. 14 (*b*) of Madras Act IV of 1938 his liability extends only to his proportionate share of the decree scaled down in his favour.

Petition under S. 115 of Act V of 1908 praying that the High Court will be pleased to revise the order of the Court of the District Munsif of Tenali dated 7th January, 1939 and made in C. M. P. No. 1236 of 1938 in O. S. No. 418 of 1931.

The Court delivered the following

JUDGMENT.—It seems that the trial Court's order is clearly wrong in so far as it directs the petitioner—the agriculturist defendant—to pay the full amount of the decree as scaled down. Under S. 14 (*b*) of Madras Act IV of 1938 his liability extends only to his proportionate share in the decree which must be scaled down in his favour. So the decree against him has to be reduced from Rs. 585 to Rs. 292-8-0, with interest thereon from 1st October, 1937, at 6½ per cent. Petitioner also contends that the lower Court is wrong in making the non-agriculturist defendant liable for the full amount of the decree as passed and that this order offends against S. 14 (*a*) of the Act. This is a contention which cannot be raised by the petitioner who is not concerned in that portion of the order. The petition is allowed to the extent indicated and the decree-holder respondent will pay petitioner's costs.

B. V. V. *Petition allowed.*

[END OF VOLUME 1940—II.]

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*C. R. P. No. 779 of 1939. 1st August, 1940.

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INDIA ACTS, 1940.

THE REGISTRATION (EMERGENCY POWERS) ACT, 1940.

ACT NO. I OF 1940.

[23rd February, 1940.

An Act to provide for the registration of certain European British subjects.

WHEREAS it is expedient to provide for the registration of certain European British subjects;

It is hereby enacted as follows:—

Short title, extent, commencement and duration.

1. (1) This Act may be called THE REGISTRATION (EMERGENCY POWERS) ACT, 1940.

(2) It extends to the whole of British India, and applies also to European British subjects in any part of India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

(4) It shall be in force during the continuance of the present war and for a period of six months thereafter.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(*a*) " European British subject " means any subject of His Majesty of European descent in the male line, born, naturalised or domiciled in the British Islands or in any Dominion as defined in the Statute of Westminster, 1931, or in any Colony except Ceylon;

(*b*) " prescribed " means prescribed by rules made under this Act.

Obligation to register.

3. (1) Every male European British subject for the time being in India (not being—

(*a*) a member of His Majesty's naval, military or air forces, or

(*b*) a person who is enrolled under the Auxiliary Force Act, 1920, or is in holy orders, or is a regular minister of any religious denomination),

who for the time being has attained the age of sixteen years but has not attained the age of fifty years, shall, within the prescribed period, correctly fill up, or cause so to be filled up, to the best of his knowledge and belief, sign and lodge with the appropriate registration authority specified in the First Schedule, or such other registration authority as may be prescribed, the form set out in the Second Schedule, and if any such European British subject claims not to be ordinarily resident in India, he shall lodge with the said form a statement of such claim.

(2) If any registration authority has reason to believe that any person is a European British subject to whom the provisions of sub-section (1) are applicable, he may, by order in writing, require such person to furnish such particulars as may be specified in the order within such time as may be so specified, and such person, whether or not he is a European British subject to whom the provisions of the said sub-section are applicable, shall within the specified time furnish correctly to the

best of his knowledge and belief the said particulars to the said registration authority in such form or manner as such order may require, and shall sign the same; and if any such person claims that he is not a European British subject to whom the provisions of sub-section (1) are applicable, he shall furnish a statement of such claim with the particulars as aforesaid.

(3) If any person refuses or, without lawful excuse (the burden of proving which shall lie upon such person), neglects fully to comply with the requirements of sub-section (1) or of any order made under sub-section (2), he shall be punishable with fine which may extend to five hundred rupees.

(4) Every registration authority under this Act shall be deemed to be a public servant within the meaning of the Indian Penal Code.

Determination of disputes as to applicability of this Act.

4. If any question arises with reference to this Act or any rule made thereunder whether a person is a European British subject to whom the provisions of sub-section (1) of section 3 are applicable, a person appointed in writing in this behalf by the prescribed authority may apply to the District Magistrate or to any officer specially empowered in this behalf by the Central Government in the area in which the person to whom the dispute relates is for the time being present, and such Magistrate or other officer, after hearing such person or giving him a reasonable opportunity for being heard, shall summarily determine the question, and the decision of such Magistrate or other officer shall be final.

Power of Central Government to make rules.

5. (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(a) prescribe registration authorities, in addition to those specified in the First Schedule;

(b) prescribe the time within which the form set out in the Second Schedule shall be lodged with the registration authority;

(c) prescribe authorities who may make the appointment referred to in section 4;

(d) provide for the issue of certificates of registration;

(e) provide for the preparation, compilation and correction of a register, and require the attendance of persons for any of such purposes;

(f) require the notification of changes of address of registered persons.

(3) Rules made under this section may provide that any contravention thereof or of any order or notice issued thereunder shall be punishable with fine which may extend to five hundred rupees.

Act not to apply to certain persons.

6. Nothing in this Act shall apply to any person confined for the time being in a prison or lunatic asylum.

Repeal of Ordinance II of 1939

7. The Registration Ordinance, 1939, is hereby repealed; but any rules made, anything done and any action taken under the said Ordinance shall be deemed to have been made, done or taken under the corresponding provisions of this Act, and any offence committed against or any proceedings commenced under the said Ordinance, may be punished, or may be continued and completed as if such offence were committed against or such proceedings were commenced under this Act.

THE FIRST SCHEDULE.

(*See* section 3)

Registration authorities.

In the case of any servant of the Crown.	The Head of the Office or Department in which he serves.
In the case of any person in the employ of any public or local authority.	The Chief Executive Officer of such authority.
In the case of any person in the employ of any railway.	The Head of the Railway Administration.
In any other case	The District Magistrate of the district in which the person is for the time being resident, or in the case of a person resident in a Presidency-town, the Commissioner of Police.

THE SECOND SCHEDULE.

(*See* section 3)

Form of particulars.

1. Name in full.
2. Address
3. Date of birth.
4. Whether single, married or widower.
5. Number of dependents, specifying their relationship, if any, to him
6. Profession or occupation
7. Name and nature of business, *or* name, address and nature of employer's business, *or* if employed in or under any Department of Government, the name of the Department
8. Whether he has served, or undergone training of any description, in any naval, military or air force. If so, give particulars of such service or training including date and duration thereof
9. Whether he possesses, or has possessed, a flying licence.

THE FOREIGNERS ACT, 1940.

ACT No. II OF 1940.

[23rd February 1940.

An Act to provide for the imposition of restrictions on foreigners.

WHEREAS it is expedient to provide for the imposition of restrictions on the entry of foreigners into British India, their presence therein and their departure therefrom ; It is hereby enacted as follows :—

Short title, extent and duration

1. (1) This Act may be called THE FOREIGNERS ACT, 1940.

(2) It extends to the whole of British India.

(3) It shall be in force during the continuance of the present war and for a period of six months thereafter.

Definitions.

2. In this Act,—

(*a*) "foreigner" has the meaning assigned to it in the Foreigners Act, 1864, except that it does not include—

(i) any ruler or subject of any Indian State ; or

(ii) any native of the tribal areas ;

(*b*) "prescribed" means prescribed by orders made under this Act ;

(*c*) "specified" means specified by direction of a prescribed authority.

Power to make orders

3. (1) The Central Government may, by order, make provision, either generally with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into British India or their departure therefrom or their presence or continued presence therein.

(2) In particular, and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner—

(a) shall not enter British India, or shall enter British India only at such times and by such route and at such port or place and subject to the observance of such conditions on arrival as may be prescribed ;

(b) shall not depart from British India, or shall depart only at such times and by such route and from such port or place and subject to the observance of such conditions on departure as may be prescribed ;

(c) shall not remain in British India, or in any prescribed area therein ;

(d) shall remove himself to, and remain in, such area in British India as may be prescribed ;

(e) shall comply with such conditions as may be prescribed or specified—

(i) requiring him to reside in a particular place ;

(ii) imposing any restrictions on his movements ;

(iii) requiring him to furnish such proof of his identity and to report such particulars to such authority in such manner and at such time and place as may be prescribed or specified ;

(iv) requiring him to allow his photograph and finger impressions to be taken and to furnish specimens of his hand-writing and signature to such authority and at such time and place as may be prescribed or specified ;

(v) prohibiting him from association with persons of a prescribed or specified description ;

(vi) prohibiting him from engaging in activities of a prescribed or specified description ;

(vii) prohibiting him from using or possessing prescribed or specified articles ; or

(viii) otherwise regulating his conduct in any such particular as may be prescribed or specified ;

(f) shall enter into a bond with or without sureties for the due observance of, or as an alternative to the enforcement of, any or all prescribed or specified restrictions or conditions ; or

(g) shall be arrested and detained or confined ;

and may make provision for such incidental and supplementary matters as may, in the opinion of the Central Government, be expedient or necessary for giving effect to this Act.

Internees.

4. (1) Any foreigner (hereinafter referred to as an internee) in respect of whom there is in force any order made under clause (g) of sub-section (2) of section 3, directing that he be detained or confined, shall be detained or confined in such place and manner and subject to such conditions as to maintenance, discipline and the punishment of offences and breaches of discipline as the Central Government may from time to time determine.

(2) No person shall—

(a) knowingly assist an internee to escape from custody or knowingly harbour an escaped internee ; or

(b) give an escaped internee any assistance with intent thereby to prevent, hinder or interfere with the apprehension of the internee.

(3) The Central Government may, by order, provide for regulating access to, and the conduct of persons in, places in British India where internees are detained and for prohibiting or regulating the despatch or conveyance from outside such places to or for internees therein of such articles as may be prescribed.

(4) No proceedings shall be taken by virtue of sub-section (2) or sub-section (3) against any person in respect of any act done by him when he is himself an internee.

Change of name.

5. (1) No foreigner who was in British India on the date on which this Act came into force shall, while in British India after that date, assume or use or purport to assume or use for any purpose any name other than that by which he was ordinarily known immediately before the said date.

(2) Where, after the date on which this Act came into force, any foreigner carries on or purports to carry on (whether alone or in association with any other person) any trade or business under any name or style other than that under which that trade or business was being carried on immediately before the said date, he shall, for the purposes of sub-section (1), be deemed to be using a name other than that by which he was ordinarily known immediately before the said date.

(3) In relation to any foreigner who, not having been in British India on the date on which this Act came into force, thereafter enters British India, sub-sections (1) and (2) shall have effect as if for any reference in those sub-sections to the date on which this Act came into force there were substituted a reference to the date on which he first enters British India thereafter.

(4) For the purposes of this section—

(*a*) the expression " name " includes a surname, and

(*b*) a name shall be deemed to be changed if the spelling thereof is altered.

(5) Nothing in this section shall apply to the assumption or use—

(*a*) of any name in pursuance of a Royal licence ; or

(*b*) by any married woman, of her husband's name.

Obligations of masters of vessels, etc.

6. Any District Magistrate and any Commissioner of Police, or, where there is no Commissioner of Police, any Superintendent of Police, may, for any purpose connected with the enforcement of this Act or any order made thereunder, enter, with such assistance as he may think fit, any vessel or aircraft at any port or place in British India and may—

(*a*) direct the master of the vessel or the pilot of the aircraft, as the case may be,—

(i) before any passenger disembarks, or before the vessel or aircraft leaves such port or place, as the case may be, to furnish a list in writing of the passengers who are on board or who have been carried on board at any time since the vessel or aircraft commenced its journey, or who have signified their intention of departing from British India on board such vessel or aircraft, setting out the ports or places at which they embarked, the ports or places of their disembarkation or intended disembarkation, and such other particulars as may be prescribed, and

(ii) to answer to the best of his ability any question relating to the passengers who are on board or who have disembarked in any part of British India ; and

(*b*) if any foreigner seeking to enter British India on board such vessel or aircraft does not give satisfactory reasons for entering British India, either—

(i) refuse to allow such foreigner to disembark from such vessel or aircraft, or

(ii) place him under such restraint as may be prescribed or specified.

Burden of proof.

7. If any question arises with reference to this Act or any order made or direction given thereunder, whether any person is or is not a foreigner or is or is not a foreigner of a particular class or description, the onus of proving that such person is not a foreigner or is not a foreigner of such particular class or description, as the case may be, shall, notwithstanding anything contained in the Indian Evidence Act, 1872, lie upon such person.

Power to exempt from application of Act.

8. The Central Government may, by order, declare that any or all of the provisions of this Act or the orders made thereunder shall not apply, or shall apply only with such modifications or subject to such conditions as may be specified, to or in relation to any individual foreigner or any class or description of foreigner.

Power to give effect to orders, directions, etc.

9. (1) Any authority empowered by or under or in pursuance of the provisions of this Act to give any direction or to exercise any other power, may, in addition to any other action expressly provided for in this Act, take or cause to be taken, such steps and use, or cause to be used, such force as may, in its opinion, be reasonably necessary for securing compliance with such direction or for preventing or rectifying any breach thereof, or for the effective exercise of such power, as the case may be.

(2) Any police officer may take such steps and use such force as may, in his opinion, be reasonably necessary for securing compliance with any order made or direction given under or in pursuance of the provisions of this Act or for preventing or rectifying any breach of such order or direction.

(3) The power conferred by this section shall be deemed to confer upon any person acting in exercise thereof a right of access to any land or other property whatsoever.

Power to delegate authority.

10. Any authority upon which any power to make or give any direction, consent or permission or to do any other act is conferred by this Act or by any order made thereunder may, unless express provision is made to the contrary, in writing authorise, conditionally or otherwise, any authority subordinate to it to exercise such power on its behalf, and thereupon the said subordinate authority shall, subject to such conditions as may be contained in the authorisation, be deemed to be the authority upon which such power is conferred by or under this Act.

Attempts etc. to contravene the provisions of this Act, etc.

11. (1) Any person who attempts to contravene, or abets, or attempts to abet, or does any act preparatory to, a contravention of, the provisions of this Act or of any order made or direction given thereunder, or fails to comply with any direction given in pursuance of any such order, shall be deemed to have contravened the provisions of this Act.

(2) Any person who, knowing or having reasonable cause to believe that any other person has contravened the provisions of this Act or of any order made or direction given thereunder, gives that other person any assistance with intent thereby to prevent, hinder or otherwise interfere with his arrest, trial or punishment for the said contravention, shall be deemed to have abetted that contravention.

(3) The master of any vessel or the pilot of any aircraft, as the case may be, by means of which any foreigner enters or leaves British India in contravention of any order made under, or direction given in pursuance of, section 3 shall, unless he proves that he exercised all due diligence to prevent the said contravention, be deemed to have contravened this Act.

Penalties.

12. If any person contravenes the provisions of this Act or of any order made thereunder, or any direction given in pursuance of this Act or such order, he shall be punished with imprisonment for a term which may extend to five years and shall also be liable to fine; and if such person has entered into a bond in pursuance of clause (*f*) of sub-section (2) of section 3, his bond shall be forfeited, any person bound thereby shall pay the penalty thereof, or show cause to the satisfaction of the convicting Court why such penalty should not be paid.

Protection to persons acting under this Act.

13. No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Act.

Application of other laws not barred.

14. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of the Foreigners Act, 1864, the Registration of Foreigners Act, 1939, and of any other enactment for the time being in force.

Repeal and saving.

15. (1) The Foreigners Ordinance, 1939, is hereby repealed.

(2) Notwithstanding such repeal, all orders made, directions given, things done and action taken under the said Ordinance, shall be deemed to have been made, given, done or taken under the provisions of this Act, as if this Act had come into force on the 26th day of August, 1939, references to the said Ordinance in any rule made under any enactment shall be construed as references to this Act, and offences committed against or proceedings commenced under the said Ordinance may be punished or may be continued and completed as if such offences were committed against or such proceedings were commenced under this Act.

THE ROYAL INDIAN NAVY (EXTENSION OF SERVICE) ACT, 1940.

ACT NO. III OF 1940.

[23rd February, 1940.

An Act to provide for the retention in service of certain person enrolled for service in the Royal Indian Navy.

WHEREAS it is expedient to provide for the retention in service of certain persons enrolled for service in the Royal Indian Navy;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE ROYAL INDIAN NAVY (EXTENSION OF SERVICE) ACT, 1940.

Extension of service where term of service has expired.

2. (1) Until such date as may be notified by the Central Government as the date of termination of the present hostilities, any person enrolled for service in the Royal Indian Navy who, by reason of the expiry of the term for which he engaged to serve when so enrolled, is no longer liable for service, shall, notwithstanding such expiry, continue to be enrolled for service and to be liable for service in the Royal Indian Navy until he is discharged by order of the Officer Commanding the Royal Indian Navy:

Provided that the period for which the service of any such person is extended under this section shall not exceed five years from the day on which his service would otherwise have terminated.

(2) The provisions of this section shall apply also to any person enrolled for service in the Royal Indian Navy if the expiry of the term for which he engaged to serve occurred between the 2nd day of September, 1939, and the commencement of this Act.

THE OFFENCES ON SHIPS AND AIRCRAFT ACT, 1940.

ACT NO. IV OF 1940.

[23rd February, 1940.

An Act to extend the operation of the Criminal law to offences committed on ships or aircraft registered in British India wherever they may be.

WHEREAS it is expedient to extend the operation of the criminal law to offences committed on ships or aircraft registered in British India wherever they may

be, and for that purpose further to amend the Indian Penal Code and the Code of Criminal Procedure, 1898;

It is hereby enacted as follows:—

Short title. 1. This Act may be called THE OFFENCES ON SHIPS AND AIRCRAFT ACT, 1940.

Amendment o section 4 of Act XLV of 1860. 2. In section 4 of the Indian Penal Code, after clause (3) the following clause shall be inserted, namely:—

"(4) any person on any ship or aircraft registered in British India wherever it may be."

Amendment of section 188 of Act V of 1898. 3. In section 188 of the Code of Criminal Procedure, 1898, after the words "Prince or Chief in India", where they occur for the second time, the following words shall be inserted, namely:—

"or

when any person commits an offence on any ship or aircraft registered in British India wherever it may be".

THE TRADE MARKS ACT, 1940.

ACT NO. V OF 1940.

[11th March, 1940.

An Act to provide for the registration and more effective protection of Trade Marks.

WHEREAS it is expedient to provide for the registration and more effective protection of trade marks; It is hereby enacted as follows:—

CHAPTER I.

PRELIMINARY.

Short title, extent and commencement. 1. (1) This Act may be called THE TRADE MARKS ACT, 1940.

(2) It extends to the whole of British India.

(3) This section and section 85 shall come into force at once; the remaining provisions of the Act shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint in this behalf.

Definitions. 2. (1) In this Act, unless there is anything repugnant in the subject or context,—

(a) "associated trade marks" means trade marks deemed to be, or required to be registered as, associated trade marks under this Act;

(b) "certification trade mark" means a mark adapted in relation to any goods to distinguish in the course of trade goods certified by any person in respect of origin, material, mode of manufacture, quality, accuracy or other characteristic, from goods not so certified and registrable as such under the provisions of Chapter VIII in respect of those goods in the name, as proprietor of the certification trade mark, of that person;

(c) "District Court" has the meaning assigned to it in the Code of Civil Procedure, 1908;

(d) "High Court" means a High Court as defined in sub-section (1) of section 219 of the Government of India Act, 1935;

(e) "limitations" (with its grammatical variations) means any limitations of the exclusive right to the use of a trade mark given by the registration of a person as proprietor thereof, including limitations of that right as to mode of use, as to use

in relation to goods to be sold or otherwise traded in within British India, or as to use in relation to goods to be exported to any market outside British India ;

(*f*) "mark" includes a device, brand, heading, label, ticket, name, signature, word, letter or numeral or any combination thereof ;

(*g*) "permitted use" means the use of a trade mark by a registered user thereof in relation to goods with which he is connected in the course of trade and in respect of which for the time being the trade mark remains registered and he is registered as a registered user, being use such as to comply with any conditions or restrictions to which his registration is subject ;

(*h*) "prescribed" means prescribed by rules made, in relation to proceedings before a High Court, by such High Court, and in other cases, by the Central Government ;

(*i*) "registered" (with its grammatical variations) means registered under this Act ;

(*j*) "registered trade mark" means a trade mark which is actually on the register ;

(*k*) "registered user" means a person who is for the time being registered as such under section 41 ;

(*l*) "trade mark" means a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right, either as proprietor or as registered user, to use the mark whether with or without any indication of the identity of that person ;

(*m*) "transmission" means transmission by operation of law, devolution on the personal representative of a deceased person and any other mode of transfers, not being assignment ;

(*n*) "tribunal" means the Registrar, or as the case may be, the Court before which the proceeding concerned is pending.

(2) References in this Act to the use of a mark shall be construed as references to the use of a printed or other visual representation of the mark, and references herein to the use of a mark in relation to goods shall be construed as references to the use thereof upon, or in any other relation whatsoever, to such goods.

Application of other laws not barred.

3. The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

CHAPTER II.

THE REGISTER AND CONDITIONS FOR REGISTRATION.

The register of trade marks.

4. (1) For the purposes of this Act there shall be established at the Patent Office a Trade Mark Registry, and a record called the Register of Trade Marks (in this Act referred to as the register) shall be kept thereat wherein shall be entered all registered trade marks with the names, addresses and descriptions of their proprietors, notifications of assignments and transmissions, the names, addresses and descriptions of registered users, disclaimers, conditions, limitations, and such other matters relating to registered trade marks as may be prescribed, but there shall not be entered in the register any notice of any trust express, implied or constructive nor shall any such notice be receivable by the Registrar.

(2) Subject to the superintendence and direction of the Central Government, the register shall be kept under the control and management of the Controller of Patents and Designs, who shall for the purposes of this Act be called the Registrar of Trade Marks and is in this Act referred to as the Registrar.

(3) The register shall at all convenient times be open to the inspection of the public, subject to such conditions and restrictions as may be prescribed.

Registration to be in respect of particular goods.

5. (1) A trade mark may be registered only in respect of particular goods or classes of goods.

(2) Any question arising as to the class within which any goods fall shall be determined by the Registrar whose decision in the matter shall be final.

Distinctiveness requisite for registration.

6. (1) A trade mark shall not be registered unless it contains or consists of at least one of the following essential particulars, namely :—

(*a*) the name of a company, individual, or firm, represented in a special or particular manner ;

(*b*) the signature of the applicant for registration or some predecessor in his business ;

(*c*) one or more invented words ;

(*d*) one or more words having no direct reference to the character or quality of the goods, and not being, according to its ordinary signification, a geographical name or sur-name or the name of a sect, caste or tribe in India ;

(*e*) any other distinctive mark, provided that a name, signature, or any word, other than such as fall within the descriptions in the above clauses, shall not be registrable except upon evidence of its distinctiveness.

(2) For the purposes of this section, the expression "distinctive" means adapted, in relation to the goods in respect of which a trade mark is proposed to be registered, to distinguish goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists, either generally or, where the trade mark is proposed to be registered subject to limitations, in relation to use within the extent of the registration.

(3) In determining whether a trade mark is adapted to distinguish as aforesaid, the tribunal may have regard to the extent to which—

(*a*) the trade mark is inherently so adapted to distinguish, and

(*b*) by reason of the use of the trade mark or of any other circumstances, the trade mark is in fact so adapted to distinguish :

Provided that in the case of a trade mark which has been continuously used (either by the applicant for registration or by some predecessor in his business, and either in its original form or with additions or alterations not substantially affecting its identity) in relation to the same goods as those in relation to which registration is applied for, during a period from a date prior to the 25th day of February, 1937, to the date of application for registration, the Registrar shall not refuse registration by reason only of the fact that the trade mark is not adapted to distinguish as aforesaid, and may accept evidence of acquired distinctiveness as entitling the trade mark to registration.

Limitation as to colour.

7. (1) A trade mark may be limited wholly or in part to one or more specified colours, and any such limitation shall be taken into consideration by any tribunal having to decide on the distinctive character of the trade mark.

(2) So far as a trade mark is registered without limitation of colour it shall be deemed to be registered for all colours.

Prohibition of registration of certain matter.

8. No trade mark nor part of a trade mark shall be registered which consists of, or contains, any scandalous design, or any matter the use of which would—

(*a*) by reason of its being likely to deceive or to cause confusion or otherwise, be disentitled to protection in a Court of justice ; or

(*b*) be likely to hurt the religious susceptibilities of any class of His Majesty's subjects ; or

(*c*) be contrary to any law for the time being in force or to morality.

Use of names of chemical elements barred.

9. No word which the commonly used and accepted name of any single chemical element or single chemical compound (as distinguished from a mixture) shall be registered as a trade mark in respect of a chemical substance or preparation, and any such registration shall, notwithstanding anything in section 24, be deemed for the purposes of section 46 to be an entry made in the register without sufficient cause or an entry wrongly remaining on the register, as the circumstances may require :

Provided that this section shall not apply to a word which is used to denote only a brand or make of the element or compound as made by the proprietor or a registered user of the trade mark, as distinguished from the element or compound as made by others, and in association with a suitable name or description open to the public use.

Prohibition of registration of identical or similar trade mark.

10. (1) Save as provided in sub-section (2), no trade mark shall be registered in respect of any goods or description of goods which is identical with a trade mark belonging to a different proprietor and already on the register in respect of the same goods or description of goods, or which so nearly resembles such trade mark as to be likely to deceive or cause confusion.

(2) In case of honest concurrent use or of other special circumstances which, in the opinion of the Registrar, make it proper so to do he may permit the registration by more than one proprietor of trade marks which are identical or nearly resemble each other in respect of the same goods or description of goods, subject to such conditions and limitations, if any, as the Registrar may think fit to impose.

(3) Where separate applications are made by different persons to be registered as proprietors respectively of trade marks which are identical or nearly resemble each other, in respect of the same goods or description of goods, the Registrar may refuse to register any of them until their rights have been determined by a competent Court.

Registration of parts of trade marks and of trade marks as a series

11. (1) Where the proprietor of a trade mark claims to be entitled to the exclusive use of any part thereof separately, he may apply to register the whole and the part as separate trade marks.

(2) Each such separate trade mark shall satisfy all the conditions applying to, and have all the incidents of, an independent trade mark.

(3) Where a person claiming to be the proprietor of several trade marks in respect of the same goods or description of goods which, while resembling each other in the material particulars thereof, yet differ in respect of—

(*a*) statements of the goods in relation to which they are respectively used or proposed to be used ; or

(*b*) statements of number, price, quality, or names of places ; or

(*c*) other matter of a non-distinctive character which does not substantially affect the identity of the trade mark ; or

(*d*) colour ;

seeks to register those trade marks, they may be registered as a series in one registration.

Associated trade marks.

12. (1) Where a trade mark which is registered, or is the subject of an application for registration, in respect of any goods is identical with another trade mark which is registered, or is the subject of an application for registration, in the name of the same proprietor in respect of the same goods or description of goods, or so nearly resembles it as to be likely to deceive or cause confusion if used by a person other than the proprietor, the Registrar may at any time require that the trade marks shall be entered on the register as associated trade marks.

(2) Where a trade mark and any part thereof are, in accordance with the provisions of sub-section (1) of section 11, registered as separate trade marks in the name of the same proprietor, they shall be deemed to be, and shall be registered as, associated trade marks.

(3) All trade marks registered in accordance with the provisions of sub-section (3) of section 11 as a series in one registration shall be deemed to be, and shall be registered as, associated trade marks.

(4) On application made in the prescribed manner by the registered proprietor of two or more trade marks registered as associated trade marks, the Registrar may dissolve the association as respects any of them if he is satisfied that there would be no likelihood of deception or confusion being caused if that trade mark were used by any other person in relation to any of the goods in respect of which it is registered, and may amend the register accordingly.

Registration subject to disclaimer.

13. If a trade mark contains—

(a) any part not separately registered as a trade mark in the name of the proprietor, or for the separate registration of which no application has been made, or

(b) any matter common to the trade, or otherwise of a non-distinctive character,

the tribunal, in deciding whether the trade mark shall be entered or shall remain on the register, may require, as a condition of its being on the register, that the proprietor shall either disclaim any right to the exclusive use of such part or of all or any portion of such matter, as the case may be, to the exclusive use of which the tribunal holds him not to be entitled, or make such other disclaimer as the tribunal may consider necessary for the purpose of defining the rights of the proprietor under the registration :

Provided that no disclaimer shall affect any rights of the proprietor of a trade mark except such as arise out of the registration of the trade mark in respect of which the disclaimer is made.

CHAPTER III.

PROCEDURE FOR, AND DURATION OF, REGISTRATION.

Application for registration.

14. (1) Any person claiming to be the proprietor of a trade mark used or proposed to be used by him who is desirous of registering it shall apply in writing to the Registrar in the prescribed manner, and subject to the provisions of this Act, the Registrar may refuse the application or may accept it absolutely or subject to such amendments, modifications, conditions or limitations, if any, as he may think fit.

(2) In the case of a refusal or conditional acceptance the Registrar shall, if required by the applicant, state in writing the grounds of his decision and the materials used by him in arriving thereat.

(3) The tribunal may at any time, whether before or after acceptance, correct any error in or in connection with the application, or may permit the applicant to amend his application upon such terms as it may think fit.

Opposition to registration.

15. (1) When an application for registration of a trade mark has been accepted, whether absolutely or subject to conditions or limitations, the Registrar shall, as soon as may be after acceptance, cause the application as accepted, together with the conditions and limitations, if any, subject to which it has been accepted, to be advertised in the prescribed manner :

Provided that the Registrar may cause an application to be advertised before acceptance if it relates to a trade mark to which clause (e) of sub-section (1) of section 6 applies, or in any other case where it appears to him that it is expedient by reason of any exceptional circumstances so to do, and where an application has

been so advertised the Registrar may, if he thinks fit, advertise it again when it has been accepted, but shall not be bound so to do.

(2) Any person may, within the prescribed time from the date of the advertisement of an application, give notice in writing in the prescribed manner to the Registrar of opposition to the registration.

(3) The Registrar shall serve in the prescribed manner a copy of the notice on the applicant, and within the prescribed time the applicant shall send to the Registrar, in the prescribed manner, a counter-statement of the grounds on which he relies for his application, and, if he does not do so, he shall be deemed to have abandoned his application.

(4) If the applicant sends such counter-statement, the Registrar shall serve in the prescribed manner a copy thereof on the persons giving notice of opposition, and shall, after hearing the parties, if so required, and considering the evidence, decide whether, and subject to what conditions or limitations, if any, registration is to be permitted.

(5) If a person giving notice of opposition or an applicant sending a counter-statement after receipt of a copy of such notice, or an appellant against any order of the Registrar under section 14 or this section, neither resides nor carries on business in British India, the tribunal may require him to give security for costs of the proceedings before it, and in default of such security being duly given may treat the opposition or application or appeal, as the case may be, as abandoned.

Registration.

16. (1) When an application for registration of a trade mark has been accepted and either has not been opposed and the time for notice of opposition has expired, or having been opposed, has been decided in favour of the applicant, the Registrar shall, unless the application has been accepted in error, or unless the Central Government otherwise directs, register the said trade mark, and the trade mark, when registered, shall be registered as of the date of the making of the said application, and that date shall, subject to any directions made under section 83 applicable to such trade mark, be deemed for the purposes of this Act to be the date of registration.

(2) On the registration of a trade mark the Registrar shall issue to the applicant a certificate in the prescribed form of the registration thereof sealed with the seal of the Patent Office.

(3) Where registration of a trade mark is not completed within twelve months from the date of the application by reason of default on the part of the applicant, the Registrar may, after giving notice to the applicant in the prescribed manner, treat the application as abandoned unless it is completed within the time specified in that behalf in the notice.

Jointly owned trade marks.

17. (1) Save as provided in sub-section (2), nothing in this Act shall authorise the registration of two or more persons who use a trade mark independently, or propose so to use it, as joint proprietors thereof.

(2) Where the relations between two or more persons interested in a trade mark are such that no one of them is entitled as between himself and the other or others of them to use it except—

(*a*) on behalf of both or all of them, or

(*b*) in relation to an article with which both or all of them are connected in the course of trade,

those persons may be registered as joint proprietors of the trade mark, and this Act shall have effect in relation to any rights to the use of the trade mark vested in those persons as if those rights had been vested in a single person.

Duration and renewal of registration.

18. (1) The registration of a trade mark shall be for a period of seven years, but may be renewed from time to time in accordance with the provisions of this section.

(2) The Registrar shall, on application made by the registered proprietor of a trade mark in the prescribed manner and within the prescribed period, renew the registration of the trade mark for a period of fifteen years from the date of expiration of the original registration or of the last renewal of registration, as the case may be (which date is in this section referred to as "the expiration of the last registration").

(3) At the prescribed time before the expiration of the last registration of a trade mark, the Registrar shall send notice in the prescribed manner to the registered proprietor of the date of expiration and the conditions as to payment of fees and otherwise upon which a renewal of registration may be obtained, and if at the expiration of the time prescribed in that behalf those conditions have not been duly complied with the Registrar may remove the trade mark from the register, subject to such conditions (if any) as to its restoration to the register as may be prescribed.

Effect of removal from register for failure to pay fee for renewal.

19. Where a trade mark has been removed from the register for failure to pay the fee for renewal, it shall nevertheless, for the purpose of any application for the registration of another trade mark during one year next after the date of the removal, be deemed to be a trade mark already on the register, unless the tribunal is satisfied either—

(*a*) that there has been no *bona fide* trade use of the trade mark which has been removed during the two years immediately preceding its removal; or

(*b*) that no deception or confusion would be likely to arise from the use of the trade mark which is the subject of the application for registration by reason of any previous use of the trade mark which has been removed.

CHAPTER IV.

Effect of Registration.

No action for infringement of unregistered trade mark.

20. (1) No person shall be entitled to institute any proceeding to prevent, or to recover damages for, the infringement of an unregistered trade mark unless such trade mark has been continuously in use since before the 25th day of February, 1937, by such person or by a predecessor in title of his and unless an application for its registration, made within five years from the commencement of this Act, has been refused; and the Registrar shall, on application in the prescribed manner, grant a certificate that such application has been refused.

(2) Nothing in this Act shall be deemed to affect rights of action against any person for passing off goods as the goods of another person or the remedies in respect thereof.

Right conferred by registration

21. Subject to the provisions of sections 22, 25 and 26, the registration of a person in the register as proprietor of a trade mark in respect of any goods shall, if valid, give to that person the exclusive right to the use of the trade mark in relation to those goods and, without prejudice to the generality of the foregoing provision, that right shall be deemed to be infringed by any person who, not being the proprietor of the trade mark or a registered user thereof using by way of the permitted use, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which it is registered, and in such manner as to render the use of the mark likely to be taken either—

(*a*) as being use as a trade mark; or

(*b*) to import a reference to some person having the right either as a proprietor or as registered user to use the trade mark or to goods with which such a person as aforesaid is connected in the course of trade.

22. (1) The right to the use of a trade mark given under section 21 by registration shall be subject to any conditions or limitations entered on the register, and shall not be deemed to be infringed by the use of any such mark as aforesaid in any mode, in relation to goods to be sold or otherwise traded in, in any place, or in relation to goods to be exported to any market, or in any other circumstances, to which, having regard to any such limitations, the registration does not extend.

No infringement in certain circumstances.

(2) The said right to the use of a trade mark shall not be deemed to be infringed by the use of any such mark as aforesaid by any person—

(*a*) in relation to goods connected in the course of trade with the proprietor or a registered user of the trade mark if, as to those goods or a bulk of which they form part, the proprietor or the registered user conforming to the permitted use has applied the trade mark and has not subsequently removed or obliterated it, or has at any time expressly or impliedly consented to the use of the trade mark ; or

(*b*) in relation to goods adapted to form part of, or to be accessory to, other goods in relation to which the trade mark has been used without infringement of the right given as aforesaid or might for the time being be so used, if the use of the mark is reasonably necessary in order to indicate that the goods are so adapted and neither the purpose nor the effect of the use of the mark is to indicate otherwise than in accordance with the fact a connection in the course of trade between any person and the goods.

(3) The use of a registered trade mark, being one of two or more registered trade marks which are identical or nearly resemble each other, in exercise of the right to the use of that trade mark given by registration as aforesaid, shall not be deemed to be an infringement of the right so given to the use of any other of those trade marks.

23. In all legal proceedings relating to a registered trade mark, the fact that a person is registered as proprietor thereof shall be *prima facie* evidence of the validity of the original registration of the trade mark and of all subsequent assignments and transmissions thereof.

Registration to be *prima facie* evidence of validity.

24. In all legal proceedings relating to a registered trade mark, the original registration of the trade mark shall after the expiration of seven years from the date of such original registration be taken to be valid in all respects unless such registration was obtained by fraud, or unless the trade mark offends against the provisions of section 8.

Registration to be conclusive as to validity after seven years

25. Nothing in this Act shall entitle the proprietor or a registered user of a registered trade mark to interfere with or restrain the use by any person of a trade mark identical with or nearly resembling it in relation to goods in relation to which that person or a predecessor in title of his has continuously used that trade mark from a date prior—

Saving for vested rights.

(*a*) to the use of the first-mentioned trade mark in relation to those goods by the proprietor or a predecessor in title of his, or

(*b*) to the registration of the first-mentioned trade mark in respect of those goods in the name of the proprietor or a predecessor in title of his,

whichever is the earlier, or to object (on such use being proved) to registration of that identical or nearly resembling trade mark in respect of those goods under sub-section (2) of section 10.

26. No registration of a trade mark shall interfere with any *bona fide* use by a person of his own name or that of his place of business, or of the name, or of the name of the place of business, of any of his predecessors in business, or the use by any person of any *bona fide* description of the character or quality of his goods, not being

Saving for use of name, address, or description of goods.

a description that would be likely to be taken as importing any such reference as is mentioned in clause (*b*) of section 21 or in clause (*b*) of section 57.

Words used as name or description of an article or substance.

27. (1) The registration of a trade mark shall not be deemed to have become invalid by reason only of any use after the date of the registration of any words which the trade mark contains or of which it consists as the name or description of an article or substance :

Provided that, if it is proved either—

(*a*) that there is a well-known and established use of the said words as the name or description of the article or substance by a person or persons carrying on a trade therein, not being use in relation to goods connected in the course of trade with the proprietor or a registered user of the trade mark or (in the case of a certification trade mark), goods certified by the proprietor ; or

(*b*) that the article or substance has been manufactured under a patent in force at or granted after the commencement of this section, that a period of two years or more after the cesser of the patent has elapsed, and that the said words are the only practicable name or description of the article or substance,—
the provisions of sub-section (2) shall apply.

(2) Where the facts mentioned in clause (*a*) or clause (*b*) of the proviso to sub-section (1) are proved with respect to any words, then—

(*a*) for the purposes of any proceedings under section 46—

(i) if the trade mark consists solely of such words, the registration of the trade mark, so far as regards registration in respect of the article or substance in question or of any goods of the same description, shall be deemed to be an entry wrongly remaining on the register ;

(ii) if the trade mark contains such words and other matter, the tribunal, in deciding whether the trade mark shall remain on the register, so far as regards registration in respect of the article or substance in question and of any goods of the same description, may, in case of a decision in favour of its remaining on the register, require as a condition thereof that the proprietor shall disclaim any right to the exclusive use in relation to that article or substance and any goods of the same description, of such words, provided that no disclaimer shall affect any rights of the proprietor of a trade mark except such as arise out of the registration of the trade mark in respect of which the disclaimer is made ;

(*b*) for the purposes of any other legal proceedings relating to the trade mark,—

(i) if the trade mark consists solely of such words, all rights of the proprietor under this Act or any other law to the exclusive use of the trade mark in relation to the article or substance in question or to any goods of the same description, or

(ii) if the trade mark contains such words and other matter, all such rights of the proprietor to the exclusive use of such words, in such relation as aforesaid,

shall be deemed to have ceased on the date at which the use mentioned in clause (*a*) of the proviso to sub-section (1) first became well-known and established, or at the expiration of the period of two years mentioned in clause (*b*) of the said proviso.

CHAPTER V.

ASSIGNMENT AND TRANSMISSION.

Power of registered proprietor to assign and give receipts.

28. The person for the time being entered in the register as proprietor of a trade mark shall, subject to the provisions of this Act and to any rights appearing from the register to be vested in any other person, have power to assign the trade mark, and to give effectual receipts for any consideration for such assignment.

Assignability of registered trade marks.

29. Notwithstanding anything in any other law to the contrary, a registered trade mark shall, subject to the provisions of this Chapter, be assignable and transmissible whether in connection with the goodwill of a business or not, and in respect either of all of the goods in respect of which it is registered or of some only of those goods.

Assignability of unregistered trade marks.

30. An unregistered trade mark shall be assignable and transmissible whether in connection with the good-will of a business or not:

Provided that, except in connection with the good will of a business, assignment or transmission shall be permissible only if—

(*a*) at the time of assignment or transmission of the unregistered trade mark it is used in the same business as a registered trade mark, and

(*b*) the registered trade mark is assigned or transmitted at the same time and to the same person as the unregistered trade mark, and

(*c*) the unregistered trade mark relates to goods in respect of which the registered trade mark is assigned or transmitted.

Restrictions on assignment or transmission where multiple exclusive rights would be created.

31. (1) Notwithstanding anything in sections 29 and 30, a trade mark shall not be assignable or transmissible in a case in which as a result of the assignment or transmission there would in the circumstances subsist, whether under this Act or any other law, exclusive rights in more than one of the persons concerned to the use, in relation to the same goods or description of goods, of trade marks nearly resembling each other or of identical trade marks, if, having regard to the similarity of the goods and of the trade marks, the use of the trade marks in exercise of those rights would be likely to deceive or cause confusion:

Provided that an assignment or transmission shall not be deemed to be invalid under this sub-section if the exclusive rights subsisting as a result thereof in the persons concerned respectively are, having regard to limitations imposed thereon, such as not to be exercisable by two or more of those persons in relation to goods to be sold, or otherwise traded in, within British India (otherwise than for export therefrom), or in relation to goods to be exported to the same market outside British India.

(2) The proprietor of a registered trade mark who proposes to assign it may submit to the Registrar in the prescribed manner a statement of case setting out the circumstances and the Registrar may issue to him a certificate stating whether, having regard to the similarity of the goods and of the trade marks referred to in the case, the proposed assignment would or would not be invalid under sub-section (1), and a certificate so issued shall, subject to appeal and unless it is shown that the certificate was obtained by fraud or misrepresentation, be conclusive as to the validity or invalidity under sub-section (1) of the assignment in so far as such validity or invalidity depends upon the facts set out in the case, but, as regards a certificate in favour of validity, only if application for the registration under section 35 of the title of the person becoming entitled is made within six months from the date on which the certificate is issued.

Restrictions on assignment or transmission when exclusive rights would be created in different parts of British India.

32. Notwithstanding anything in sections 29 and 30, a trade mark shall not be assignable or transmissible in a case in which as a result of the assignment or transmission there would in the circumstances subsist, whether under this Act or any other law, an exclusive right in one of the persons concerned to the use of the trade mark limited to use in relation to goods to be sold, or otherwise traded in, in any place in British India and an exclusive right in another of these persons to the use of a trade mark nearly resembling the first-mentioned trade mark or of an identical trade mark in relation

to the same goods or description of goods limited to use in relation to goods to be sold, or otherwise traded in, in any other place in British India :

Provided that in any such case, on application in the prescribed manner by the proprietor of a trade mark who proposes to assign it, or by a person who claims that a registered trade mark has been transmitted to him or to a predecessor in title of his since the commencement of this Act, the Registrar, if he is satisfied that in all the circumstances the use of the trade mark in exercise of the said rights would not be contrary to the public interest, may approve the assignment or transmission, and an assignment or transmission so approved shall not, unless it is shown that the approval was obtained by fraud or misrepresentation, be deemed to be invalid under this section or section 31 if application for the registration under section 35 of the title of the person becoming entitled is made within six months from the date on which the approval is given or, in the case of a transmission, was made before that date.

Conditions for assignment otherwise than in connection with the goodwill of a business.

33. Where an assignment in respect of any goods of a trade mark which is at the time of the assignment used in a business in those goods, is made after the commencement of this Act otherwise than in connection with the goodwill of that business, the assignment shall not take effect unless the assignee, not later than the expiration of six months from the date on which the assignment is made or within such extended period, if any, as the Registrar may allow, applies to the Registrar for directions with respect to the advertisement of the assignment, and advertises it in such form and manner and within such period as a Registrar may direct.

Conditions for assignment and transmission of certification trade marks and associated trade marks.

34. (1) A certification trade mark shall not be assignable or transmissible otherwise than with the consent of the Central Government, for which application shall be made in writing in the prescribed manner through the Registrar.

(2) Associated trade marks shall be assignable and transmissible only as a whole and not separately.

Registration of assignments and transmissions

35. (1) Where a person becomes entitled by assignment or transmission to a registered trade mark, he shall apply in the prescribed manner to the Registrar to register his title, and the Registrar shall on receipt of the application and on proof of title to his satisfaction, register him as the proprietor of the trade mark in respect of the goods in respect of which the assignment or transmission has effect, and shall cause particulars of the assignment or transmission to be entered on the register.

(2) Except for the purposes of an appeal against a decision of the Registrar under sub-section (1) or of an application under section 46, a document or instrument in respect of which no entry has been made in the register in accordance with sub-section (1) shall not be admitted in evidence before any tribunal in proof of the title to a trade mark unless the tribunal otherwise directs.

CHAPTER VI.

USE OF TRADE MARKS AND REGISTERED USERS.

Proposed use of trade mark by company to be formed.

36. (1) No application for the registration of a trade mark in respect of any goods shall be refused, nor shall permission for such registration be withheld, on the ground only that it appears that the applicant does not use or propose to use the trade mark, if the Registrar is satisfied that a company is about to be formed and registered under the Indian Companies Act, 1913, and that the applicant intends to assign the trade mark to that company with a view to the use thereof in relation to those goods by the company.

(2) The tribunal may, in a case to which sub-section (1) applies, require the applicant to give security for the costs of any proceedings relative to any opposition or appeal, and in default of such security being duly given may treat the application as abandoned.

(3) Where in a case to which sub-section (1) applies, a trade mark in respect of any goods is registered in the name of an applicant who relies on intention to assign to a company, then, unless within such period as may be prescribed, or within such further period not exceeding six months as the Registrar may, on application being made to him in the prescribed manner, allow, the company has been registered as the proprietor of the trade mark in respect of those goods, the registration shall cease to have effect in respect thereof at the expiration of that period, and the Registrar shall amend the register accordingly.

Removal from register and imposition of limitations on ground of non-use

37. (1) Subject to the provisions of section 38, a registered trade mark may be taken off the register in respect of any of the goods in respect of which it is registered on application in the prescribed manner by any person aggrieved to a High Court or to the Registrar, on the ground either—

(*a*) that the trade mark was registered without any *bona fide* intention on the part of the applicant for registration that it should be used in relation to those goods by him, or in a case to which the provisions of section 36 apply, by the company concerned, and that there has in fact been no *bona fide* use of the trade mark in relation to those goods by any proprietor thereof for the time being up to a date one month before the date of the application; or

(*b*) that up to a date one month before the date of the application, a continuous period of five years or longer elapsed during which the trade mark was registered and during which there was no *bona fide* use thereof in relation to those goods by any proprietor thereof for the time being :

Provided that, except where the applicant has been permitted under sub-section (2) of section 10 to register an identical or nearly resembling trade mark in respect of the goods in question or where the tribunal is of opinion that he might properly be permitted so to register such a trade mark, the tribunal may refuse an application made under clause (*a*) or clause (*b*) in relation to any goods, if it is shown that there has been, before the relevant date or during the relevant period, as the case may be, *bona fide* use of the trade mark by any proprietor thereof for the time being in relation to goods of the same description, being goods in respect of which the trade mark is registered.

(2) Where in relation to any goods in respect of which a trade mark is registered—

(*a*) the circumstances referred to in clause (*b*) of sub-section (1) are shown to exist so far as regards non-use of the trade mark in relation to goods to be sold, or otherwise traded in, in a particular place in British India (otherwise than for export from British India), or in relation to goods to be exported to a particular market outside British India, and

(*b*) a person has been permitted under sub-section (2) of section 10 to register an identical or nearly resembling trade mark in respect of those goods under a registration extending to use in relation to goods to be so sold, or otherwise traded in, or in relation to goods to be so exported, or the tribunal is of opinion that he might properly be permitted so to register such a trade mark,

on application by that person in the prescribed manner to a High Court or to the Registrar, the tribunal may impose on the registration of the first-mentioned trade mark such limitations as it thinks proper for securing that that registration shall cease to extend to such use.

(3) An applicant shall not be entitled to rely for the purpose of clause (*b*) of sub-section (1) or of sub-section (2) on any non-use of a trade mark which is shown to have been due to special circumstances in the trade and not to any inten-

tion to abandon or not to use the trade mark in relation to the goods to which the application relates.

Defensive registration of well-known trade marks.

38. (1) Where a trade mark consisting of any invented word has become so well-known as respects any goods in relation to which it is registered and has been used, that the use thereof in relation to other goods would be likely to be taken as indicating a connection in the course of trade between those goods and a person entitled to use the trade mark in relation to the first-mentioned goods, then, notwithstanding that the proprietor registered in respect of the first-mentioned goods does not use or propose to use the trade mark in relation to those other goods and notwithstanding anything in section 37, the trade mark may on application in the prescribed manner by such proprietor be registered in his name in respect of those other goods as a defensive trade mark and, while so registered, shall not be liable to be taken off the register in respect of those goods under the said section.

(2) The registered proprietor of a trade mark may apply for the registration thereof in respect of any goods as a defensive trade mark notwithstanding that it is already registered in his name in respect of those goods otherwise than as a defensive trade mark, or may apply for the registration thereof in respect of any goods otherwise than as a defensive trade mark notwithstanding that it is already registered in his name in respect of those goods as a defensive trade mark, in lieu in each case of the existing registration.

(3) A trade mark registered as a defensive trade mark and that trade mark as otherwise registered in the name of the same proprietor shall, notwithstanding that the respective registrations are in respect of different goods, be deemed to be, and shall be registered as, associated trade marks.

(4) On application in the prescribed manner by any person aggrieved to a High Court or to the Registrar, the registration of a trade mark as a defensive trade mark may be cancelled on the ground that the requirements of sub-section (1) are no longer satisfied in respect of any goods in relation to which the trade mark is registered in the name of the same proprietor otherwise than as a defensive trade mark, or may be cancelled as respects any goods in relation to which it is registered as a defensive trade mark on the ground that there is no longer any likelihood that the use of the trade mark in relation to those goods would be taken as giving the indication mentioned in sub-section (1).

(5) The Registrar may at any time cancel the registration as a defensive trade mark of a trade mark of which there is no longer any registration in the name of the same proprietor otherwise than as a defensive trade mark.

(6) Except as otherwise expressly provided in this section, the provisions of this Act shall apply in respect of the registration of trade marks as defensive trade marks and of trade marks so registered as they apply in other cases.

Registered users.

39. (1) A person other than the proprietor of a trade mark may be registered as a registered user thereof in respect of all or any of the goods in respect of which it is registered (otherwise than as a defensive trade mark) and either with or without conditions or restrictions.

(2) The permitted use of a trade mark shall be deemed to be use by the proprietor thereof, and shall be deemed not to be use by a person other than the proprietor, for any purpose for which such use is material under this Act or any other law.

Power of registered user to take proceedings against infringement.

40. (1) Subject to any agreement subsisting between the parties, a registered user of a trade mark shall be entitled to call upon the proprietor thereof to take proceedings to prevent infringement thereof, and if the proprietor refuses or neglects to do so within three months after being so called upon, the registered user may institute proceedings for infringement in his own name as if hewere the proprietor, making the proprietor a defendant.

(2) Notwithstanding anything contained in any other law, a proprietor so added as defendant shall not be liable for any costs unless he enters an appearance and takes part in the proceedings.

Application for registration as registered user

41. (1) Where it is proposed that a person should be registered as a registered user of a trade mark, the proprietor and the proposed registered user shall make application in writing to the Registrar in the prescribed manner accompanied by an affidavit made by the proprietor, or by some person authorised to the satisfaction of the Registrar to act on his behalf,—

(a) giving particulars of the relationship, existing or proposed, between the proprietor and the proposed registered user, including particulars showing the degree of control by the proprietor over the permitted use which their relationship will confer and whether it is a term of their relationship that the proposed registered user shall be the sole registered user or that there shall be any other restriction as to persons for whose registration as registered users application may by made ;

(b) stating the goods in respect of which registration is proposed ;

(c) stating any conditions or restrictions proposed with respect to the characteristics of the goods, to the mode or place of permitted use, or to any other matter ;

(d) stating whether the permitted use is to be for a period or without limit of period, and, if for a period, the duration thereof ;

and by such further documents, information or evidence as may be required by the Registrar or as may be prescribed.

(2) When the requirements of sub-section (1) have been complied with, if the Registrar is satisfied that in all the circumstances the use of the trade mark in respect of the proposed goods or any of them by the proposed registered user subject to any conditions or restrictions which the Registrar may think proper, would not be contrary to the public interest, the Registrar may register, subject as aforesaid, the proposed registered user as a registered user in respect of the goods as to which he is so satisfied.

(3) The Registrar shall refuse an application under this section if it appears to him that the grant thereof would tend to facilitate trafficking in a trade mark.

(4) The Registrar shall, if so requested by an applicant, take steps for securing that information given for the purposes of an application under this section (other than matter entered in the register) is not disclosed to rivals in trade.

(5) The Registrar shall issue notice in the prescribed manner—

(a) of the registration of a person as a registered user, to any other registered user of the trade mark ;

(b) of an application under section 42, to the registered proprietor, and each registered user, (not being the applicant) of the trade mark.

Power to Registrar to vary or cancel registration as registered user.

42. Without prejudice to the provisions of section 46, the registration of a person as a registered user—

(a) may be varied by the Registrar as regards the goods in respect of which, or any conditions or restrictions subject to which, it has effect, on the application in writing in the prescribed manner of the registered proprietor of the trade mark ;

(b) may be cancelled by the Registrar on the application in writing in the prescribed manner of the registered proprietor or of the registered user or of any other registered user of the trade mark ;

(c) may be cancelled by the Registrar on the application in writing in the prescribed manner of any person on any of the following grounds, namely :—

(i) that the registered user has used the trade mark otherwise than by way of the permitted use, or in such a way as to cause or to be likely to cause, deception or confusion ;

(ii) that the proprietor or the registered user misrepresented, or failed to disclose, some fact material to the application for the registration, or that the circumstances have materially changed since the date of the registration;

(iii) that the registration ought not to have been effected having regard to rights vested in the applicant by virtue of a contract in the performance of which he is interested;

(*d*) may be cancelled by the Registrar in respect of any goods in relation to which the trade mark is no longer registered.

Registered user not to have right of assignment or transmission.

43. Nothing in this Act shall confer on a registered user of a trade mark any assignable or transmissible right to the use thereof.

Use of one of associated or substantially identical trade marks equivalent to use of another.

44. (1) Where under the provisions of this Act use of a registered trade mark is required to be proved for any purpose, the tribunal may, if and so far as it shall think right, accept use of a registered associated trade mark, or of the trade mark with additions or alterations not substantially affecting its identity, as an equivalent for the use required to be proved.

(2) The use of the whole of a registered trade mark shall for the purposes of this Act be deemed to be also a use of any trade mark being a part thereof and registered in accordance with sub-section (1) of section 11 in the name of the same proprietor.

Use of trade mark for export trade, and use when form of trade connection changes.

45. (1) The application in British India of a trade mark to goods to be exported from British India, and any other act done in British India in relation to goods to be so exported which, if done in relation to goods to be sold or otherwise traded in within British India would constitute use of a trade mark therein, shall be deemed to constitute use of the trade mark in relation to those goods for any purpose for which such use is material under this Act or any other law.

(2) The use of a registered trade mark in relation to goods between which and the person using the mark any form of connection in the course of trade subsists shall not be deemed to be likely to cause deception or confusion on the ground only that the mark has been or is used in relation to goods between which and the person using the mark or any predecessor in his business different form of connection in the course of trade subsisted or subsists.

CHAPTER VII.

RECTIFICATION AND CORRECTION OF THE REGISTER.

Power to cancel or vary registration and to rectify the register.

46. (1) On application in the prescribed manner by any person aggrieved to a High Court or to the Registrar, the tribunal may make such order as it may think fit for cancelling or varying the registration of a trade mark on the ground of any contravention of, or failure to observe a condition entered on the register in relation thereto.

(2) Any person aggrieved by the absence or omission from the register of any entry, or by any entry made in the register without sufficient cause, or by any entry wrongly remaining on the register, or by any error or defect in any entry in the register, may apply in the prescribed manner to a High Court or to the Registrar, and the tribunal may make such order for making, expunging or varying the entry as it may think fit.

(3) The tribunal may in any proceeding under this section decide any question that it may be necessary or expedient to decide in connection with the rectification of the register.

(4) A High Court or the Registrar, of its or his own motion, may, after giving notice in the prescribed manner to the parties concerned and after giving them an opportunity of being heard, make any order referred to in sub-section (1) or sub-section (2).

(5) Any order of the Court rectifying the register shall direct that notice of the rectification shall be served upon the Registrar in the prescribed manner who shall upon receipt of such notice rectify the register accordingly.

Correction of register

47. (1) The Registrar may, on application made in the prescribed manner by the registered proprietor,—

(*a*) correct any error in the name, address or description of the registered proprietor of a trade mark;

(*b*) enter any change in the name, address or description of the person who is registered as proprietor of a trade mark;

(*c*) cancel the entry of a trade mark on the register;

(*d*) strike out any goods or classes of goods from those in respect of which a trade mark is registered;

(*e*) enter a disclaimer or memorandum relating to a trade mark which does not in any way extend the rights given by the existing registration of the trade mark.

(2) The Registrar may, on application made in the prescribed manner by a registered user of a trade mark, correct any error, or enter any change, in the name, address or description of the registered user.

Alteration of registered trade mark.

48. (1) The registered proprietor of a trade mark may apply in the prescribed manner to the Registrar for leave to add to or alter the trade mark in any manner not substantially affecting the identity thereof, and the Registrar may refuse leave or may grant it on such terms and subject to such limitations as he may think fit.

(2) The Registrar may cause an application under this section to be advertised in the prescribed manner in any case where it appears to him that it is expedient so to do, and where he does so, if within the prescribed time from the date of the advertisement any person gives notice to the Registrar in the prescribed manner of opposition to the application, the Registrar shall, after hearing the parties if so required, decide the matter.

(3) Where leave is granted under this section, the trade mark as altered shall be advertised in the prescribed manner, unless the application has already been advertised under sub-section (2).

Adaptation of entries in register to amended or substituted classification of goods.

49. (1) The Registrar shall not, in exercise of any power conferred on him under clause (*a*) of sub-section (2) of section 84, make any amendment of the register which would have the effect of adding any goods or classes of goods to those in respect of which a trade mark is registered (whether in one or more classes) immediately before the amendment is to be made, or of antedating the registration of a trade mark in respect of any goods:

Provided that this sub-section shall not apply when the Registrar is satisfied that compliance therewith would involve undue complexity and that the addition or antedating, as the case may be, would not affect any substantial quantity of goods and would not substantially prejudice the rights of any person.

(2) A proposal so to amend the register shall be notified to the registered proprietor of the trade mark affected and advertised in the prescribed manner, and may be opposed before the Registrar by any person aggrieved on the ground that the proposed amendment contravenes the provisions of sub-section (1).

CHAPTER VIII.

CERTIFICATION TRADE MARKS.

Provisions of this Act applicable to certification trade marks

50. Subject to the provisions of this Chapter, the other provisions of this Act except sections 6, 21, 22, 31, 32, 33, 36, 37, 38, 39, 40, 41, 42 and 43 and sub-section (2) of section 45 shall apply to certification trade marks as they apply to trade marks.

Certification trade mark not to be registered in name of person trading in goods certified thereby.

51. A mark shall not be registrable as a certification trade mark in the name of a person who carries on a trade in goods of the kind certified.

Determination whether a mark is a certification trade mark.

52. In determining whether a mark is adapted to distinguish in accordance with the provisions of clause (*b*) of sub-section (1) of section 2, the tribunal may have regard to the extent to which—

(*a*) the mark is inherently so adapted to distinguish in relation to the goods in question ; and

(*b*) by reason of the use of the mark or of any other circumstances, the mark is in fact so adapted to distinguish in relation to the goods in question.

Application for registration

53. (1) An application for the registration of a mark as a certification trade mark shall be made to the Registrar in writing in the prescribed manner by the person proposed to be registered as the proprietor thereof, and accompanied by a draft of the regulations to be deposited under section 56.

(2) The provisions of section 14 shall have effect in relation to an application under this section as they have effect in relation to an application under the said section, except that for references therein to acceptance of an application there shall be substituted references to authorisation to proceed with the application.

(3) In dealing under the said provisions with an application under this section, the tribunal shall have regard to the like considerations, so far as relevant, as if the application were an application under section 14 and to any other considerations (not being matters within the competence of the Central Government under section 54) relevant to applications under this section, including the desirability of securing that a certification trade mark shall comprise some indication that it is a certification trade mark.

Consideration of application for registration by Central Government.

54. When authorisation to proceed with an application under section 53 has been given, the Registrar shall forward the application to the Central Government who shall consider the application with regard to the following matters, namely :—

(*a*) whether the applicant is competent to certify the goods in respect of which the mark is to be registered ;

(*b*) whether the draft of the regulations to be deposited under section 56 is satisfactory ;

(*c*) whether in all the circumstances of the registration applied for would be to the public advantage ;

and may either—

(i) direct that the application shall not be accepted ; or

(ii) direct the Registrar to accept the application and approve the said draft of the regulations either without modification and unconditionally or subject to any conditions or limitations, or to any amendments or modification of the application or of the regulations, which it thinks requisite having regard to any of the said matters ;

but, except in the case of a direction for acceptance and approval without modification and unconditionally, the Central Government shall not decide the matter without giving to the applicant an opportunity of being heard :

Provided that the Central Government may, at the request of the applicant made with the concurrence of the Registrar, consider the application with regard to any of the said matters before authorisation to proceed with the application has been given, so however that the Central Government shall be at liberty, to reconsider any matter on which it has given a decision under this proviso if any amendment or modification is thereafter made in the application or in the draft of the regulations.

Opposition to registration

55. (1) When an application has been accepted, the Registrar shall, as soon as may be thereafter, cause the application as accepted to be advertised in the prescribed manner, and the provisions of section 15 shall have effect in relation to the registration of the mark as if the application had been an application under section 14 :

Provided that, in deciding under the said provisions the tribunal shall have regard only to the considerations referred to in sub-section (3) of section 53, and a decision under the said provisions in favour of the applicant shall be conditional on the determination in his favour by the Central Government under sub-section (2) of this section of any opposition relating to any of the matters referred to in section 54.

(2) When notice of opposition is given relating to any of the matters referred to in section 54, the Central Government shall, after hearing the parties, if so required, and considering any evidence, decide whether, and subject to what conditions or limitations, or amendments or modifications, if any, of the application or of the regulations to be deposited under section 56, registration is, having regard to those matters, to be permitted.

Deposit of regulations governing the use of a certification trade mark.

56. (1) There shall be deposited at the Patent Office in respect of every mark registered as a certification trade mark regulations approved by the Central Government for governing the use thereof, which shall include provisions as to the cases in which the proprietor is to certify goods and to authorise the use of the certification trade mark, and may contain any other provisions which the Central Government may by general or special order require or permit to be inserted therein (including provisions conferring a right of appeal to the Registrar against any refusal of the proprietor to certify goods or to authorise the use of the certification trade mark in accordance with the regulations) ; and regulations so deposited shall be open to inspection in like manner as the register.

(2) The regulations so deposited may on the application of the registered proprietor be altered by the Registrar with the consent of the Central Government.

(3) The Central Government may cause such application to be advertised in any case where it appears to it expedient so to do, and where it does so, if within the time specified in the advertisement any person gives notice of opposition to the application, the Central Government shall not decide the matter without giving the parties an opportunity of being heard.

Right conferred by registration.

57. Subject to the provisions of sections 25, 26 and 58, the registration of a person as proprietor of a certification trade mark in respect of any goods shall, if valid, give to that person the exclusive right to the use of the certification trade mark in relation to those goods, and, without prejudice to the generality of the foregoing provision, that right shall be deemed to be infringed by any person who, not being the proprietor of the mark or a person authorised by him in that behalf under the regulations deposited under section 56, using it in accordance therewith, uses a mark identical with it or so nearly resembling it as to be likely to deceive or cause confusion, in the course of trade, in relation to any goods in respect of which

it is registered, and in such manner as to render the use of the mark likely to be taken either—

(*a*) as being use as a certification trade mark; or

(*b*) to import a reference to some person having the right either as proprietor, or by his authorisation under the said regulations, to use the mark, or to goods certified by the proprietor.

No infringement in certain circumstances.

58. (1) The right to the use of a certification trade mark given under section 57 by registration shall be subject to any conditions or limitations entered on the register, and shall not be deemed to be infringed by the use of any such mark as aforesaid in any mode, in relation to goods to be sold or otherwise traded in in any place, in relation to goods to be exported to any market, or in any other circumstances, to which having regard to any such limitations, the registration does not extend.

(2) The said right to the use of a certification trade mark shall not be deemed to be infringed by the use of any such mark as aforesaid by any person—

(*a*) in relation to goods certified by the proprietor of the mark if, as to those goods or a bulk of which they form part, the proprietor or another in accordance with his authorisation under the relevant regulations has applied the mark and has not subsequently removed or obliterated it, or the proprietor has at any time expressly or impliedly consented to the use of the mark, or

(*b*) in relation to goods adapted to form part of, or to be accessory to, other goods, in relation to which the mark has been used without infringement of the right given as aforesaid or might for the time being be so used, if the use of the mark is reasonably necessary in order to indicate that the goods are so adapted and neither the purpose nor the effect of the use of the mark is to indicate otherwise than in accordance with the fact that the goods are certified by the proprietor:

Provided that clause (*a*) shall not apply to the case of use consisting of the application of any such mark as aforesaid to any goods, notwithstanding that they are such goods as are mentioned in that clause if such application is contrary to the said regulations.

(3) Where a certification trade mark is one of two or more registered certification trade marks which are identical or nearly resemble each other, the use of any of those marks in exercise of the right to the use of that mark given by registration, shall not be deemed to be an infringement of the right so given to the use of any other of those marks.

Cancellation or varying of registration

59. (1) The Central Government may, on the application in the prescribed manner of any person aggrieved or on the recommendation of the Registrar, and after giving the proprietor an opportunity of opposing the application or recommendation, make such order as it thinks fit for expunging or varying any entry in the register relating to a certification trade mark, or for varying the deposited regulations, on any of the following grounds, namely:—

(*a*) that the proprietor is no longer competent, in the case of any of the goods in respect of which the mark is registered, to certify those goods;

(*b*) that the proprietor has failed to observe any provision of the deposited regulations to be observed on his part;

(*c*) that it is no longer to the public advantage that the mark should be registered;

(*d*) that it is requisite for the public advantage that, if the mark remains registered, the regulations should be varied;

and neither a High Court nor the Registrar shall have any jurisdiction to make an order under section 46 on any of those grounds.

(2) The Registrar shall rectify the register and the deposited regulations in such manner as may be requisite for giving effect to an order made under sub-section (1).

Costs not to be awarded in certain cases.

60. The Registrar shall have no power to award costs to or against any party on an appeal to him against a refusal of the proprietor of a certification trade mark to certify goods or to authorise the use of the mark.

Decisions of Central Government to be final.

61. Save as otherwise expressly provided in this Chapter, every decision of the Central Government under this Chapter shall be final.

CHAPTER IX.

SPECIAL PROVISIONS FOR TEXTILE GOODS.

Textile goods.

62. The Central Government shall prescribe classes of goods (in this Chapter referred to as textile goods) to the trade marks used in relation to which the provisions of this Chapter shall apply; and subject to the said provisions, the other provisions of this Act shall apply to such trade marks as they apply to trade marks used in relation to other classes of goods.

Branch of Trade Marks Registry at Bombay and Textile Marks Record.

63. (1) There shall be established at Bombay, for the purpose of facilitating the registration of trade marks in respect of textile goods, a branch of the Trade Marks Registry. The officer in charge of the branch shall be called the Deputy Registrar.

(2) There shall be kept at the said branch for the purposes of this Act a record called the Textile Marks Record wherein shall be entered copies of all entries in the register relating to trade marks registered in respect of textile goods and the said record shall at all convenient times be open to the inspection of the public, subject to such conditions and restrictions as may be prescribed.

(3) Trade marks in respect of textile goods of which registration has been refused shall be entered in a list called the Refused Textile Marks List, a copy of which shall be kept at the said branch, and the list and the said copy shall at all convenient times be open to the inspection of the public, subject to such conditions and restrictions as may be prescribed.

Restrictions on registration of piece-goods.

64. In respect of textile goods being piece-goods—

(*a*) no mark consisting of a line heading alone shall be registrable as a trade mark;

(*b*) a line heading shall not be deemed to be adapted to distinguish;

(*c*) the registration of a trade mark shall not give any exclusive right to the use of a line heading;

(*d*) the registration of letters or numerals, or any combination thereof, shall be subject to such conditions and restrictions as may be prescribed.

Registration.

65. (1) Applications for the registration of a trade mark in respect of textile goods may be made either to the Registrar or the Deputy Registrar at the option of the applicant.

(2) In respect of all trade marks, applications for registration of which are duly made to the Deputy Registrar under this chapter, the Deputy Registrar shall exercise all the powers of the Registrar under this Act but shall be subject to the general superintendence of the Registrar.

Advisory Committees.

66. (1) The Central Government may in the prescribed manner constitute one or more Advisory Committees of persons versed in the usages of the textile trade for the purpose of this section.

(2) The Registrar or the Deputy Registrar shall consult any such Committee with respect to any circumstances peculiar to the textile trade arising on an application to register a trade mark in respect of textile goods.

(3) The place of meeting and the conduct of business of such Committees shall be determined by rules made under this Act.

CHAPTER X.

OFFENCES AND RESTRAINT OF USE OF ROYAL ARMS AND STATE EMBLEMS.

Penalty for falsification of entries in register.

67. If any person makes, or causes to be made, a false entry in the register, or a writing falsely purporting to be a copy of an entry in the register, or produces or tenders, or causes to be produced, or tendered, in evidence any such writing, knowing the entry or writing to be false, he shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

Penalty for falsely representing a trade mark as registered.

68. (1) From such date, not being earlier than one year from the commencement of this Act, as the Central Government may, by notification in the Official Gazette, appoint in this behalf, no person shall make any representation—

(*a*) with respect to a mark not being a registered trade mark, to the effect that it is a registered trade mark; or

(*b*) with respect to a part of a registered trade mark not being a part separately registered as a trade mark, to the effect that it is separately registered as a trade mark; or

(*c*) to the effect that a registered trade mark is registered in respect of any goods in respect of which it is not in fact registered; or

(*d*) to the effect that the registration of a trade mark gives an exclusive right to the use thereof in any circumstances in which, having regard to limitations entered on the register, the registration does not in fact give that right.

(2) If any person contravenes any of the provisions of sub-section (1), he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to five hundred rupees, or with both.

(3) For the purposes of this section, the use in British India in relation to a trade mark of the word "registered," or of any other expression referring whether expressly or impliedly to registration, shall be deemed to import a reference to registration in the register, except—

(*a*) where that word or other expression is used in direct association with other words delineated in characters at least as large as those in which that word or other expression is delineated and indicating that the reference is to registration as a trade mark under the law of a country outside British India, being a country under the law of which the registration referred to is in fact in force; or

(*b*) where that other expression is of itself such as to indicate that the reference is to such registration as is mentioned in clause (*a*); or

(*c*) where that word is used in relation to a mark registered as a trade mark under the law of a country outside British India and in relation solely to goods to be exported to that country.

Restraint of use of Royal Arms and State emblems.

69. If a person, without due authority, uses in connection with any trade, business, calling or profession—

(*a*) the Royal Arms (or arms so closely resembling the same as to be calculated to deceive) in such manner as to be calculated to lead to the belief that he is duly authorised so to use the Royal Arms, or

(*b*) any device, emblem or title in such manner as to be calculated to lead to the belief that he is employed by, or supplies goods to, or is connected with, His Majesty's Government or the Central Government or any Provincial Government or any department of any such Government,

he may, at the suit of any person who is authorised to use such Arms or such device, emblem or title or of the Registrar, be restrained by injunction from continuing so to use the same.

CHAPTER XI.

MISCELLANEOUS.

Procedure before the Registrar.

70. In all proceedings under this Act before the Registrar—

(a) the Registrar shall have all the powers of a Civil Court for the purposes of receiving evidence, administering oaths, enforcing the attendance of witnesses, compelling the discovery and production of documents and issuing commissions for the examination of witnesses ;

(b) evidence shall be given by affidavit, provided that the Registrar may, if he thinks fit, take oral evidence in lieu of, or in addition to, such evidence by affidavit ;

(c) the Registrar shall not exercise any power vested in him by this Act or the rules made thereunder adversely to any party duly appearing before him without (if required in writing within the prescribed time so to do) giving such party an opportunity of being heard ;

(d) the Registrar may, save as otherwise expressly provided in this Act, and subject to any rules made in this behalf under section 84, make such orders as to costs as he considers reasonable, and any such order shall be executable as a decree of a Civil Court.

Procedure before Central Government.

71. In all proceedings under this Act before the Central Government, evidence shall be given by affidavit, provided that the Central Government may, if it thinks fit, take oral evidence in lieu of, or in addition to, such evidence by affidavit, and shall for that purpose have all the powers of a Civil Court referred to in clause (a) of section 70.

Procedure in certain cases of option to apply to a High Court or the Registrar.

72. Where under this Act an applicant has the option of making an application either to a High Court or to the Registrar,—

(a) if any suit or other proceedings concerning the trade mark in question is pending before a High Court or a District Court, the application shall be made to that High Court or, as the case may be, to the High Court within whose jurisdiction that District Court is situated ;

(b) if in any other case the application is made to the Registrar, the Registrar may, if he thinks fit, refer the application at any stage of the proceedings to a High Court.

Suits for infringement to be instituted before District Court.

73. No suit for the infringement of a trade mark or otherwise relating to any right in a trade mark shall be instituted in any Court inferior to a District Court having jurisdiction to try the suit.

Appearance of Registrar in proceedings involving rectification of register

74. (1) In any suit or other legal proceeding in which the relief sought includes alteration or rectification of the register, the Registrar shall have the right to appear and be heard, and shall appear if so directed by the tribunal.

(2) Unless the tribunal otherwise directs, the Registrar may, in lieu of appearing, submit a statement in writing signed by him, giving such particulars as he thinks proper of the proceedings before him relating to the matter in issue, or of the grounds of any decision given by him affecting it, or of the practice of the Patent Office in like cases, or of other matters relevant to the issues and within his knowledge as Registrar, and such statement shall be evidence in the suit or other proceeding.

(3) The costs of the Registrar shall be in the discretion of the tribunal, but the Registrar shall not be ordered to pay the costs of any of the parties.

Evidence of entries in register and things done by Registrar.

75. (1) A printed or written copy of any entry in the register, purporting to be certified by the Registrar and sealed with the seal of the Patent Office, shall be admitted in evidence in all Courts in British India and in all proceedings without further proof of production of the original.

(2) A certificate purporting to be under the hand of the Registrar as to any entry, matter or thing that he is authorised by this Act or the rules to make or do shall be *prima facie* evidence of the entry having been made, and of the contents thereof, or of the matter or thing having been done or not done.

Appeals

76. (1) Save as otherwise expressly provided in this Act, an appeal shall lie, within the period prescribed by the Central Government, from any decision of the Registrar or Deputy Registrar under this Act or the rules made thereunder to the High Court having jurisdiction :

Provided that if any suit or other proceeding concerning the trade mark in question is pending before a High Court or a District Court, the appeal shall be made to that High Court or, as the case may be, to the High Court within whose jurisdiction that District Court is situated.

(2) In an appeal by an applicant for registration against a decision of the Registrar under section 13 or section 14 or section 15, it shall not be open, save with the express permission of the Court, to the Registrar or any party opposing the appeal to advance grounds other than those recorded in the said decision or advanced by the party in the proceedings before the Registrar, as the case may be ; and where any such additional grounds are advanced, the applicant for registration may, on giving notice in the prescribed manner, withdraw his application without being liable to pay the costs of the Registrar or the parties opposing his appl cation.

(3) Subject to the provisions of this Act and of rules made thereunder, the provisions of the Code of Civil Procedure, 1908, shall apply to appeals before a High Court under this Act.

Power to High Courts to make rules

77. A High Court may make rules consistent with this Act as to the conduct and procedure of all proceedings under this Act before it.

Certificate of validity

78. If in any legal proceeding in which the validity of the registration of a trade mark comes into question, a decision is given in favour of the proprietor of the trade mark, the tribunal may grant a certificate to that effect, and if such a certificate is granted, then in any subsequent legal proceeding in which the said validity comes into question, the said proprietor on obtaining a final order or judgment in his favour shall, unless the said final order or judgment for sufficient reason directs otherwise, be entitled to his full costs, charges and expenses as between legal practitioner and client.

Trade usage, etc., to be taken into consideration

79. In any suit or other proceeding relating to a trade mark, the tribunal shall admit evidence of the usages of the trade concerned and of any relevant trade mark or get up legitimately used by other persons.

Agents.

80. Where by or under this Act any act, other than the making of an affidavit, is required to be done by any person, the act may, subject to prescribed conditions or in special cases with the consent of the Central Government, be done, in lieu of by that person himself, by a duly authorised agent, being either a legal practitioner or a person registered in the prescribed manner as a trade marks agent.

Fees.

81. There shall be paid in respect of applications and registration and other matters under this Act such fees as may be prescribed by the Central Government.

Crown to be bound

82. The provisions of this Act shall be binding on the Crown.

Power to make reciprocal arrangements with other Governments

83. If at any time after the expiry of six months from the commencement of this section it is made to appear to the Central Government that any Government outside British India has made satisfactory provision for the protection within its territories of trade marks in respect of which an application for registration has been made in British India, the Central Government may, by notification in the Official Gazette, make provision with regard to trade marks in respect of which an application for registration has been made within the territories of that Government to enable any person who has applied within such territories for registration of a trade mark or his legal representative or assignee to obtain registration of the trade mark in British India under this Act on his making an application for registration in British India within such period as may be fixed in this behalf by the notification as if an application for registration under this Act had been made in respect of that trade mark at the date at which the application for registration was made within the territories of that Government.

Power of Central Government to make rules.

84. (1) The Central Government may, subject to the condition of previous publication by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(*a*) prescribe the classification of goods for the purpose of the registration of trade marks, and empower the Registrar to amend the register so far as may be necessary for the purpose of adapting the entries therein to any amended or substituted classification which may be prescribed;

(*b*) require the making of duplicates of trade marks and other documents connected therewith;

(*c*) provide for securing and regulating the publication, sale or distribution of copies of trade marks and other documents connected therewith;

(*d*) prescribe additional matters to be entered in the register;

(*e*) prescribe the conditions and restrictions subject to which the register, the Textile Marks Record and the Refused Textile Marks List may be inspected;

(*f*) prescribe the form of certificates of registration;

(*g*) prescribe the conditions under which a trade mark removed from the register may be restored under sub-section (3) of section 18;

(*h*) prescribe the further documents, information or evidence to accompany an application under sub-section (1) of section 41;

(*i*) prescribe classes of goods as textile goods for the purposes of Chapter IX;

(*j*) provide for the constitution of Advisory Committees referred to in section 66, and prescribe the places of meeting, and conduct of business at meetings, of such Committees;

(*k*) regulate the awarding of costs by the Registrar under section 70;

(*l*) prescribe the conditions subject to which an agent referred to in section 80 may act;

(*m*) prescribe the fees to be paid under this Act;

(*n*) provide for the establishment of branches of the Trade Marks Registry when expedient for facilitating the working of this Act, and authorise the preparation of copies of the register to be kept at such branch offices;

(o) prescribe the manner in which, in proceedings under this Act before the Central Government or the Registrar, applications shall be made, notices given and matters advertised ;

(p) prescribe times or periods required by this Act to be prescribed ;

(q) provide, generally, for regulating the business of the Trade Marks Registry and of branches established under clause (n) or under section 63, and for regulating all things by this Act placed under the direction or control of the Central Government or the Registrar.

Power to Central Government to make provision for applications for registration before the coming into force of the remaining provisions of Act.

85. The Central Government may, by notification in the official Gazette, provide such procedure as it considers expedient to enable intending applicants to deposit trade marks at the Patent Office before the coming into force of the remaining provisions of this Act :

Provided that the deposit of a trade mark under this section shall not affect any right, existing or accruing in the trade mark.

THE INDIAN COINAGE (AMENDMENT) ACT, 1940.

ACT NO. VI OF 1940.

[11th March, 1940.

An Act further to amend the Indian Coinage Act, 1906.

WHEREAS it is expedient further to amend the Indian Coinage Act, 1906, for the purpose hereinafter appearing ; It is hereby enacted as follows :—

Short title.

1. This Act may be called THE INDIAN COINAGE (AMENDMENT) ACT, 1940.

Amendment of section 5 of Act III of 1906.

2. For section 5 of the Indian Coinage Act, 1906 (hereinafter referred to as the said Act), the following section shall be substituted, namely :—

Standard weight and fineness.

"5 (1) The standard weight of the Government rupee shall be one hundred and eighty grains troy.

(2) The other silver coins shall be of proportionate weight.

(3) The standard fineness of the Government rupee shall be as follows, namely, eleven-twelfths, or one hundred and sixty-five grains of fine silver, and one-twelfth or fifteen grains of alloy : of the half-rupee, eleven-twelfths, or eighty-two and a half grains of fine silver, and one-twelfth or seven and a half grains of alloy : and of the quarter rupee, one-half, or twenty-two and a half grains of fine silver, and one-half, or twenty-two and a half grains of alloy.

(4) In the making of silver coins, a remedy shall be allowed of an amount not exceeding the following, namely :—

	Remedy in weight.	Remedy in fineness.
Rupee Half-rupee	Five-thousandths	Two-thousandths.
Quarter-rupee	Nine-thousandths.	Five-thousandths.

and in applying the said remedies to quarter-rupees the remedies shall be applied to the average of one hundred coins and not to individual coins."

Amendment of section 15, Act III of 1906.

3. To section 15 of the said Act the following sub-section shall be added, namely :—

"(3) All quarter-rupee silver coins which may have been issued under this Act prior to the commencement of the Indian Coinage (Amendment) Act, 1940, shall continue to be a legal tender in payment or on account for any sum not exceeding one rupee at the rate of four for a rupee."

THE RESERVE BANK OF INDIA (CLOSING OF ANNUAL ACCOUNTS) ACT, 1940.

ACT No. VII OF 1940.

[11th March, 1940.

An Act to facilitate the changing of the date on which the annual accounts of the Reserve Bank of India are closed.

WHEREAS it is expedient that certain provisions should be made to facilitate the changing of the date on which the annual accounts of the Reserve Bank of India are closed ; It is hereby enacted as follows :—

Short title and extent

1. (1) This Act may be called THE RESERVE BANK OF INDIA (CLOSING OF ANNUAL ACCOUNTS) ACT, 1940.

(2) It extends to the whole of British India.

Definition

2. In this Act "the Bank" means the Reserve Bank of India constituted by the Reserve Bank of India Act, 1934.

Power to close accounts at expiry of period of six months.

3. Notwithstanding anything to the contrary contained in the Reserve Bank of India Act, 1934, or the regulations made under section 58 thereof the Bank may, for the purpose of facilitating the changing of the date on which the annual accounts of the Bank are closed, close its accounts as at the close of business on the 30th day of June, 1940, and convene a general meeting (which shall be an annual general meeting within the meaning of the said Act) at a place where there is an office of the Bank within six weeks from the date on which the accounts are closed :

Provided that this general meeting shall not be held at the same place as that at which the immediately preceding annual general meeting was held.

Application of Act II of 1934 when accounts are closed under section 3

4. References in sub-section (2) of section 14, section 52 and sub-sections (2) and (3) of section 53 of the Reserve Bank of India Act, 1934, to annual accounts, annual balance-sheet, the auditor's report upon the annual balance-sheet and accounts, and the report of the Central Board on the working of the Bank throughout the year, shall be deemed to include references to the accounts, balance-sheet, auditors' report and the report of the Central Board in respect of a period of six months ending on the 30th day of June 1940.

Interpretation of section 47, Act II of 1934.

5. For the purposes of section 47 of the Reserve Bank of India Act, 1934, the net profits of the Bank for the period of six months ending on the 30th day of June, 1940, shall be deemed to be "net annual profits" but the cumulative dividend referred to in that section as payable out of such profits shall be payable at the rate of one and three quarter per cent.

Power to make regulations.

6. The Central Board of Directors of the Bank may, with the previous sanction of the Central Government, make regulations to provide for any matter for which provision is necessary or convenient in connection with the changing of the date on which the annual accounts of the Bank are closed, and in particular and without prejudice to the generality of the foregoing power for the manner in which the amount, if any, of the additional

dividend referred to in section 47 of the Reserve Bank of India Act, 1934, shall be calculated in respect of the period of six months ending on the 30th day of June, 1940.

THE INDIAN EMIGRATION (AMENDMENT) ACT, 1940.

ACT NO. VIII OF 1940.

[11th March, 1940.

An Act further to amend the Indian Emigration Act, 1922.

WHEREAS it is expedient further to amend the Indian Emigration Act, 1922, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title

1. This Act may be called THE INDIAN EMIGRATION (AMENDMENT) ACT, 1940.

Amendment of section 29, Act VII of 1922.

2. In section 29 of the Indian Emigration Act, 1922 (hereinafter referred to as the said Act), for the words "may be exercised by those officers for the prevention of offences against this Act" the following shall be substituted, namely:—

"may be exercised, for the prevention of offences against this Act, by any such officer, or by a Protector of Emigrants, or a person appointed under section 5."

Amendment of section 30-A, Act VII of 1922.

3. To section 30-A of the said Act the following sub-section shall be added, namely:—

"(5) If any person commits an offence under this section, any police-officer may arrest him without warrant."

THE RESERVE BANK OF INDIA (AMENDMENT) ACT, 1940.

ACT NO. IX OF 1940.

[11th March, 1940.

An Act further to amend the Reserve Bank of India Act, 1934.

WHEREAS it is expedient further to amend the Reserve Bank of India Act, 1934, for the purpose of enabling the Reserve Bank of India to act as agent of, and make loans and advances to, the Board of Commissioners of Currency of Ceylon;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE RESERVE BANK OF INDIA (AMENDMENT) ACT, 1940.

Amendment of section 17 of Act II of 1934.

2. In section 17 of the Reserve Bank of India Act, 1934,—

(a) in clause (4) as adapted and modified by the Third Schedule to the India and Burma (Burma Monetary Arrangements) Order, 1937, for the words "and Burma co-operative banks", the words "Burma co-operative banks and the principal currency authority of Ceylon" shall be substituted;

(b) in clause (13) the words "a bank which is" shall be omitted, and for the words "such banks" the words "banks which are such principal currency authorities" shall be substituted.

THE ARBITRATION ACT, 1940.

ACT NO. X OF 1940.

[11th March, 1940.

An Act to consolidate and amend the law relating to Arbitration.

WHEREAS it is expedient to consolidate and amend the law relating to arbitration in British India; It is hereby enacted as follows:—

CHAPTER I.

INTRODUCTORY.

Short title, extent and commencement

1. (1) This Act may be called THE ARBITRATION ACT, 1940.

(2) It extends to the whole of British India.

(3) It shall come into force on the 1st day of July, 1940.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not;

(b) "award" means an arbitration award.

(c) "Court" means a Civil Court having jurisdiction to decide the questions forming the subject-matter of the reference if the same had been the subject-matter of a suit, but does not, except for the purpose of arbitration proceedings under section 21, include a Small Cause Court;

(d) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased, and, where a party acts in a representative character, the person on whom the estate devolves on the death of the party so acting;

(e) "reference" means a reference to arbitration.

CHAPTER II.

ARBITRATION WITHOUT INTERVENTION OF A COURT.

Provisions implied in arbitration agreement.

3. An arbitration agreement, unless a different intention is expressed therein, shall be deemed to include the provisions set out in the First Schedule in so far as they are applicable to the reference.

Agreement that arbitrators be appointed by third party

4. The parties to an arbitration agreement may agree that any reference thereunder shall be to an arbitrator or arbitrators to be appointed by a person designated in the agreement either by name or as the holder for the time being of any office or appointment.

Authority of appointed arbitrator or umpire irrevocable except by leave of Court.

5. The authority of an appointed arbitrator or umpire shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement.

Arbitration agreement not to be discharged by death of party thereto.

6. (1) An arbitration agreement shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such event be enforceable by or against the legal representative of the deceased.

(2) The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed.

(3) Nothing in this section shall affect the operation of any law by virtue of which any right of action is extinguished by the death of a person.

Provisions in case of insolvency

7. (1) Where it is provided by a term in a contract to which an insolvent is a party that any differences arising thereout or in connection therewith shall be referred to arbitration, the said term shall, if the receiver adopts the contract, be enforceable by or against him so far as it relates to any such differences.

(2) Where a person who has been adjudged an insolvent had, before the commencement of the insolvency proceedings, become a party to an arbitration agreement, and any matter to which the agreement applies is required to be deter-

mined in connection with, or for the purposes of, the insolvency proceedings, then, if the case is one to which sub-section (1) does not apply, any other party to the agreement or the receiver may apply to the Court having jurisdiction in the insolvency proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the agreement, and the Court may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

(3) In this section the expression "receiver" includes an Official Assignee.

Power of Court to appoint arbitrator or umpire.

8. (1) In any of the following cases—

(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments; or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy; or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him;

any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy.

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard, appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have like power to act in the reference and to make an award as if he or they had been appointed by consent of all parties.

Power to party to appoint new arbitrator or, in certain cases, a sole arbitrator.

9. Where an arbitration agreement provides that a reference shall be to two arbitrators, one to be appointed by each party, then, unless a different intention is expressed in the agreement,—

(a) if either of the appointed arbitrators neglects or refuses to act, or is incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place;

(b) if one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for fifteen clear days after the service by the other party of a notice in writing to make the appointment, such other party having appointed his arbitrator before giving the notice, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent:

Provided that the Court may set aside any appointment as sole arbitrator made under clause (b) and either, on sufficient cause being shown, allow further time to the defaulting party to appoint an arbitrator or pass such other order as it thinks fit.

Explanation.—The fact that an arbitrator or umpire, after a request by either party to enter on and proceed with the reference, does not within one month comply with the request may constitute a neglect or refusal to act within the meaning of section 8 and this section.

Provisions as to appointment of three or more arbitrators.

10. (1) Where an arbitration agreement provides that a reference shall be to three arbitrators, one to be appointed by each party and the third by the two appointed arbitrators, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.

(2) Where an arbitration agreement provides that a reference shall be to three arbitrators to be appointed otherwise than as mentioned in sub-section (1), the award of the majority shall, unless the arbitration agreement otherwise provides, prevail.

(3) Where an arbitration agreement provides for the appointment of more arbitrators than three, the award of the majority, or if the arbitrators are equally divided in their opinions, the award of the umpire shall, unless the arbitration agreement otherwise provides, prevail.

Power to Court to remove arbitrators or umpire in certain circumstances.

11. (1) The Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.

(2) The Court may remove an arbitrator or umpire who has misconducted himself or the proceedings.

(3) Where an arbitrator or umpire is removed under this section, he shall not be entitled to receive any remuneration in respect of his services.

(4) For the purposes of this section the expression "proceeding with the reference" includes, in a case where reference to the umpire becomes necessary, giving notice of that fact to the parties and to the umpire.

Power of Court where arbitrator is removed or his authority revoked.

12. (1) Where th Court removes an umpire who has not entered on the reference or one or more arbitrators (not being all the arbitrators), the Court may, on the application of any party to the arbitration agreement, appoint persons to fill the vacancies.

(2) Where the authority of an arbitrator or arbitrators or un umpire is revoked by leave of the Court, or where the Court removes an umpire who has entered on the reference or a sole arbitrator or all the arbitrators, the Court may, on the application of any party to the arbitration agreement, either—

(*a*) appoint a person to act as sole arbitrator in the place of the person or persons displaced, or

(*b*) order that the arbitration agreement shall cease to have effect with respect to the difference referred.

(3) A person appointed under this section as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the arbitration agreement.

Powers of arbitrator.

13. The arbitrators or umpire shall, unless a different intention is expressed in the agreement, have power to—

(*a*) administer oath to the parties and witnesses appearing;

(*b*) state a special case for the opinion of the Court on any question of law involved, or state the award, wholly or in part, in the form of a special case of such question for the opinion of the Court;

(*c*) make the award conditional or in the alternative;

(*d*) correct in an award any clerical mistake or error arising from any accidental slip or omission;

(*e*) administer to any party to the arbitration such interrogatories as may, in the opinion of the arbitrators or umpire, be necessary.

Award to be signed and filed.

14. (1) When the arbitrators or umpire have made their award, they shall sign it and shall give notice in writing to the parties of the making and signing thereof and of the amount of fees and charges payable in respect of the arbitration and award.

(2) The arbitrators or umpire shall, at the request of any party to the arbitration agreement or any person claiming under such party or if so directed by the Court and upon payment of the fees and charges due in respect of the arbitration and award and of the costs and charges of filing the award cause the award or a signed copy of it, together with any depositions and documents which may have been taken and proved before them, to be filed in Court, and the Court shall thereupon give notice to the parties of the filing of the award.

(3) Where the arbitrators or umpire state a special case under clause (*b*) of section 13, the Court, after giving notice to the parties and hearing them, shall pronounce its opinion thereon and such opinion shall be added to, and shall form part of, the award.

Power of Court to modify award.

15. The Court may by order modify or correct an award.—

(*a*) where it appears that a part of the award is upon a matter not referred to arbitration and such part can be separated from the other part and does not affect the decision on the matter referred ; or

(*b*) where the award is imperfect in form, or contains any obvious error which can be amended without affecting such decision ; or

(*c*) where the award contains a clerical mistake or an error arising from an accidental slip or omission.

Power to remit award

16. (1) The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit—

(*a*) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration and such matter cannot be separated without affecting the determination of the matters referred ; or

(*b*) where the award is so indefinite as to be incapable of execution ; or

(*c*) where an objection to the legality of the award is apparent upon the face of it.

(2) Where an award is remitted under sub-section (1) the Court shall fix the time within which the arbitrator or umpire shall submit his decision to the Court :

Provided that any time so fixed may be extended by subsequent order of the Court.

(3) An award remitted under sub-section (1) shall become void on the failure of the arbitrator or umpire to reconsider it and submit his decision within the time fixed.

Judgment in terms of award

17. Where the Court sees no cause to remit the award or any of the matters referred to arbitration for reconsideration or to set aside the award, the Court shall, after the time for making an application to set aside the award has expired, or such application having been made, after refusing it, proceed to pronounce judgment according to the award, and upon the judgment so pronounced a decree shall follow, and no appeal shall lie from such decree except on the ground that it is in excess of, or not otherwise in accordance with, the award.

Power of Court to pass interim orders.

18. (1) Notwithstanding anything contained in section 17, at any time after the filing of the award, whether notice of the filing has been served or not, upon being satisfied by affidavit or otherwise that a party has taken or is about to take steps to defeat, delay or obstruct the execution of any decree that may be passed upon the award, or that speedy execution of the award is just and necessary, the Court may pass such interim orders as it deems necessary.

(2) Any person against whom such interim orders have been passed may show cause against such orders, and the Court, after hearing the parties, may pass such further orders as it deems necessary and just.

Power to supersede arbitration when award becomes void or is set aside

19. Where an award has become void under sub-section (3) of section 16 or has been set aside, the Court may by order supersede the reference and shall thereupon order that the arbitration agreement shall cease to have effect with respect to the difference referred.

CHAPTER III.

ARBITRATION WITH INTERVENTION OF A COURT WHERE THERE IS NO SUIT PENDING.

Application to file in Court arbitration agreement.

20. (1) Where any persons have entered into an arbitration agreement before the institution of any suit with respect to the subject-matter of the agreement or any part of it, and where a difference has arisen to which the agreement applies, they or any of them, instead of proceeding under Chapter II, may apply to a Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court.

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs and the remainder as defendant or defendants, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and the other parties as defendants.

(3) On such application being made, the Court shall direct notice thereof to be given to all parties to the agreement other than the applicants, requiring them to show cause within the time specified in the notice why the agreement should not be filed.

(4) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed by the parties, whether in the agreement or otherwise, or, where the parties cannot agree upon an arbitrator, to an arbitrator appointed by the Court.

(5) Thereafter, the arbitration shall proceed in accordance with, and shall be governed by, the other provisions of this Act so far as they can be made applicable.

CHAPTER IV.

ARBITRATION IN SUITS.

Parties to suit may apply for order of reference.

21. Where in any suit all the parties interested agree that any matter in difference between them in the suit shall be referred to arbitration, they may at any time before judgment is pronounced apply in writing to the Court for an order of reference.

Appointment of arbitrator.

22. The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

Order of reference.

23. (1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall in the order specify such time as it thinks reasonable for the making of the award.

(2) Where a matter is referred to arbitration, the Court shall not, save in the manner and to the extent provided in this Act, deal with such matter in the suit.

Reference to arbitration by some of the parties.

24. Where some only of the parties to a suit apply to have the matters in difference between them referred to arbitration in accordance with, and in the manner provided by, section 21, the Court may, if it thinks fit, so refer such matters to arbitration (provided that the same can be separated from the rest of the subject-matter of the suit) in the manner provided in that section, but the suit shall

continue so far as it relates to the parties who have not joined in the said application and to matters not contained in the said reference as if no such application had been made, and an award made in pursuance of such a reference shall be binding only on the parties who have joined in the application.

Provisions applicable to arbitrations under this Chapter.

25. The provisions of the other Chapters shall, so far as they can be made applicable, apply to arbitrations under this Chapter :

Provided that the Court may, in any of the circumstances mentioned in sections 8, 10, 11 and 12, instead of filling up the vacancies or making the appointments, make an order superseding the arbitration and proceed with the suit, and where the Court makes an order superseding the arbitration under section 19, it shall proceed with the suit.

CHAPTER V.

GENERAL.

Application of Chapter.

26. Save as otherwise provided in this Act, the provisions of this Chapter shall apply to all arbitrations.

Power of arbitrators to make an interim award.

27. (1) Unless a different intention appears in the arbitration agreement, the arbitrators or umpire may, if they think fit, make an interim award.

(2) All references in this Act to an award shall include references to an interim award made under sub-section (1).

Power to Court only to enlarge time for making award.

28. (1) The Court may, if it thinks fit, whether the time for making the award has expired or not and whether the award has been made or not, enlarge from time to time the time for making the award.

(2) Any provision in an arbitration agreement whereby the arbitrators or umpire may, except with the consent of all the parties to the agreement, enlarge the time for making the award, shall be void and of no effect.

Interest on awards.

29. Where and in so far as an award is for the payment of money the Court may in the decree order interest, from the date of the decree at such rate as the Court deems reasonable, to be paid on the principal sum as adjudged by the award and confirmed by the decree.

Grounds for setting aside award.

30. An award shall not be set aside except on one or more of the following grounds, namely :—

(*a*) that an arbitrator or umpire has misconducted himself or the proceedings;

(*b*) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35 ;

(*c*) that an award has been improperly procured or is otherwise invalid.

Jurisdiction.

31. (1) Subject to the provisions of this Act, an award may be filed in any Court having jurisdiction in the matter to which the reference relates.

(2) Notwithstanding anything contained in any other law for the time being in force and save as otherwise provided in this Act, all questions regarding the validity, effect or existence of an award or an arbitration agreement between the parties to the agreement or persons claiming under them shall be decided by the Court in which the award, under the agreement, has been, or may be, filed, and by no other Court.

(3) All applications regarding the conduct of arbitration proceedings or otherwise arising out of such proceedings shall be made to the Court where the award has been, or may be, filed, and to no other Court.

(4) Notwithstanding anything contained elsewhere in this Act or in any other law for the time being in force, where in any reference any application under this Act has been made in a Court competent to entertain it, that Court alone shall have jurisdiction over the arbitration proceedings and all subsequent applications arising out of that reference and the arbitration proceedings shall be made in that Court and in no other Court.

Bar to suits contesting arbitration agreement or award

32. Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act.

Arbitration agreement or award to be contested by application

33. Any party to an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of an arbitration agreement or an award or to have the effect of either determined shall apply to the Court and the Court shall decide the question on affidavits:

Provided that where the Court deems it just and expedient, it may set down the application for hearing on other evidence also, and it may pass such orders for discovery and particulars as it may do in a suit.

Power to stay legal proceedings where there is an arbitration agreement.

34. Where any party to an arbitration agreement or any person claiming under him commences any legal proceedings against any other party to the agreement or any person claiming under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time before filing a writing statement or taking any other steps in the proceedings, apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.

Effect of legal proceedings on arbitration.

35. (1) No reference nor award shall be rendered invalid by reason only of the commencement of legal proceedings upon the subject-matter of the reference, but when legal proceedings upon the whole of the subject-matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending reference shall, unless a stay of proceedings is granted under section 34, be invalid.

(2) In this section the expression "parties to the reference" includes any persons claiming under any of the parties and litigating under the same title.

Power of Court where arbitration agreement is ordered not to apply to a particular difference, to order that a provision making an award a condition precedent to an action shall not apply to such difference.

36. Where it is provided (whether in the arbitration agreement or otherwise) that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the Court, if it orders (whether under this Act or any other law) that the agreement shall cease to have effect as regards any particular difference, may further order that the said provision shall also cease to have effect as regards that difference.

Limitations.

37. (1) All the provisions of the Indian Limitation Act, 1908, shall apply to arbitrations as they apply to proceedings in Court.

(2) Notwithstanding any term in an arbitration agreement to the effect that no cause of action shall accrue in respect of any matter required by the agreement

to be referred until an award is made under the agreement, a cause of action shall, for the purpose of limitation, be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the agreement.

(3) For the purposes of this section and of the Indian Limitation Act, 1908, an arbitration shall be deemed to be commenced when one party to the arbitration agreement serves on the other parties thereto a notice requiring the appointment of an arbitrator, or where the arbitration agreement provides that the reference shall be to a person named or designated in the agreement, requiring that the difference be submitted to the person so named or designated.

(4) Where the terms of an agreement to refer future differences to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a difference arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may on such terms, if any, as the justice of the case may require, extend the time for such period as it thinks proper.

(5) Where the Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration agreement shall cease to have effect with respect to the difference referred, the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by the Indian Limitation Act, 1908, for the commencement of the proceedings (including arbitration) with respect to the difference referred.

Disputes as to arbitrator's remuneration or costs.

38. (1) If in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by him, the Court may, on an application in this behalf, order that the arbitrator or umpire shall deliver the award to the applicant on payment into Court by the applicant of the fees demanded, and shall, after such inquiry, if any, as it thinks fit, further order that out of the money so paid into Court there shall be paid to the arbitrator or umpire by way of fees such sum as the Court may consider reasonable and that the balance of the money, if any, shall be refunded to the applicant.

(2) An application under sub-section (1) may be made by any party to the reference unless the fees demanded have been fixed by written agreement between him and the arbitrator or umpire, and the arbitrator or umpire shall be entitled to appear and be heard on any such application.

(3) The Court may make such orders as it thinks fit respecting the costs of an arbitration where any question arises respecting such costs and the award contains no sufficient provision concerning them.

CHAPTER VI.

APPEALS.

Appealable orders.

39. (1) An appeal shall lie from the following orders passed under this Act (and from no others) to the Court authorised by law to hear appeals from original decrees of the Court passing the order:—

An order—

(i) superseding an arbitration;

(ii) on an award stated in the form of a special case;

(iii) modifying or correcting an award;

(iv) filing or refusing to file an arbitration agreement;

(v) staying or refusing to stay legal proceedings where there is an arbitration agreement;

(vi) setting aside or refusing to set aside an award :

Provided that the provisions of this section shall not apply to any order passed by a Small Cause Court.

(2) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to His Majesty in Council.

CHAPTER VII.

MISCELLANEOUS.

Small Cause Court not to have jurisdiction over arbitrations save arbitrations in suits before it.

40. A Small Cause Court shall have no jurisdiction over any arbitration proceedings or over any application arising thereout save on application made under section 21.

Procedure and powers of Court.

41. Subject to the provisions of this Act and of rules made thereunder—

(a) the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the Court, and to all appeals, under this Act, and

(b) the Court shall have, for the purpose of, and in relation to, arbitration proceedings, the same power of making orders in respect of any of the matters set out in the Second Schedule as it has for the purpose of, and in relation to, any proceedings before the Court :

Provided that nothing in clause (b) shall be taken to prejudice any power which may be vested in an arbitrator or umpire for making orders with respect to any of such matters.

Service of notice by party or arbitrator.

42. Any notice required by this Act to be served otherwise than through the Court by a party to an arbitration agreement or by an arbitrator or umpire shall be served in the manner provided in the arbitration agreement, or if there is no such provision, either—

(a) by delivering it to the person on whom it is to be served, or

(b) by sending it by post in a letter addressed to that person at his usual or last known place of abode or business in British India and registered under Chapter VI of the Indian Post Office Act, 1898.

Power of Court to issue processes for appearance before arbitrator.

43. (1) The Court shall issue the same processes to the parties and witnesses whom the arbitrator or umpire desires to examine as the Court may issue in suits tried before it.

(2) Persons failing to attend in accordance with such process, or making any other default, or refusing to give their evidence, or guilty of any contempt to the arbitrator or umpire during the investigation of the reference, shall be subject to the like disadvantages, penalties and punishments by order of the Court on the representation of the arbitrator or umpire as they would incur for the like offences in suits tried before the Court.

(3) In this section the expression "process" includes summonses and commissions for the examination of witnesses and summonses to produce documents.

Power to High Court to make rules.

44. The High Court may make rules consistent with this Act as to—

(a) the filing of awards and all proceedings consequent thereon or incidental thereto ;

(b) the filing and hearing of special cases and all proceedings consequent thereon or incidental thereto ;

(c) the staying of any suit or proceeding in contravention of an arbitration agreement ;

(*d*) the forms to be used for the purposes of this Act;

(*e*) generally, all proceedings in Court under this Act.

Crown to be bound.

45. The provisions of this Act shall be binding on the Crown.

Application of Act to statutory arbitrations.

46. The provisions of this Act, except sub-section (1) of section 6 and sections 7, 12 and 37, shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder.

Act to apply to all arbitrations.

47. Subject to the provisions of section 46, and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder:

Provided that an arbitration award otherwise obtained may with the consent of all the parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending.

Saving for pending references.

48. The provisions of this Act shall not apply to any reference pending at the commencement of this Act, to which the law in force immediately before the commencement of this Act shall, notwithstanding any repeal effected by this Act, continue to apply.

Repeals and amendments.

49. (1) The enactments specified in the Third Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

(2) The enactments specified in the Fourth Schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

THE FIRST SCHEDULE

(*See* section 3.)

IMPLIED CONDITIONS OF ARBITRATION AGREEMENTS.

1. Unless otherwise expressly provided, the reference shall be to a sole arbitrator.

2. If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments.

3. The arbitrators shall make their award within four months after entering on the reference or after having been called upon to act by notice in writing from any party to the arbitration agreement or within such extended time as the Court may allow.

4. If the arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators.

5. The umpire shall make his award within two months of entering on the reference or within such extended time as the Court may allow.

6. The parties to the reference and all persons claiming under them shall, subject to the provisions of any law for the time being in force, submit to be examined by the arbitrators or umpire on oath or affirmation in relation to the matters in difference and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings and documents within their possession or power respectively, which may be required or called for, and do all other things which, during the proceedings on the reference, the arbitrators or umpire may require.

7. The award shall be final and binding on the parties and persons claiming under them respectively.

8. The costs of the reference and award shall be in the discretion of the arbitrators or umpire who may direct to, and by whom, and in what manner, such costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof and may award costs to be paid as between legal practitioner and client.

THE SECOND SCHEDULE

(*See* section 41.)

POWERS OF COURT.

1. The preservation, interim custody or sale of any goods which are the subject-matter of the reference.

2. Securing the amount in difference in the reference.

3. The detention, preservation or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein and authorising for any of the aforesaid purposes any person to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

4. Interim injunctions or the appointment of a receiver.

5. The appointment of a guardian for a minor or person of unsound mind for the purposes of arbitration proceedings.

THE THIRD SCHEDULE.

[*See* section 49 (1).]

ENACTMENTS REPEALED.

Year.	No.	Short title.	Extent of repeal.
1	2	3	4
1899	IX	The Indian Arbitration Act, 1899.	The whole.
1908	V	The Code of Civil Procedure, 1908.	Section 89, clauses (*a*) to (*f*) (both inclusive) of sub-section (1) of section 104 of the Second Schedule.

THE FOURTH SCHEDULE.

[*See* section 49 (2).]

ENACTMENTS AMENDED

Year.	No.	Short title	Amendments.
1	2	3	4
1863	XX	The Religious Endowments Act, 1863.	(*a*) In section 16— (*i*) for the words and figure " Chapter VI of the Code of Civil Procedure " the words and figures " Chapter IV of the Arbitration Act, 1940 " shall be substituted ; (*ii*) for the words and figure " section 312 of the said Code " the words and figure " section 21 of the said Act " shall be substituted. (*b*) In section 17, for the words and figure "section 312 of the said Code of Civil Procedure " the words and figures " section 21 of the Arbitration Act, 1940 " shall be substituted.
1877	I	The Specific Relief Act, 1877.	In section 21— (*i*) for the words and figure " Code of Civil Procedure, and the Indian Arbitration Act, 1899 " the words and figure " Arbitration Act, 1940 " shall be substituted; (*ii*) after the words " but if any person who has made such a contract " the words " other than an arbitration agreement to which the provisions of the said Act apply " shall be inserted.
1908	IX	The Indian Limitation Act, 1908.	In the First Schedule— (*i*) for Article 158 the following shall be substituted, namely :— "158 Under the Arbitration Act, 1940, to set aside an award or to get an award remitted for reconsideration — Thirty days — The date of service of the notice of filing of the award." (*ii*) in Articles 159 and 179, for the words " same Code " in the first column the words and figure " Code of Civil Procedure, 1908 " shall be substituted ;

Year.	No.	Short title.	Amendments.
1	2	3	4
			(iii) for Article 178 the following shall be substituted, namely :— " 178. Under the Arbitration Act, 1940, for the filing in Court of an award. — Ninety days — The date of service of the notice of the making of the award "
1910	IX	The Indian Electricity Act, 1910	In section 52, for the figure " 1899 " the figure " 1940 " shall be substituted.
1913	VII	The Indian Companies Act, 1913.	In section 152— (i) for the figure " 1899," in both places where it occurs, the figure " 1940 " shall be substituted ; (ii) in sub-section (3) the words " other than those restricting the application of the Act in respect of the subject-matter of the arbitration " shall be omitted.

THE COAL MINES SAFETY (STOWING) AMENDMENT ACT, 1940.

ACT NO. XI OF 1940.

[26th March, 1940.

An Act to amend the Coal Mines Safety (Stowing) Act, 1939.

WHEREAS it is expedient to amend the Coal Mines Safety (Stowing) Act, 1939, for the purposes hereinafter appearing ; It is hereby enacted as follows :—

Short title.

1. This Act may be called THE COAL MINES SAFETY (STOWING) AMENDMENT ACT, 1940.

Amendment of preamble to Act XIX of 1939.

2. In the preamble to the Coal Mines Safety (Stowing) Act, 1939 (hereinafter referred to as the said Act), after the word "stowing" the words " and other operations " shall be inserted, and for the word " operation ", where it occurs for the second time, the word " operations " shall be substituted.

Amendment of section 6, Act XIX of 1939.

3. In section 6 of the said Act,—

(a) the brackets and words " (not being territory which has been declared under section 5 of the Indian Tariff Act, 1934, to be foreign territory for the purposes of that section) " shall be omitted ;

(b) after the words " a duty of customs " the brackets and words " (which shall be in addition to any duty of customs for the time being leviable under any other Act) " shall be inserted.

Amendment of section 7, Act XIX of 1939.

4. In section 7 of the said Act, for the words, figures and brackets " determined in like manner to that provided in sub-section (1) of section 144 of the Government of India Act, 1935 " the words " determined in such manner as may be prescribed " shall be substituted.

Amendment of section 8, Act XIX of 1939.

5. In sub-section (1) of section 8 of the said Act,—

(a) the word " and " at the end of clause (i) shall be omitted ;

(b) after clause (ii) the following clauses shall be added, namely :—

"(iii) the execution of operations other than stowing in furtherance of the objects of this Act; and

(iv) the prosecution of research work connected with safety in mines."

Amendment of section 9, Act XIX of 1939.

6. In sub-section (2) of section 9 of the said Act, after the word "stowing," where it occurs for the second time, the words "or any other operation towards which assistance may be granted under this Act" shall be inserted.

Amendment of section 12, Act XIX of 1939.

7. In sub-section (2) of section 12 of the said Act, after clause (b) the following clause shall be inserted, namely:—

"(bb) the determination of the net proceeds of the duty of excise for the purposes of section 7."

THE INCOME-TAX LAW AMENDMENT ACT, 1940.

ACT No. XII OF 1940.

[26th March, 1940.

An Act to amend the law relating to Income-tax.

WHEREAS it is expedient to amend the law relating to income-tax for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title and extent

1. (1) This Act may be called THE INCOME-TAX LAW AMENDMENT ACT, 1940.

(2) It extends to the whole of British India.

Amendment of Act VII of 1939.

2. In section 11 of the Indian Income-tax (Amendment) Act, 1939, for clause (a) of sub-clause (iii) of clause (b) the following clause shall be substituted, namely:—

'(a) after the word "equivalent" the words "where the assets are ships other than ships ordinarily plying on inland waters," shall be inserted, and after the word "prescribed" the following words shall be added, namely:—

"and in any other case, to such percentage on the written down value thereof as may in any case or class of cases be prescribed".'.

Amendment of section 35, Act XI of 1922.

3. In section 35 of the Indian Income-tax Act, 1922, (hereinafter referred to as the said Act),—

(a) in sub-section (1),—

(i) after the words "assessment order" the words "or refund order" shall be inserted, and for the words "or assessment" the words "assessment or refund" shall be substituted;

(ii) in the first proviso, after the word "assessment" the words "or reducing a refund" shall be inserted;

(b) in sub-section (3), after the words "enhancing the assessment" the words "or reducing a refund" shall be inserted.

Amendment of section 54, Act XI of 1922.

4. In sub-section (3) of section 54 of the said Act,—

(a) after clause (g) the following clause shall be inserted, namely:—

"(gg) of any such particulars, relevant to any inquiry into a charge of misconduct in connection with income-tax proceedings against a lawyer or registered accountant, to the authority referred to in sub-section (3) of section 61, when exercising the functions referred to in that sub-section,";

(*b*) in sub-clause (*m*), before the words "so much of such particulars" the word "of" shall be inserted.

Amendment of section 58S, Act XI of 1922.

5. In section 58S of the said Act, the words "and super-tax", in both places where they occur, shall be omitted.

Amendment of section 64, Act XI of 1922.

6. To section 64 of the said Act the following sub-section shall be added, namely :—

"(5) The provisions of sub-section (1) and sub-section (2) shall not apply and shall be deemed never at any time to have applied to any assessee—

(*a*) on whom an assessment or re-assessment for the purposes of this Act has been, is being or is to be made in the course of any case in respect of which a Commissioner of Income-tax appointed without reference to area under sub-section (2) of section 5 is exercising the functions of a Commissioner of Income-tax, or

(*b*) where by any distribution or allocation of work made by the Commissioner of Income-tax under sub-section (5) of section 5, a particular Income-tax Officer has been charged with the function of assessing that assessee, or,

(*c*) who or whose income is included in a class of persons or a class of incomes specified in any notification issued under sub-section (6) of section 5,

but the assessment of such person, whether the proceedings for such assessment began before or after the 1st day of April, 1939, shall be made by the Income-tax Officer for the time being charged with the function of making such assessment by the Central Board of Revenue or by the Commissioner of Income-tax to whom he is subordinate, as the case may be."

Insertion of new section 67B in Act XI of 1922.

7. After section 67 A of the said Act the following section shall be inserted, namely :—

Act to have effect pending legislative provision for charge of income-tax.

"67B. If on the 1st day of April on any year provision has not yet been made by an Act of the Indian Legislature for the charging of income-tax for that year, this Act shall nevertheless have effect until such provision is so made as if the provision in force in the preceding year or the provision proposed in the Bill then before the Legislature, whichever is more favourable to the assessee, were actually in force.".

Amendment of Schedule, Act XI of 1922.

8. In the Schedule to the said Act, in paragraph (*b*) of the second rule, after the word "surplus", where it first occurs, the words "arrived at by adjusting the surplus or deficit" shall be inserted, and the words "after adjusting such surplus" shall be omitted.

Validity of certain assessments and proceedings made under Act XI of 1922.

9. No assessment made in accordance with sub-section (5) of section 64 of the said Act before the 30th day of December, 1939, and no proceedings taken in the course of, or for the purposes of, so making any assessment before that date shall be or continue to be invalid by reason of anything contained in sub-sections (1) and (2) of section 64 of the said Act.

Repeal of Ordinance IX of 1939.

10. The Income-tax (Removal of Difficulties and Validating) Ordinance, 1939, is hereby repealed.

THE RESERVE BANK OF INDIA (SECOND AMENDMENT) ACT, 1940.

ACT NO. XIII OF 1940.

[*26th March, 1940.*

An Act further to amend the Reserve Bank of India Act, 1934.

WHEREAS it is expedient further to amend the Reserve Bank of India Act, 1934, for the purpose hereinafter appearing; It is hereby enacted as follows :—

Short title.

1. This Act may be called THE RESERVE BANK OF INDIA (SECOND AMENDMENT) ACT, 1940.

Amendment of section 4, Act II of 1934.

2. In section 4 of the Reserve Bank of India Act, 1934, as adapted and modified in accordance with the Third Schedule to the India and Burma (Burma Monetary Arrangements) Order, 1937 (hereinafter referred to as the said Act), after sub-section (4) the following sub-section shall be inserted, namely :—

" (4A) Without prejudice to the validity of any registration made before the commencement of the Reserve Bank of India (Second Amendment) Act, 1940, no person shall, after the commencement of that Act, be registered as a shareholder in respect of any shares held by him whether in his own name or jointly with another person or persons in excess of a total nominal value of twenty thousand rupees, or be entitled to payment of any dividend on such shares or to exercise any of the rights of a shareholder in respect of such shares otherwise than for the purpose of selling the shares."

Amendment of section 56, Act II of 1934.

3. In sub-section (2) of section 56 of the said Act, after the words " registered in his name " the following words shall be inserted, namely :—

" or that any shareholder, to whom the provisions of sub-section (4A) of section 4 apply, is the holder of shares in excess of a total nominal value of twenty thousand rupees."

THE PARSI MARRIAGE AND DIVORCE (AMENDMENT) ACT, 1940.

ACT No. XIV OF 1940.

[6th April, 1940.

An Act to amend the Parsi Marriage and Divorce Act, 1936.

WHEREAS it is expedient to amend the Parsi Marriage and Divorce Act, 1936; It is hereby enacted as follows :—

Short title.

1. This Act may be called THE PARSI MARRIAGE AND DIVORCE (AMENDMENT) ACT, 1940.

Amendment of section 40, Act III of 1936.

2. In section 40 of the Parsi Marriage and Divorce Act, 1936,—

(a) in sub-section (1), after the words " the husband shall " the words " while the wife remains chaste and unmarried " shall be inserted ;

(b) in clause (a) of sub-section (1), the words " while she remains chaste and unmarried " shall be omitted ;

(c) after sub-section (2) the following sub-section shall be added :—

" (3) Where an order for alimony or maintenance in favour of a wife has been made either under the provisions of the Parsi Marriage and Divorce Act, 1865, or under the provisions of this Act, the Court, if satisfied that the wife has remarried or has not remained chaste, shall vary or rescind the order."

THE EXCESS PROFITS TAX ACT, 1940.

ACT No. XV OF 1940.

[6th April 1940.

An Act to impose a tax on excess profits arising out of certain businesses.

WHEREAS it is expedient to impose a tax on excess profits arising out of certain businesses in the conditions prevailing during the present hostilities ; It is hereby enacted as follows :—

Short title, extent and commencement

1. (1) This Act may be called THE EXCESS PROFITS TAX ACT, 1940.

(2) It extends to the whole of British India.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "accounting period" in relation to any business means—

(a) where the accounts of the business are made up for successive periods of twelve months, each of such periods;

(b) in any other case, such period as the Excess Profits Tax Officer may determine:

Provided that in determining any accounting period under sub-clause (b) the Excess Profits Tax Officer shall have regard to the period, if any, which is, or has been, determined as the previous year for that business for the purposes of the Indian Income-tax Act, 1922;

(2) "Appellate Assistant Commissioner" means a person appointed to be an Appellate Assistant Commissioner of Excess Profits Tax under section 3;

(3) "average amount of capital" means the average amount of capital employed in any business as computed in accordance with the Second Schedule;

(4) "Board of Referees" means a Board of Referees appointed under section 3;

(5) "business" includes any trade, commerce or manufacture or any adventure in the nature of trade, commerce or manufacture or any profession or vocation, but does not include a profession carried on by an individual or by individuals in partnership if the profits of the profession depend wholly or mainly on his or their personal qualifications unless such profession consists wholly or mainly in the making of contracts on behalf of other persons or the giving to other persons of advice of a commercial nature in connection with the making of contracts:

Provided that where the functions of a company or of a society incorporated by or under any enactment consist wholly or mainly in the holding of investments or other property, the holding of the investments or property shall be deemed for the purpose of this definition to be a business carried on by such company or society:

Provided further that all businesses to which this Act applies carried on by the same person shall be treated as one business for the purposes of this Act;

(6) "chargeable accounting period" means—

(a) any accounting period falling wholly within the term beginning on the 1st day of September, 1939, and ending on the 31st day of March, 1941, and

(b) where any accounting period falls partly within and partly without the said term, such part of that accounting period as falls within the said term;

(7) "Commissioner" means a person appointed to be a Commissioner of Excess Profits Tax under section 3;

(8) "company" means a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, or of an Act of the Legislature of a British possession or of a law of an Indian State, and includes any foreign association whether incorporated or not which the Central Board of Revenue may, by general or special order, declare to be a company for the purposes of this Act;

(9) "deficiency" of profits means—

(i) where profits have been made in any chargeable accounting period, the amount by which such profits fall short of the standard profits;

(ii) where a loss has been made in any chargeable accounting period, the amount of the loss added to the amount of the standard profits;

(10) "director" includes any person occupying the position of a director by whatever name called and also includes any person who—

(i) is a manager of the company or concerned in the management of the business; and

(ii) is remunerated out of the funds of the business; and

(iii) is the beneficial owner of not less than twenty per cent. of the ordinary share capital of the company;

(11) "dividend" has the meaning assigned to the expression in section 2 of the Indian Income-tax Act, 1922;

(12) "Excess Profits Tax Officer" means a person appointed to be an Excess Profits Tax Officer under section 3;

(13) "income" has the meaning assigned to the expression in section 2 of the Indian Income-tax Act, 1922;

(14) "fixed rate" in relation to dividends on share capital, other than ordinary share capital, includes a rate fluctuating in accordance with the maximum rate of income-tax;

(15) "Inspecting Assistant Commissioner" means a person appointed to be an Inspecting Assistant Commissioner of Excess Profits Tax under section 3;

(16) "loss" means a loss computed in the same manner as, for the purposes of this Act, profits are to be computed;

(17) "person" includes a Hindu undivided family;

(18) "prescribed" means prescribed by rules made under this Act;

(19) "profits" means profits as determined in accordance with the First Schedule;

(20) "standard profits" means standard profits as computed in accordance with the provisions of section 6;

(21) "statutory percentage" means—

(a) in relation to a business carried on by a body corporate (other than a company the directors whereof have a controlling interest therein), eight per cent. per annum;

(b) in relation to any other business, ten per cent. per annum:

Provided that in relation to any decrease of capital the statutory percentage shall be in all cases six per cent.:

Provided further that where the business was commenced on or after the 1st day of July, 1938, the foregoing percentages shall be increased from eight, ten and six per cent. to ten, twelve and eight percent., respectively;

(22) "written down value" has the meaning assigned to that expression in sub-section (5) of section 10 of the Indian Income-tax Act, 1922.

Excess profits tax authorities.

3. (1) There shall be the following classes of excess profits tax authorities for the purposes of this Act, namely:—

(a) the Central Board of Revenue;

(b) Commissioners of Excess Profits Tax;

(c) Assistant Commissioners of Excess Profits Tax, who may be either Appellate Assistant Commissioners of Excess Profits Tax or Inspecting Assistant Commissioners of Excess Profits Tax:

(d) Excess Profits Tax Officers;

(e) Boards of Referees.

(2) Every Commissioner of Excess Profits Tax, Appellate Assistant Commissioner of Excess Profits Tax, Inspecting Assistant Commissioner of Excess Profits Tax and Excess Profits Tax Officer shall be a person who is exercising the functions of Commissioner of Income-tax, Appellate Assistant Commissioner of Income-tax,

Inspecting Assistant Commissioner of Income-tax and Income-tax Officer, respectively, under the Indian Income-tax, Act, 1922.

(3) The Central Board of Revenue shall, subject to the provisions of sub-section (2), appoint such persons as Commissioners of Excess Profits Tax, Appellate Assistant Commissioners of Excess Profits Tax, Inspecting Assistant Commissioners of Excess Profits Tax and Excess Profits Tax Officers as it thinks fit and such persons shall perform their functions in respect of such cases as the Central Board of Revenue may assign to them :

Provided that such directions shall be made entirely at the discretion of the Central Board of Revenue, and, in particular, it shall be competent for that Board to assign a case or class of cases to an officer who is not exercising in respect of that case or class of cases the corresponding functions in relation to the charge of income-tax under the Indian Income-tax Act, 1922.

(4) All officers and persons employed in the execution of this Act shall observe and follow the orders, instructions and directions of the Central Board of Revenue :

Provided that nothing in this sub-section applies to a Board of Referees :

Provided further that no such orders, instructions or directions shall be given so as to interfere with the discretion of the Appellate Assistant Commissioner in the exercise of his appellate functions.

(5) A Board of Referees shall consist of not less than three and not more than five persons, of whom not less than one-half shall be non-officials having business experience, and one shall be a judicial officer who has exercised the powers of a District Judge or who possesses such qualifications as are normally required for appointment to the post of District Judge, and who has held judicial office for a period of not less than ten years.

(6) Subject to the provisions of sub-section (5), the Central Government may make rules regulating the formation, composition and procedure of Boards of Referees.

Charge of tax.

4. Subject to the provisions of this Act, there shall, in respect of any business to which this Act applies, be charged, levied and paid on the amount by which the profits during any chargeable accounting period exceed the standard profits a tax (in this Act referred to as "excess profits tax") which shall, in respect of any chargeable accounting period ending on or before the 31st day of March, 1941, be equal to fifty per cent. of that excess and shall, in respect of any chargeable accounting period beginning after that date, be equal to such percentage of that excess as may be fixed by the annual Finance Act :

Provided that any profits which are, under the provisions of sub-section (3) of section 4 of the Indian Income-tax Act, 1922, exempt from Income-tax, and all profits from any business of life insurance shall be totally exempt from excess profits tax under this Act.

Application of Act.

5. This Act shall apply to every business of which any part of the profits made during the chargeable accounting period is chargeable to income-tax by virtue of the provisions of sub-clause (*i*) or sub-clause (*ii*) of clause (*b*) of sub-section (1) of section 4 of the Indian Income-tax Act, 1922, or of clause (*c*) of that sub-section :

Provided that this Act shall not apply to any business the whole of the profits of which accrue or arise without British India where such business is carried on by or on behalf of a person who is resident but not ordinarily resident in British India unless the business is controlled in India :

Provided further that where the profits of a part only of a business carried on by a person who is not resident in British India or not ordinarily so resident accrue or arise in British India or are deemed under the Indian Income-tax Act, 1922, so to accrue or arise, then, except where the business being the business of a

person who is resident but not ordinarily resident in British India is controlled in India, this Act shall apply only to such part of the business, and such part shall for all the purposes of this Act be deemed to be a separate business.

Standard profits.

6. (1) For the purposes of this Act, the standard profits of a business in relation to any chargeable accounting period shall, subject to the provisions of sub-sections (3) and (4), be an amount bearing to the profits of the business during the standard period, if in respect of that business a standard period is available, the same proportion as the chargeable accounting period bears to the standard period :

Provided that if the average amount of capital employed in the business during such chargeable accounting period is greater or less than the average amount of capital employed during the standard period, such amount shall be increased or decreased, as the case may be, by an amount calculated by applying the statutory percentage to the amount of such increase or decrease :

Provided further that in the case of a business which was commenced on or after the 31st day of March, 1936, the standard profits shall, at the option of the person carrying on the business, be an amount calculated by applying the statutory percentage to the average amount of capital employed in the business during such chargeable accounting period.

(2) For the purposes of this section the standard period shall, at the option of the person carrying on the business, be—

(*a*) the "previous year" as determined under section 2 of the Indian Income-tax Act, 1922, for the purpose of the income-tax assessment for the year ending on the 31st day of March, 1937, or the previous year as so determined for the year ending on the 31st day of March, 1938 ; or

(*b*) the "previous year" as so determined for the year ending on the 31st day of March, 1937, and that for the year ending on the 31st day of March, 1939 ; or

(*c*) the "previous year" as so determined for the year ending on the 31st day of March, 1938, and that for the year ending on the 31st day of March, 1939 ; or

(*d*) the "previous year" as so determined for the year ending on the 31st day of March, 1939, and that for the year ending on the 31st day of March, 1940 :

Provided that in no case shall any period of less than nine months be taken as a standard period.

(3) If, within the period specified in the notice issued under sub-section (1) of section 13, the person carrying on the business makes an application to the Excess Profits Tax Officer in this behalf, the Excess Profits Tax Officer shall refer the application to the Board of Referees, and if the Board is satisfied that during the standard period the profits of the business were less than might at the beginning of that period have been reasonably expected, it may direct that the standard profits shall be computed as if the profits during the standard period were such greater amount as it thinks just :

Provided that such amount shall not exceed the statutory percentage of the average amount of the capital employed in the business unless the Board is satisfied that owing to some specific cause peculiar to the business it is just that a greater amount should be allowed.

(4) The standard profits shall be taken to be rupees thirty-six thousand in any case in which the standard profits computed in accordance with sub-section (1) are less than this sum :

Provided that if the chargeable accounting period is greater or less than one year the sum of rupees thirty-six thousand shall for the purpose of this sub-section be increased or decreased proportionately.

(5) Where the standard period includes any period prior to the commencement of Part III of the Government of India Act, 1935, during which Burma was

part of British India, there shall, in computing the standard profits of a business under this section, be excluded from the profits of the business during the standard period so much of such profits as arose or accrued or were received in Burma unless such profits are also included in the profits of the business during the chargeable accounting period.

Relief on occurrence of deficiency of profits.

7. Where a deficiency of profits occurs in any chargeable accounting period in any business, the profits of the business chargeable with excess profits tax shall be deemed to be reduced and relief shall be granted in accordance with the following provisions :—

(a) the aggregate amount of the profits so chargeable for the previous chargeable accounting periods shall be deemed to be reduced by the amount of the deficiency of profits and the amount of excess profits tax payable in respect thereof shall be deemed to be reduced accordingly and the relief necessary to give effect to the reduction shall be given by repayment or otherwise ;

(b) where the amount of the deficiency of profits exceeds the aggregate amount of the profits so chargeable for the previous chargeable accounting periods, or where there is no previous chargeable accounting period, the balance of the deficiency of profits or the whole of the deficiency, as the case may be, shall be applied in reducing any profits so chargeable for the next subsequent chargeable accounting period, and if and so far as it exceeds the amount of those profits, any profits so chargeable for the next subsequent chargeable accounting period and so on.

Successions and amalgamations.

8. (1) As from the date of any change in the persons carrying on a business, the business shall, subject to the provisions of this section, be deemed for all the purposes of this Act, except for the purposes of determining the amount of the statutory percentage to have been discontinued, and a new business to have been commenced.

(2) Where the change took place before the 1st day of September, 1939, and consisted in the death or retirement of a partner, or the taking in of a partner, the persons carrying on the business after the change may, by notice given in writing before the prescribed date to the Excess Profits Tax Officer, elect that, for the purposes of the provisions of this Act relating to the computation of standard profits, the business shall not be deemed to have been discontinued.

(3) A business shall not, for the purposes of the provisions of this Act relating to the computation of standard profits, be deemed to be discontinued by reason of any change occurring on or after the 1st day of September, 1939, in the persons carrying it on, and the standard profits of the business in relation to any chargeable accounting period shall be computed accordingly, and, in particular, in computing the capital employed in the business after the change, no regard shall be had to any consideration given in respect of the transfer of the business or any of the assets thereof on the occasion of the change.

(4) Where, on or after the 1st day of September, 1939, two or more businesses are amalgamated, the resulting business shall be treated afor the purposes of the provisions of this Act relating to the computation of standard profits as if—

(a) it had been in existence throughout the period during which there were in existence any of the former businesses ;

(b) any profits made or losses incurred or capital employed in any of those former businesses had been made, incurred or employed in the resulting business ; and

(c) any assets of any of those former businesses had become assets of the resulting business when they became assets of the former business;

and, in particular, in computing the capital employed in the resulting business, no regard shall be had to any consideration given in respect of the transfer of any o

those former businesses or any of the assets thereof on the occasion of the amalgamation.

(5) Where, on or after the 1st day of September, 1939, part of a business is transferred as a going concern, by the person theretofore carrying it on to another person, the part transferred and the part not transferred shall each be deemed for the purposes of the provisions of this Act relating to the computation of standard profits to be a continuation of the original business, and the said provisions, including the provisions of this section relating to amalgamations, shall apply accordingly, subject to any necessary modifications :

Provided that, for the purposes aforesaid, such apportionments shall be made of the profits made, and losses incurred, and the capital employed, in the original business, and of any assets of the original business as may appear to the Excess Profits Tax Officer, or on appeal in the prescribed time and manner to the Board of Referees, to that Board, to be just.

(6) Notwithstanding anything in the foregoing provisions of this section, where a business was carried on immediately before the 1st day of April, 1936, and that business, or the main part of that business, was transferred after the said day and before the 1st day of September, 1939, by the person carrying it on to another person, the Excess Profits Tax Officer, if he is satisfied that the business carried on after the transference was not substantially different from the business or part transferred, shall, on the application of the person carrying on the business after the transference, treat that person, for the purposes of the provisions of this Act relating to the computation of standard profits, as if he had carried on the transferred business or part of the business as from the date of the commencement of that business, subject, however, to such modifications (including modifications as respects the computation of capital) as he may consider just.

(7) Where, on or after the 1st day of September, 1939, a partner in a firm carrying on a business to which this Act applies dies, then notwithstanding anything contained in sub-section (1) any deficiency of profits in respect of any chargeable accounting period ending on or before the date of his death shall, if it has not been fully applied in reducing the profits of any chargeable accounting period under section 7, be carried forward and applied in reducing any profits from the same business carried on by the surviving partner or partners in the first chargeable accounting period after the death of the partner, and if and so far as it exceeds the amount of those profits, in reducing any profits from such business in the next subsequent chargeable accounting period and so on.

Inter connected companies.

9. (1) Where any interest, annuity, or other annual payment, or any royalty, or rent, is paid by one company to another company and one of those companies is a subsidiary of the other, or both are subsidiaries of a third company, the capital, profits and losses of both companies shall be computed for the purposes of this Act as if—

(a) the interest, annuity, annual payment, royalty or rent were not payable ;

(b) any debt in respect of which any such interest is payable did not exist ; and

(c) any asset in respect of which any such royalty or rent is payable were the property of the company paying the royalty or the rent.

(2) Where

(a) a company (hereinafter referred to as "the principal company") is resident in British India and is not a subsidiary of any other company resident in British India ; and

(b) during the whole or any part of any chargeable accounting period of the principal company, another company, whether or not resident or carrying on business within British India (hereinafter referred to as "the subsidiary company") is a subsidiary of the principal company,

the following provisions of this section shall, subject to the provisions of section 5, have effect in relation to that chargeable accounting period.

(3) If the subsidiary company is a subsidiary of the principal company throughout the chargeable accounting period, such capital employed in, and profits or losses arising from, the business of the subsidiary company as is employed or arise in—

(*i*) the chargeable accounting period ; or

(*ii*) any year constituting or comprised in the standard period of the principal company,

shall be treated for the purposes of this Act as if it or they were capital employed in, or as the case may be, profits or losses arising from, the business of the principal company.

(4) If the subsidiary company is a subsidiary of the principal company during part only of the chargeable accounting period, the excess or deficiency of profits of the subsidiary company for that part of that period shall be treated as increasing or, as the case may be, decreasing the excess or deficiency of profits of the principal company for the whole period and shall not be deemed to be an excess or deficiency of profits of the subsidiary company.

In this sub-section, the expression "excess" and "deficiency" mean, in relation to profits, an excess or deficiency in relation to the standard profits of the subsidiary company or, as the case may be, the principal company.

(5) In any case to which sub-section (3) or sub-section (4) applies, such alteration, if any, of the periods which would otherwise be the chargeable accounting periods of the subsidiary company shall be made as the Central Board of Revenue may direct.

(6) For the purposes of this section, a company shall be deemed to be a subsidiary of another company if and so long as not less than nine-tenths of its ordinary share capital is owned by that other company, whether directly or through another company or other companies, or partly directly or partly through another company or other companies.

(7) The amount of ordinary share capital of one company owned by a second company through another company or other companies, or partly directly and partly through another company or other companies shall be determined in accordance with the provisions of the Third Schedule.

(8) In this section and the Third Schedule references to ownership shall be construed as references to beneficial ownership, and the expression "ordinary share capital", in relation to a company, means all the issued share capital (by whatever name called) of the company, other than capital the holders whereof have a right to a dividend at a fixed rate but have no other right to share in the profits of the company.

(9) The principal company shall be entitled to allocate to its subsidiary company or companies the respective proportionate shares of the excess profits tax payable by the whole group.

(10) The excess profits tax payable by virtue of this section by the principal company in respect of the profits of any subsidiary company shall, for the purposes of section 12, be deemed to have been paid by the subsidiary company and not by the principal company.

Artificial transactions.

10. (1) A person shall not for the purpose of reducing any excess profits which are or would be chargeable to excess profits tax enter into a fictitious or artificial transaction, or carry out any fictitious or artificial operation.

Explanation.—For the purposes of this section an artificial transaction or operation includes every device of whatever nature adopted for the purpose of presenting the accounts of a business in a misleading form or manner with intent to evade or having the effect of evading any obligation imposed by this Act.

(2) Any such transaction or operation shall be treated as null and void for the purpose of computing the excess profits tax payable under this Act.

(3) If the Excess Profits Tax Officer is satisfied that any person has acted in contravention of the provisions of sub-section (1), he may with the previous approval of the Inspecting Assistant Commissioner direct that such person shall pay, in addition to any excess profits tax for which he is or would, but for such transaction or operation, be liable, a penalty not exceeding the tax evaded or sought to be evaded.

Relief in respect of double excess profits taxation.

11. (1) The Central Government may by notification in the official Gazette make provision for the granting of relief in cases where both excess profits tax under this Act and excess profits tax under any law in force in the United Kingdom, in any Indian State, or in any other part of His Majesty's Dominions have been paid upon the profits of any business if it appears to the Central Government that the laws of the United Kingdom or of that Indian State or of that other part of His Majesty's Dominions provide for corresponding relief in respect of excess profits tax charged on profits both in the United Kingdom or in that State or in that part and in British India :

Provided that where under section 19 of the Finance (No. 2) Act, 1939, national defence contribution has been paid in the United Kingdom in lieu of excess profits tax, that portion of the national defence contribution so paid which is equal to the excess profits tax which would otherwise have been payable shall, for the purposes of this sub-section, be deemed to be excess profits tax paid in the United Kingdom.

(2) If any person, who has paid excess profits tax under this Act for any chargeable accounting period in respect of profits arising outside India in a country the laws of which do not provide for any relief in respect of excess profits tax charged in British India, proves that he has paid excess profits tax under the laws of the said country in respect of the same profits, he shall be entitled to the deduction from the excess profits tax payable in British India of a sum equal to one-half thereof or to one-half of the excess profits tax payable in the said country, whichever is the less.

Allowance of excess profits tax in computing income for income-tax purposes.

12. (1) The amount of the excess profits tax payable in respect of a business for any chargeable accounting period diminished by any amount allowable by way of relief under the provisions of section 11, shall, in computing for the purposes of income-tax or super-tax the profits and gains of that business, be allowed to be deducted as an expense incurred in that period.

(2) There shall also be so deducted the amount of any excess profits tax payable under any law in force in a country outside British India on the profits of the business in respect of any chargeable accounting period to the extent that such profits arose in the said country, after diminishing such amount by any amount which is allowable by way of relief by repayment, set off or otherwise under any law in the country where the tax is payable providing for the granting of relief in that country where excess profits tax has also been charged in British India :

Provided that where, under the provisions of this Act relating to deficiencies of profits or under any corresponding law in force in the said country without British India, relief is given by way of repayment from excess profits tax chargeable for any chargeable accounting period previous to that in which the deficiency occurs, the amount of the deduction allowed under sub-section (1) or sub-section (2) shall not be altered, but the amount repayable shall be taken into account in computing the profits and gains of the business for the purposes of income-tax as if it were a profit of the business accruing in the chargeable accounting period in which the deficiency of profits occurs.

Issue of notices for assessment.

13. (1) The Excess Profits Tax Officer may, for the purposes of this Act, require any person whom he believes to be engaged in any business to which this Act applies, or to have been so engaged during any chargeable accounting period, or to be otherwise liable to pay excess profits tax, to furnish within such

period, not being less than sixty days from the date of the service of the notice, as may be specified in the notice, a return in the prescribed form and verified in the prescribed manner setting forth (along with such other particulars as may be provided for in the notice) with respect to any chargeable accounting period specified in the notice the profits of the business and the standard profits of the business as computed in accordance with the provisions of section 6 or the amount of deficiency available for relief under section 7 :

Provided that the Excess Profits Tax Officer may, in his discretion, extend the date for the delivery of the return.

(2) The Excess Profits Tax Officer may serve on any person, upon whom a notice has been served under sub-section (1), a notice requiring him on a date to be therein specified to produce, or cause to be produced, such accounts or documents as the Excess Profits Tax Officer may require and may from time to time serve further notices in like manner requiring the production of such further accounts or documents or other evidence as he may require :

Provided that the Excess Profits Tax Officer shall not require the production of any accounts relating to a period prior to the "previous year" as determined under section 2 of the Indian Income-tax Act, 1922, for the purpose of the income-tax assessment for the year ending on the 31st day of March, 1937.

Assessments.

14. (1) The Excess Profits Tax Officer shall, by an order in writing after considering such evidence, if any, as he has required under section 13, assess to the best of his judgment the profits liable to excess profits tax and the amount of excess profits tax payable on the basis of such assessment, or if there is a deficiency of profits, the amount of that deficiency and the amount of excess profits tax, if any, repayable and shall furnish a copy of such order to the person on whom the assessment has been made.

(2) Excess profits tax payable in respect of any chargeable accounting period shall be payable by the person carrying on the business in that period.

(3) Where two or more persons were carrying on the business jointly in the chargeable accounting period, the assessment shall be made upon them jointly and, in the case of a partnership, may be made in the partnership name.

(4) Where by virtue of the foregoing provisions an assessment could, but for his death, have been made on any person either solely or jointly with any other person or persons, the assessment may be made on his legal representative either solely or jointly with that other person or persons, as the case may be.

Profits escaping assessment.

15. If, in consequence of definite information which has come into his possession, the Excess Profits Tax Officer discovers that profits of any chargeable accounting period chargeable to excess profits tax have escaped assessment, or have been underassessed, or have been the subject of excessive relief, he may at any time within five years of the end of the chargeable accounting period in question serve on the person liable to such tax a notice containing all or any of the requirements which may be included in a notice under section 13, and may proceed to assess or re-assess the amount of such profits liable to excess profits tax and the provisions of this Act shall, so far as may be, apply as if the notice were a notice issued under that section.

Penalties.

16. If the Excess Profits Tax Officer, the Appellate Assistant Commissioner or the Commissioner, in the course of any proceedings under this Act, is satisfied that any person has, without reasonable cause, failed to furnish the return required under sub-section (1) of section 13, or to produce or cause to be produced the accounts or documents or other evidence required by the Excess Profits Tax Officer under sub-section (2) of that section, or has concealed particulars of the profits made by or capital employed in the business, or has deliberately furnished inaccurate particulars of such profits or capital, he may direct that such person shall pay by way of penalty, in addition to the amount of any excess profits tax payable, a sum not exceeding—

(*a*) where the person has failed to furnish the return required under sub-section (1) of section 13, the amount of the excess profits tax payable; and

(*b*) in any other case, the amount of excess profits tax which would have been avoided if the return made had been accepted as correct.

Provided that the Excess Profits Tax Officer shall not impose any penalty under this section without the previous approval of the Inspecting Assistant Commissioner.

Appeals.

17. (1) Any person aggrieved by a decision made in pursuance of section 8, or objecting to the amount of excess profits tax for which he is liable as assessed by the Excess Profits Tax Officer or denying his liability to be assessed under this Act, or objecting to any penalty imposed by the Excess Profits Tax Officer, or to the amount of any deficiency of profits as assessed by the Excess Profits Tax Officer, or to the amount allowed by the Excess Profits Tax Officer by way of relief under any provision of this Act or to any refusal by the Excess Profits Tax Officer to grant relief may appeal to the Appellate Assistant Commissioner:

Provided that no appeal shall lie against a determination of the amount of the profits of any standard period where those profits have been determined in accordance with the first proviso to rule 1 of the First Schedule except in respect of adjustments made under the provisions of that Schedule:

Provided further that no appeal shall lie under this section against any apportionment made by the Excess Profits Tax Officer under the proviso to sub-section (5) of section 8 or against any decision of the Board of Referees under sub-section (3) of section 6.

(2) An appeal shall ordinarily be presented within forty-five days of receipt of the notice of demand relating to the assessment or penalty objected to, or in the case of an appeal against the assessment of a deficiency of profits, within forty-five days of the receipt of the copy of the order determining the deficiency, or in the case of an appeal against the amount of a relief granted or a refusal to grant relief, within forty-five days of the receipt of the intimation of the order granting or refusing to grant the relief, but the Appellate Assistant Commissioner may admit an appeal after the expiration of that period if he is satisfied that the appellant had sufficient cause for not presenting it within that period.

(3) An appeal shall be in the prescribed form and shall be verified in the prescribed manner.

(4) The Appellate Assistant Commissioner shall hear and determine the appeal and, subject to the provisions of this Act, shall pass such orders as he thinks fit, and such orders may include an order enhancing the assessment or a penalty:

Provided that an order enhancing an assessment or penalty shall not be made unless the person affected thereby has been given a reasonable opportunity of showing cause against such enhancement.

(5) The procedure to be adopted in the hearing and determination of appeals shall be in accordance with the rules made in this behalf by the Central Board of Revenue.

Appeal to Commissioner against Appellate Assistant Commissioner's orders, imposing penalties or enhancing assessments or penalties.

18. (1) Any person objecting to an order passed by an Appellate Assistant Commissioner imposing on him a penalty under section 16 or enhancing his assessment or enhancing a penalty under section 17 may appeal to the Commissioner within thirty days of the date on which he was served with notice of such order.

(2) In disposing of the appeal the Commissioner may, after giving the appellant an opportunity of being heard, pass such orders thereon as he thinks fit.

(3) On the coming into operation of Part II of the Indian Income-tax (Amendment) Act, 1939, this section shall cease to have effect.

19. (1) The Commissioner may of his own motion call for the record of any proceeding under this Act which has been taken by any Excess Profits Tax Officer or Appellate Assistant Commissioner subordinate to him, and on receipt of the record may make such enquiry, or cause such enquiry to be made, and, subject to the provisions of this Act, may pass such orders thereon (including an order enhancing an assessment) as he thinks fit :

Power of revision.

Provided that he shall not pass any order prejudicial to a person to whose business this Act applies without hearing him, or giving him a reasonable opportunity of being heard.

(2) On the coming into operation of Part II of the Indian Income-tax (Amendment) Act, 1939, sub-section (1) shall cease to have effect, but thereafter any Excess Profits Tax Officer or any person in respect of whose business an order under section 14 has been passed who objects to an order passed by an Appellate Assistant Commissioner under section 16 or section 17 may, within the prescribed time and in the prescribed manner, appeal against such order to the Appellate Tribunal constituted under the Indian Income-tax Act, 1922, and that Tribunal shall have all such powers in disposing of the appeal as it has in respect of appeals preferred to it under the Indian Income-tax Act, 1922.

20. The Commissioner may, at any time within four years from the date of any order passed whether by himself or by any Appellate Assistant Commissioner or Excess Profits Tax Officer under this Act, rectify any mistake in any evidence recorded during assessment or appellate proceedings, or any mistake apparent from the record and shall within the like period rectify any mistake apparent from the record which has been brought to his notice by a person to whose business this Act applies :

Rectification of mistakes.

Provided that no such rectification shall be made having the effect of enhancing the liability of any person unless that person has been given a reasonable opportunity of being heard.

21. The provisions of sections 4A, 4B, 10, 13, 24B, 29, 36 to 44C (inclusive), 45 to 48 (inclusive), 49E, 49F, 50, 54, 61 to 63 (inclusive) 65 to 67A (inclusive) of the Indian Income-tax Act, 1922, shall apply with such modifications, if any, as may be prescribed, as if the said provisions were provisions of this Act and referred to excess profits tax instead of to income-tax, and every officer exercising powers under the said provisions in regard to income-tax may exercise the like powers under this Act in regard to excess profits tax in respect of cases assigned to him under sub-section (3) of section 3 as he exercises in relation to income-tax under the said Act :

Application of provisions of Act XI of 1922.

Provided that references in the said provisions to the assessee shall be construed as references to a person to whose business this Act applies.

22. (1) Notwithstanding anything contained in the Indian Income-tax Act, 1922, all information contained in any statement or return made or furnished under the provisions of that Act or obtained or collected for the purposes of that Act may be used for the purposes of this Act.

Income-tax papers to be available for the purposes of this Act.

(2) All information contained in any statement or return made or furnished under the provisions of this Act or obtained or collected for the purposes of this Act may be used for the purposes of the Indian Income-tax Act, 1922.

23. If any person fails, without reasonable cause or excuse, to furnish in due time any return or statement, or to produce, or cause to be produced, any accounts or documents required to be produced under section 13, he shall on conviction by a Magistrate be punishable with fine which may extend to five hundred rupees, and with a further fine which may extend to fifty rupees for every day during which the default continues.

Failure to deliver returns or statements.

False statement and declaration.

24. If a person makes in any return required under section 13 any statement which is false, and which he either knows or believes to be false, or does not believe to be true, he shall be punishable on conviction by a Magistrate with simple imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

Institution of proceedings and composition of offences.

25. (1) A person shall not be proceeded against for an offence under section 23 or section 24 except at the instance of the Inspecting Assistant Commissioner.

(2) No prosecution for an offence punishable under section 23 or section 24 or under the Indian Penal Code shall be instituted in respect of the same facts as those in respect of which a penalty has been imposed under this Act.

(3) The Inspecting Assistant Commissioner may, either before or after the institution of proceedings, compound any offence punishable under section 23 or section 24.

Power of Central Board of Revenue to grant relief in special cases.

26. (1) If the Central Board of Revenue is satisfied in the case of any business that special circumstances exist which render it inequitable that the standard profits of the business in relation to any chargeable accounting period should be computed in accordance with the provisions of sub-section (1) of section 6, and that no relief or insufficient relief has been granted under the provisions of sub-section (3) of that section, the Central Board of Revenue may direct that the standard profits of the business shall be computed to be such greater amount as the Central Board of Revenue thinks just :

Provided that such amount shall not exceed the statutory percentage of the average amount of the capital employed in the business unless the Central Board of Revenue is satisfied that owing to some specific cause peculiar to the business it is just that a greater amount should be allowed and that the relief, if any, afforded, by the Board of Referees under sub-section (3) of section 6 is inadequate.

(2) Without prejudice to the generality of the provisions of sub-section (1) the Central Board of Revenue shall, in considering the making of a direction under that sub-section, have regard to the following circumstances, namely :—

(*a*) that the capital employed in a business commenced on or after the 1st day of July, 1938, is so small in relation to the volume of the activities of the business that to compute the standard profits in accordance with the provisions of section 6 would be inequitable, taking into account the normal profits made in similar businesses ;

(*b*) that owing to the nature of the business heavy expenditure by way of preliminary expenses or expenses in connection with experimental or development work has been incurred in accounting periods closely preceding the chargeable accounting period and that during the chargeable accounting period such expenditure would normally fall to be written off wholly or partly in the books of the person chargeable to excess profits tax ;

(*c*) that the business is of a pioneer nature, that is to say, is concerned with an industrial process or a form of manufacture or production not undertaken in British India before the 1st day of April, 1932, and has not been in existence long enough to have paid income-tax for the previous year as determined for the purpose of the income-tax assessment for the year beginning on the 1st day of April, 1937.

(3) If the Central Board of Revenue is satisfied that the computation in accordance with the provisions of Schedule I of the profits of a business during any chargeable accounting period would be inequitable, owing to any of the following circumstances, namely :—

(*a*) any postponement or suspension, as a consequence of the present hostilities, of renewals or repairs, or

(*b*) the provision of buildings, plant or machinery which will not be required for the purposes of the business after the termination of the present hostilities, or

(*c*) difficulties in bringing into British India income arising outside British India where the country in which the income accrued prohibits or restricts by its laws the remittance of money to British India, and loss in the remittance to British India of such income because of fluctuations in the rate of exchange between that country and British India;

the Central Board of Revenue may direct that such allowances shall be made in computing the profits of the business during that chargeable accounting period as the Central Board of Revenue thinks just:

Provided that in making such direction the Central Board of Revenue may impose such conditions as it deems appropriate.

Power to make rules.

27. (1) The Central Board of Revenue may, subject to the control of the Central Government, make rules for carrying out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may—

(*a*) prescribe the procedure to be followed on appeals, applications for rectification of mistakes, and applications for refunds;

(*b*) provide for the adaptation to excess profits tax of any of the provisions of the Indian Income-tax Act, 1922, which are made applicable to excess profits tax by section 21; or of any rules made under any such provision;

(*c*) provide in regard to companies whose business consists wholly or mainly in the dealing in or holding of investments for the granting of exemption or relief from liability to excess profits tax of profits derived from investments in other companies the profits of which have been subjected to excess profits tax in British India;

(*d*) provide for any matter which by, or under, this Act is to be prescribed.

(3) The power to make rules conferred by this section shall be exercised in like manner as the power to make rules under section 59 of the Indian Income-tax Act, 1922.

SCHEDULE I.

[*See* section 2 (19).]

Rules for the computation of profits for purposes of Excess Profits Tax.

1. The profits of a business during the standard period, or during any chargeable accounting period, shall be separately computed, and shall, subject to the provisions of this Schedule, be computed on the principles on which the profits of a business are computed for the purposes of income-tax under section 10 of the Indian Income-tax Act, 1922:

Provided that where the profits during any standard period have already been determined for the purpose of an assessment under the Indian Income-tax Act, 1922, such profits as so determined shall, subject to the adjustments required by this Schedule, be taken as the profits during that period for the purpose of excess profits tax:

Provided further that where a standard period or chargeable accounting period is not an accounting period, the profits or losses of the business during any accounting periods wholly or partly included within the standard period or chargeable accounting period shall be so computed as aforesaid, and such division and apportionment to specific periods of those profits or losses and such aggregation of those profits and losses, or any apportioned part thereof shall be made as appears necessary to arrive at the profit during the standard period or chargeable accounting period: and any such apportionment shall be made in proportion to the number of months or fractions of months in the respective periods unless the Excess Profits Tax Officer, having regard to any special circumstances, otherwise directs.

2. The profits of a business during the standard period shall be computed on the same basis and in the same manner as the profits of that business are under the Indian Income-tax Act, 1922, as amended by the Indian Income-tax (Amendment) Act, 1939, computed for the chargeable accounting period, notwithstanding that the Indian Income-tax (Amendment) Act, 1939, may not have been in force in the standard period.

3. (1) The principle of adding the allowance for depreciation for any one period to the allowance for depreciation for any subsequent period and deeming it to be part of the allowance for such subsequent period shall not be followed.

(2) No allowance shall be made for any loss other than a loss sustained in a business to which this Act applies.

(3) Nothing in this Act shall be construed as permitting the application, in computing profits for the purposes of the excess profits tax, of the provisions of sub-section (2) of section 24 of the Indian Income-tax Act, 1922.

4. (1) Income received from investments shall be included in the profits in the cases and to the extent provided in sub-rules (2) and (4) of this rule and not otherwise.

(2) In the case of the business of a building society, or of a money lending business, banking business, insurance business or business consisting wholly or mainly in the dealing in or holding of investments, the profits shall include all income received from investments, whether or not such income is included in the profits charged under section 10 of the Indian Income-tax Act, 1922, or is charged under any other section of that Act, or has been subjected to deduction of tax at source or is free of or exempt from income-tax.

(3) Notwithstanding anything contained in sub-rule (2), where the profits of a subsidiary company are under the provisions of section 9 to be included in the profits of the principal company for the purposes of assessment to excess profits tax, dividends from the subsidiary company out of such profits shall not also be included in the profits of the principal company.

(4) In the case of a business which consists wholly or partly in the letting out of property on hire, the income from the property shall be included in the profits of the business whether or not it has been charged to income-tax under section 9 of the Indian Income-tax Act, 1922, or under any other section of that Act.

(5) Where the person carrying on a business is the beneficial owner of any investments, the income from which is by virtue of the provisions of this rule not to be taken into account in computing the profits of the business, and a deduction would, apart from the provisions of this rule, fall to be made in respect of interest on borrowed money, the deduction (if any) to be made in respect of that interest shall be computed as if the principal of the borrowed money were reduced by the value of those investments :

Provided that where the person carrying on the business is not a company, no such reduction shall be deemed to be made in the principal of any borrowed money in respect of any investments unless the investments are mortgaged, charged or pledged as security for the repayment of that money and interest thereon.

5. If at any time after the close of the standard period, any increase in the capital employed in a business has been effected by means of a loan from a bank carrying on a *bona fide* banking business, or by means of a public issue of debentures secured on the property of the company, the interest on so much of the loan or debentures as has been utilised in effecting the increase in the capital shall not be deducted in computing the profits for the purposes of excess profits tax and, notwithstanding the provisions of rule 2 of Schedule II, that amount of such loan or debentures shall not be deducted in arriving at the amount of the capital employed in the business.

6. No deduction shall be made on account of liability to pay, or payment of, income-tax, super-tax, or excess profits tax.

7. (1) In the case of a business carried on, in any accounting period which constitutes or includes a chargeable accounting period, by a company the directors whereof have a controlling interest therein,—

(*a*) if the standard profits of the company are computed by reference to the profits during a standard period, no deduction shall be allowed in respect of directors' remuneration in excess of the amount paid for directors' remuneration in respect of the standard period or, if the standard period is longer or shorter than the accounting period, in excess of a sum which bears to the sum paid for directors' remuneration in respect of the standard period the same proportion as the length of the accounting period bears to that of the standard period ;

(*b*) if the standard profits are not computed by reference to the profits during a standard period, no deduction shall be allowed in respect of directors' remuneration.

(2) In this rule the expression "directors' remuneration" does not include—

(*a*) the remuneration of any director who is required to devote substantially the whole of his time to the service of the company in a managerial or technical capacity and is not the beneficial owner of, or able, either directly or through the medium of other companies or by any other indirect means, to control, more than five per cent. of the ordinary share capital of the company, or

(*b*) the remuneration of any managing agent where such remuneration is included in the profits of the managing agent's business for the purposes of excess profits tax.

8. In the case of a business carried on by a company, if the standard profits of the company are computed by reference to the profits during a standard period, no deduction shall be allowed in respect of remuneration paid to a managing agent in excess of the amount which would have been payable to that managing agent if the agreement in force in the standard period had been in force in the chargeable accounting period, except where such remuneration is subjected to excess profits tax in the hands of the managing agent.

9. Where the performance of a contract extends beyond the accounting period, there shall (unless the Excess Profits Tax Officer, owing to any special circumstances, otherwise directs) be attri-

buted to the accounting period such proportion of the entire profits or loss which has resulted, or which it is estimated will result, from the complete performance of the contract as is properly attributable to the accounting period, having regard to the extent to which the contract was performed therein :

Provided that when any such contract has been completed and the profits have been finally ascertained, if the aggregate of the amounts attributed to previous accounting periods exceeds the profit, as finally ascertained, from the complete performance of the contract, an adjustment shall be made to reduce the amounts so attributed to the various chargeable accounting periods to the amount of the profits as finally ascertained.

10. In respect of any building erected on or after the 1st day of September, 1939, which during any chargeable accounting period has ceased to be required for the purposes of the business or has been sold, any amount by which the value of the building at the date when it ceased to be required for the purposes of the business or the price obtained for the building, as the case may be, falls short of the written down value of the building shall be allowed as a deduction in arriving at the profits of that chargeable accounting period.

SCHEDULE II.

[*See* section 2 (3)]

Rules for computing the average amount of capital.

1. (1) Subject to the provisions of this Schedule, the average amount of the capital employed in a business (so far as it does not consist of money) shall be taken to be—

(*a*) so far as it consists of assets acquired by purchase on or after the commencement of the business, the price at which those assets were acquired, subject to the deductions hereafter specified ;

(*b*) so far as it consists of assets being debts due to the person carrying on the business, the nominal amount of those debts, subject to the said deductions ;

(*c*) so far as it consists of any other assets which have been acquired otherwise than by purchase as aforesaid, the value of the assets when they became assets of the business, subject to the said deductions.

(2) The price or value of any assets other than a debt shall be subject to such deductions for depreciation as are necessary to reduce the asset to its written down value and, in the case of a debt, the nominal amount of the debt shall be subject to any deduction which has been allowed in respect thereof for income-tax purposes.

(3) Where the price of any asset has been satisfied otherwise than in cash, the then value of the consideration actually given for the asset shall be treated as the price at which the asset was acquired.

2. (1) Any borrowed money and debts shall be deducted, and in particular any debt for income-tax or super-tax or for excess profits tax in respect of the business shall be deducted :

Provided that any such debt for income-tax or super-tax or excess profits tax shall, for the purposes of this Schedule, be deemed to have become due—

(*a*) in the case of income-tax and super-tax, on the last day of the period of time within which the tax is payable under section 45 of the Indian Income-tax Act, 1922 ;

(*b*) in the case of excess profits tax, on the first day after the end of the chargeable accounting period in respect of which the tax is assessable notwithstanding that the excess profits tax may not have been assessed until after that date.

(2) Where any debt for the excess profits tax assessable in respect of any period is to be deducted under this rule, the amount thereof shall not be reduced as the result of any relief to be given in respect of a deficiency of profits occurring in any subsequent period, and the amount of any such relief shall be treated as having become an asset of the business on the first day after the end of the chargeable accounting period in which the deficiency occurred.

3. Any investments the income from which is by virtue of the provisions of the First Schedule not to be taken into account in computing the profits of the business, and any moneys not required for the purposes of the business, shall be left out of account, but where any investments in the beneficial ownership of the person carrying on the business are so left out of account, the sum (if any) to be deducted under the last preceding rule in respect of borrowed money shall be computed as if the principal of the borrowed money were reduced by the value of those investments :

Provided that where the person carrying on the business is not a company, no reduction shall be deemed to be made in the principal of any borrowed money in respect of any investments unless the investments are mortgaged, charged or pledged as security for the repayment of that money and the interest thereon.

4. Notwithstanding anything contained in rule 3, in the case of the business of shipping, to which this Act applies, the sale proceeds of any tonnage sold or the amount of compensation in respect of loss of ships or the amount of accumulation of reserves, whether invested or not, shall be taken into account in computing the average amount of capital employed in such business :

Provided that any income received from investment of such funds shall be included in computing profits for purposes of the excess profits tax

5. For the purpose of ascertaining the average amount of capital employed in a business during any period, the profits or losses made in that period shall, except so far as the contrary is shown, be deemed—

(*a*) to have accrued at an even rate throughout the period ; and

(*b*) to have resulted, as they accrued, in a corresponding increase or decrease, as the case may be, in the capital employed in the business.

6. Where, in accordance with the second proviso to section 5 of this Act, this Act is applicable to part only of a business, the capital employed in that part shall be computed separately from any other capital of the person carrying on the business, and all references to capital employed in a business shall be construed as references to capital employed in that part of the business only.

SCHEDULE III.

[*See* sectoin 9 (7)]

Rules for determining the amount of Capital held by a company through other Companies.

1. Where, in the case of a number of companies, the first directly owns ordinary share capital of the second and the second directly owns ordinary share capital of the third, then, for the purposes of this Schedule, the first shall be deemed to own ordinary share capital of the third through the second and, if the third directly owns ordinary share capital of a fourth, the first shall be deemed to own ordinary share capital of the fourth through the second and third, and the second shall be deemed to own ordinary share capital of the fourth through the third, and so on.

2. In this Schedule—

(*a*) any number of companies of which the first directly owns ordinary share capital of the next and the next directly owns ordinary share capital of the next but one and so on, and, if they are more than three, any three or more of them, are referred to as "a series";

(*b*) in any series—

(i) that company which owns ordinary share capital of another through the remainder is referred to as "the first owner";

(ii) that other company the ordinary share capital of which is so owned is referred to as "the last owned company";

(iii) the remainder, if one only, is referred to as an "intermediary" or, if more than one, is referred to as a "chain of intermediaries;"

(*c*) a company in a series which directly owns ordinary share capital of another company in the series is referred to as an "owner";

(*d*) any two companies in a series of which one owns ordinary share capital of the other directly, and not through one or more of the other companies in the series, are referred to as being directly related to one another.

3. Where every owner in a series owns the whole of the ordinary share capital of the company to which it is directly related, the first owner shall be deemed to own through the intermediary or chain of intermediaries the whole of the ordinary share capital of the last owned company.

4. Where one of the owners in a series owns a fraction of the ordinary share capital of the company to which it is directly related, and every other owner in the series owns the whole of the ordinary share capital of the company to which it is directly related, the first owner shall be deemed to own that fraction of the ordinary share capital of the last owned company through the intermediary or chain of intermediaries.

5. Where—

(*a*) each of two or more of the owners in a series owns a fraction, and every other owner in a series owns the whole, of the ordinary share capital of the company to which it is directly related; or

(*b*) every owner in a series owns a fraction of the ordinary share capital of the company to which it is directly related;

the first owner shall be deemed to own through the intermediary or chain of intermediaries such fraction of the ordinary share capital of the last owned company as results from the multiplication of those fractions.

6. Where the first owner in any series owns a fraction of the ordinary share capital of the last owned company in that series through the intermediary or chain of intermediaries in that series, and also owns another fraction or other fractions of the ordinary share capital of the last owned company, either—

(*a*) directly: or

(*b*) through any intermediary or intermediaries which is not a member or are not members of that series; or

(*c*) through a chain or chains of intermediaries of which one or some or all are not members of that series; or

(*d*) in a case where the series consists of more than three companies, through an intermediary or intermediaries which is a member or are members of the series, or through a chain or chains of intermediaries consisting of some but not all of the companies of which the chain of intermediaries in the series consists;

then, for the purpose of ascertaining the amount of the ordinary share capital of the last owned company owned by the first owner, all those fractions shall be aggregated and the first owner shall be deemed to own the sum of those fractions.

THE INDIAN FINANCE ACT, 1940.

ACT No. XVI OF 1940.

[*6th April, 1940.*

An Act to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the rate of excise duty on sugar other than khandsari *or palmyra sugar*

leviable under the Sugar (Excise Duty) Act, 1934, to vary the rate of the excise and customs duty on motor spirit leviable under the Motor Spirit (Duties) Act, 1917, and the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, and to fix rates of income-tax and super-tax.

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the rate of excise duty on sugar other than *khandsari* or palymra sugar, leviable under the Sugar (Excise Duty) Act, 1934, to vary the rate of the excise duty on motor spirit leviable under the Motor Spirit (Duties) Act, 1917, to vary the rate of the customs duty on motor spirit leviable under the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, and to fix rates of income-tax and super-tax; It is hereby enacted as follows :—

Short title and extent.

1. (1) This Act may be called THE INDIAN FINANCE ACT, 1940.

(2) It extends to the whole of British India.

Fixation of salt duty.

2. The provisions of section 7 of the Indian Salt Act, 1882, shall, in so far as they enable the Central Government to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India, be construed as if, for the year beginning on the 1st day of April, 1940, they imposed such duty at the rate of one rupee and four annas per maund of eighty-two and two-sevenths pounds avoirdupois of salt manufactured in, or imported by land into, any such part, and such duty shall, for all the purposes of the said Act, be deemed to have been imposed by rule under that section.

Excise duty on sugar.

3. For clause (*ii*) of sub-section (2) of section 3 of the Sugar Excise Duty Act, 1934, the following shall be substituted, namely :—

" (*ii*) on all other sugar except palmyra sugar at the rate—

(*a*) of two rupees per cwt., in the case of sugar produced on or before the 29th day of February, 1940, and either issued out of a factory on or after that date or used within a factory on or after that date in the manufacture of any commodity other than sugar; and

(*b*) of three rupees per cwt. in the case of sugar produced on or after the 1st day of March, 1940."

Excise duty on motor spirit.

4. In sub-section (1) of section 3 of the Motor Spirit (Duties) Act, 1917, for the words " eight annas " the words " twelve annas " shall be substituted, and the provisions of section 5 of the Indian Finance (Supplementary and Extending) Act, 1931, so far as they relate to the levy of an additional duty on motor spirit shall cease to have effect.

Import duty on motor spirit.

5. In the First Schedule to the Indian Tariff Act, 1934, in Item No. 27 (6), for the words " Ten annas per Imperial gallon " in the fourth column, the following words shall be substituted, namely :—

" The rate at which excise duty is for the time being leviable on motor spirit."

Inland postage rates.

6. For the year beginning on the 1st day of April, 1940, the Schedule contained in Schedule I to this Act shall be inserted in the Indian Post Office Act, 1898, as the First Schedule to that Act.

Income-tax and super-tax.

7. (1) Subject to the provisions of sub-section (2)—

(*a*) income-tax for the year beginning on the 1st day of April, 1940, shall be charged at the rates specified in Part I of Schedule II to the Indian Finance Act, 1939;

(b) rates of super-tax for the year beginning on the 1st day of April, 1940, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be the rates specified in Part II of Schedule II to the Indian Finance Act, 1939:

Provided that in the case of an association of persons being a Co-operative Society, other than the Sanikatta Saltowners' Society in the Bombay Presidency, for the time being registered under the Co-operative Societies Act, 1912, or under an Act of the Provincial Legislature governing the registration of Co-operative Societies, the rates of super-tax for the year beginning on the 1st day of April, 1940, shall be—

(1) On the first Rs. 25,000 of total income	*Nil.*
(2) On the balance of total income	One anna in the rupee.

(2) In cases to which section 17 of the Indian Income-tax Act, 1922, applies, the tax chargeable shall be determined in accordance with the provisions of that section with reference to the rates imposed by sub-section (1).

(3) For the purpose of this section and of the rates of tax imposed by sub-section (1), the expression "total income" means total income as determined for the purposes of income-tax or super-tax, as the case may be, in accordance with the provisions of the Indian Income-tax Act, 1922.

SCHEDULE I.

Schedule to be inserted in the Indian Post Office Act, 1898.

[*See* section 6.]

"THE FIRST SCHEDULE.

INLAND POSTAGE RATES.

[*See* section 7.]

Letters.

For a weight not exceeding one tola	One anna.
For every tola, or fraction thereof, exceeding one tola	Half an anna.

Postcards.

Single	Nine pies.
Reply	One and a half annas.

Book, Pattern and Sample Packets.

For the first two and a half tolas or fraction thereof ..	Six pies.
For every additional two and a half tolas, or fraction thereof, in excess of two and a half tolas	Three pies.

Registered Newspapers.

For a weight not exceeding ten tolas	Quarter of an anna.
For a weight exceeding ten tolas and not exceeding twenty tolas ..	Half an anna.
For every twenty tolas, or fraction thereof, exceeding twenty tolas. ..	Half an anna.
In the case of more than one copy of the same issue of a registered newspaper being carried in the same packet—	
For a weight not exceeding ten tolas	Half an anna.
For every additional five tolas, or fraction thereof, in excess of ten tolas.	Quarter of an anna.
Provided that such packet shall not be delivered at any addressee's residence but shall be given to a recognised agent at the post office.	

Parcels,

For a weight not exceeding forty tolas	Four annas.
For every forty tolas or fraction thereof, exceeding forty tolas ..	Four annas."

THE FACTORIES (AMENDMENT) ACT, 1940.

ACT NO. XVII OF 1940.

[9th April, 1940.

An Act further to amend the Factories Act, 1934, for a certain purpose.

WHEREAS it is expedient to make provision for regulating labour in certain small factories, and for that purpose further to amend the Factories Act, 1934; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE FACTORIES (AMENDMENT) ACT, 1940.

Insertion of new Chapter VA in Act XXV of 1934.

2. After Chapter V of the Factories Act, 1934 (hereinafter referred to as the said Act), the following Chapter shall be inserted, namely :—

"CHAPTER VA.

SMALL FACTORIES.

Small factories.

59A. (1) In this Act, unless there is anything repugnant in the subject or context, "small factory" means any premises including the precincts thereof whereon ten or more but less than twenty workers are working or were working on any day of the preceding six months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, but does not include a mine subject to the operation of the Indian Mines Act, 1923 :

Provided that the Provincial Government may by notification in the official Gazette, declare any premises to be a small factory, notwithstanding that less than ten workers are working thereon, if such premises would otherwise be a small factory.

(2) For the purposes of this Chapter an adolescent holding a certificate granted under this Act to work as an adult shall be deemed to be an adult.

Certain provisions of this Act to apply to small factories wherein child labour is employed.

59B. (1) All the provisions of this Act, except clause (j) of section 2, sections 4, 5, 6 and 7, sub-sections (1) and (4) of section 14, sections 15, 21, 22 and 25, sub-sections (1), (2) and (3) of section 33 and Chapter IV shall apply to, and in relation to, all small factories wherein any worker who is not, or is not deemed to be, an adult is employed ; and in the provisions hereby made so applicable every reference to a factory shall be deemed to include, so far as may be, a reference to a small factory.

(2) The aforesaid provisions shall cease to apply to a small factory on the expiry of six months from the receipt by the Inspector of a notice in writing from the occupier that he has ceased to employ therein any worker who is not, or is not deemed to be, an adult, unless any such worker is employed therein on any day of the said six months :

Provided that if any such worker is thereafter employed in the small factory, the said provisions of this Act shall again apply thereto.

Certain other provisions of law not barred.

59C. The provisions of this Chapter shall be in addition to, and not in derogation of, the provisions of the Employment of Children Act, 1938."

THE NATIONAL SERVICE (EUROPEAN BRITISH SUBJECTS) ACT, 1940.

ACT No. XVIII OF 1940.

[9th April, 1940.

An Act to make certain provisions relating to service by European British Subjects in the armed forces of, or in a civil capacity under, the Crown.

WHEREAS it is expedient to make certain provisions relating to service by European British subjects in the armed forces of, or in a civil capacity under, the Crown ; It is hereby enacted as follows :—

Short title, extent, and commencement.

1. (1) This Act may be called THE NATIONAL SERVICE (EUROPEAN BRITISH SUBJECTS) ACT, 1940.

(2) It extends to the whole of British India, and applies also to European British subjects in any part of India.

(3) It shall come into force at once.

Definitions.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "competent authority" means, with reference to any person liable under this Act to be called up for enquiry, the Officer Commanding the military district, or Independent Area, or Sind Area or Delhi Area, as the case may be, in which that person is for the time being resident;

(b) "European British subject" means any subject of His Majesty of European descent in the male line born, naturalised or domiciled in the British Islands or in any Dominion as defined in the Statute of Westminster, 1931, or in any Colony except Ceylon;

(c) "prescribed" means prescribed by rules made under this Act;

(d) "national service" means service in the armed forces of the Crown or in any civilian capacity under the Crown.

Liability to be called up for enquiry.

3. (1) Every male European British subject for the time being in India, not being—

(a) a person in holy orders, or a regular minister of any religious denomination, or

(b) member of His Majesty's regular Naval, Military or Air Forces, or a member of any Reserve of any such force who is liable under his terms of service in such Reserve to be called up for service at any time and not only on partial or general mobilisation, or

(c) a servant of the Crown, or

(d) a person not included in clause (c) who is serving in the service of a federal railway of an Indian State railway or a minor railway as defined in the Government of India Act, 1935,

shall be liable under this Act to be called up for enquiry into his availability and fitness for national service.

(2) A person liable to be called up for enquiry under this Act shall remain so liable until he has completed his fiftieth year and no longer.

Calling up for enquiry.

4. (1) The competent authority may, after consultation with the National Service Advisory Committee constituted under section 5, cause to be served on any person, for the time being liable under this Act to be called up for enquiry, a written notice (hereinafter referred to in this Act as a calling-up notice) stating that he is called up for enquiry into his fitness and availability for national service and requiring him to present himself to such person and at such place and at such time (not earlier than the seventh day after the date of the service of the notice) as may be specified in the notice, and to submit himself to examination by the National Service Advisory Committee constituted under section 5.

(2) Where a notice under sub-section (1) has been duly served on any person, the competent authority may, at any time while that person remains liable under this Act to be called up for enquiry, cancel the notice and cause to be served on him a further notice varying the original notice.

(3) A calling up notice served on any person shall cease to have effect if, before the date on which he is thereby required to present himself, he ceases to be liable under this Act to be called up for enquiry.

(4) Such travelling and other allowances as may be prescribed shall be paid by the competent authority to any person required to present himself in accordance with any notice under this section.

National Service Advisory Committees.

5. (1) The Central Government shall constitute for such areas and in such places as it thinks fit committees (in this Act referred to as National Service Advisory Committees) to exercise the functions assigned to such committees by this Act.

(2) Each National Service Advisory Committee shall consist of not less than four members of whom one shall be an officer of one of His Majesty's Forces in India appointed by the competent authority, and the others shall be European British subjects, not being servants of the Crown appointed by the Central Government.

(3) The Chairman of the Committee shall be appointed by the Committee.

(4) A National Service Advisory Committee shall have power to co-opt as additional members for such time or purpose as it thinks fit any persons qualified for appointment to the Committee by the Central Government.

(5) A National Service Advisory Committee may meet at such times and places as it thinks fit and shall meet when required to do so by the Central Government or by the competent authority.

(6) A National Service Advisory Committee shall have the powers of a Civil Court for the purpose of receiving evidence, administering oaths, enforcing the attendance of witnesses, and compelling the discovery of documents, and shall be deemed to be a Civil Court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898.

(7) A National Service Advisory Committee may order any person called up for enquiry under sub-section (1) of section 4 to submit himself to be examined by a medical officer of the armed forces, and if he questions the decision of that officer, to appear before a medical board convened under military regulations.

Functions of National Service Advisory Committees.

6. The following shall be the functions of National Service Advisory Committees, namely :—

(*a*) when consulted by the competent authority, to advise that authority on the exercise of that authority's powers under sub-section (1) of section 4 ;

(*b*) to examine the case of any person ordered under section 4 to present himself for enquiry, and to report to the competent authority whether such person is available (*i.e.* can be spared without detriment to the public interest from his existing employment) and is fit for national service ;

(*c*) when consulted by the Central Government, to advise the Central Government on any matter arising out of this Act which the Central Government may refer or is required by this Act to refer to the Committees.

Taking into service on the advice of a National Service Advisory Committee.

7. (1) When a National Service Advisory Committee reports that a person is available and fit for national service, the competent authority shall require such person to state whether he is or is not willing to undertake such service, and such person shall state accordingly.

(2) If such person states that he is willing to undertake national service the competent authority may specify the capacity for which such person is suitable, and if he serves in such capacity such person shall for the purposes of section 8 be deemed to be a person who has been taken into national service on the advice of a National Service Advisory Committee.

Reinstatement.

8. It shall be the duty of any employer by whom a person who has been taken into national service on the advice of a National Service Advisory Committee, or by whom a European British subject who has been called out for service in the Reserve of His Majesty's Regular Naval, Military or Air Forces at any time after the 2nd day of September, 1939, and before the termination of hostilities, or by whom a person subject to this Act who with the consent of his employers was between the 2nd day of September, 1939, and the coming into force of this Act granted an emergency commission or enlisted in His Majesty's armed forces or accepted for training as a cadet at an officer's training school, was employed, to reinstate him in his employment at the termination of that service, in an occupation and under conditions not less favourable to him than those which would have been applicable to him had he not been so taken into service as aforesaid :

Provided that if for any reason the reinstatement of such person or member is represented by the employer to be impracticable, either party may refer the matter to a tribunal constituted under section 9 and that tribunal shall after consideration pass an order either exempting the employer from the provisions of this section or requiring him to re-employ such person or member on such terms as it thinks suitable, or requiring him to pay to such person or member a sum in compensation for failure to re-employ not exceeding an amount equal to six months' remuneration at the rate at which his last remuneration was payable to him by the employer; and if any employer fails to obey the order of the tribunal, he shall be punishable with a fine which may extend to one thousand rupees; and the Court by which an employer is convicted under this section may order him (if he has not already been so required by the tribunal) to pay the person whom he has failed to re-employ a sum not exceeding an amount equal to six months' remuneration at the rate at which his last remuneration was payable to him by the employer, and any amount so required by the tribunal to be paid or so ordered by the Court to be paid shall be recoverable as if it were a fine imposed by such Court:

Provided further that in any proceedings under this section it shall be a defence for an employer to prove that the person formerly employed by him did not apply to the employer for reinstatement within a period of two months from the termination of the national service into which he was taken on the advice of a National Service Advisory Committee.

Tribunal.

9. (1) The Central Government shall constitute for such areas and in such places as it thinks fit tribunals to hear and decide any matters referred to it under the proviso to section 8.

(2) Each tribunal shall consist of three members to be nominated by the Central Government, of whom one who shall be chairman of the tribunal shall be a member of a Civil Service of the Crown not lower in status than a District and Sessions Judge, one shall be a military officer not below the rank of Brigadier, and one shall be a European British subject, not being a servant of the Crown.

(3) No person serving as a member of a National Service Advisory Committee constituted under section 5 shall while so serving be a member of a tribunal.

(4) A tribunal may meet at such times and places as it thinks fit and shall meet when required to do so by the competent authority.

(5) A tribunal shall have the powers of a Civil Court for the purposes of receiving evidence, administering oaths, enforcing the attendance of witnesses, and compelling the discovery and production of documents, and shall be deemed to be a Civil Court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898.

Penalties and Procedure.

10. (1) Whoever wilfully fails to comply with any notice issued under section 4 or with any order given under sub-section (7) of section 5, or sub-section (1) of section 7 shall be punishable with imprisonment which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

(2) No Court inferior to that of a Presidency Magistrate or a Magistrate of the first class shall try any offence under this Act.

Service of notices.

11. Any notice to be served on any person for the purposes of this Act may be sent by post addressed to that person at his last known address.

Power to make rules.

12. (1) The Central Government may, by notification in the official Gazette, make rules for the purpose of giving effect to the provisions of this Act.

(2) Without prejudice to the generality of the foregoing power, the Central Government may make rules prescribing the forms of the notices referred to in sub-section (1) of section 4, the amount and manner of payment of the allowances

referred to in sub-section (4) of section 4 and the procedure to be followed in references to a tribunal under the proviso to section 8.

Act not to apply to certain persons.

13. Nothing in this Act shall apply to any person—

(*a*) for the time being confined in a prison or a lunatic asylum, or

(*b*) who is under the age of eighteen or over the age of fifty.

THE DEFENCE OF INDIA (AMENDMENT) ACT, 1940.

ACT No. XIX OF 1940.

[*10th April, 1940.*

An Act to amend the Defence of India Act, 1939.

WHEREAS it is expedient to amend the Defence of India Act, 1939, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE DEFENCE OF INDIA (AMENDMENT) ACT, 1940.

Amendment of section 2, Act XXXV of 1939.

2. In section 2 of the Defence of India Act, 1939 (hereinafter referred to as the said Act),—

(*a*) in clause (*v*) of sub-section (2), after the words "with foreign powers," the words "or with States in India, or to prejudice the maintenance of peaceful conditions in the tribal areas," shall be inserted;

(*b*) in sub-section (5), after the words "not being" the brackets and words "(except in the case of a Chief Commissioner's Province)" shall be inserted.

Amendment of section 18, Act XXXV of 1939.

3. In section 18 of the said Act, after the word "from", in both places where it occurs, the words "or in respect of" shall be inserted.

THE INSURANCE (AMENDMENT) ACT, 1940.

ACT No. XX OF 1940.

[*10th April, 1940.*

An Act further to amend the Insurance Act, 1938.

WHEREAS it is expedient further to amend the Insurance Act, 1938, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INSURANCE (AMENDMENT) ACT, 1940.

Amendment of section 2, Act IV of 1938.

2. To clause (3) of section 2 of the Insurance Act, 1938, (hereinafter referred to as the said Act), the following words shall be added, namely:—

"and any security issued by the Government of an Indian State and specified as an approved security for the purposes of this Act by the Central Government by notification in the official Gazette."

Amendment of section 3, Act IV of 1938.

3. In section 3 of the said Act,—

(*a*) in sub-section (1), for the word "insurer", where it occurs for the first time, the word "person" shall be substituted, and to the sub-section the following proviso shall be added and shall be deemed always to have been added, namely:—

"Provided that in the case of an insurer who was carrying on any class of insurance business in British India at the commencement of this Act, failure to obtain a certificate of registration in accordance with the requirements of this sub-

section shall not operate to invalidate any contract of insurance entered into by him if before the expiry of one month from the commencement of the Insurance (Amendment) Act, 1940, he has obtained that certificate." ;

(*b*) in clause (*e*) of sub-section (2), and in sub-section (3), for the words "British India" the word "India" shall be substituted ;

(*c*) for sub-section (4) the following sub-section shall be substituted and shall be deemed always to have been substituted, namely :—

"(4) The Superintendent of Insurance shall cancel the registration of an insurer either wholly or in so far as it relates to a particular class of insurance business, as the case may be,—

(*a*) if the insurer fails to comply with the provisions of section 7 or section 98 as to deposits, or

(*b*) if the insurer is in liquidation or is adjudged an insolvent, or

(*c*) if the business or a class of the business of the insurer has been transferred to any person or has been transferred to or amalgamated with the business of any other insurer, or

(*d*) if the whole of the deposit made in respect of a class of insurance business has been returned to the insurer under section 9";

(*d*) in sub-section (5), for the word, brackets and figure "sub-section (4)" the words, brackets, letter and figure "clause (*a*) of sub-section (4)" shall be substituted and shall be deemed always to have been substituted ;

(*e*) after sub-section (5) the following sub-sections shall be inserted and shall be deemed always to have been inserted, namely :—

"(5A) When the Superintendent of Insurance cancels any registration under clause (*b*), clause (*c*) or clause (*d*) of sub-section (4) the cancellation shall take effect on the date on which notice of the order of cancellation is served on the insurer.

(5B) When a registration is cancelled the insurer shall not, after the cancellation has taken effect, enter into any new contracts of insurance, but all rights and liabilities in respect of contracts of insurance entered into by him before such cancellation takes effect shall, subject to the provisions of sub-section (5D), continue as if the cancellation had not taken place.

(5C) where a registration is cancelled under clause (*a*) of sub-section (4), the Superintendent of Insurance may at his discretion revive the registration, if the insurer within six months from the date on which the cancellation took effect makes the deposits required by section 7 or section 98, as the case may be, and complies with any directions which may be given to him by the Superintendent of Insurance.

(5D) Where a registration is cancelled under sub-section (4) and the insurer is a company incorporated under the Indian Companies Act, 1913, or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby, the Superintendent of Insurance shall, as soon as may be after the expiry of six months from the date on which the cancellation took effect, apply to the Court for an order to wind up the insurance company, or to wind up the affairs of the company in respect of a class of insurance business, unless the registration of the insurance company has been revived under sub-section (5C) or an application for winding up the company has been already presented to the Court. The Court may proceed as if an application under this sub-section were an application under sub-section (2) of section 53, or sub-section (1) of section 58, as the case may be." ;

(*f*) in sub-section (6) for the words "the Act" the words "this section" shall be substituted, and for the words "grant the insurer" the words "register the insurer and grant him" shall be substituted.

Amendment of section 7, Act IV of 1938.

4. In section 7 of the said Act,—

(*a*) in sub-section (1),—

(i) for the words "cash or approved securities estimated at the market value of the securities on the day of deposit of the amount hereafter specified, namely," the words "the amount hereafter specified, either in cash or in approved securities estimated at the market value of the securities on the day of deposit, or partly in cash and partly in approved securities so estimated", shall be substituted and shall be deemed always to have been substituted;

(ii) in clause (d), for the words "is accident and miscellaneous insurance including workmen's compensation and motor car insurance" the following shall be substituted and shall be deemed always to have been substituted, namely:—

"is miscellaneous insurance only, that is to say, insurance which is not in the opinion of the Central Government principally or wholly of any kind or kinds included in clauses (a), (b) or (c)";

(iii) in clauses (e), (f), (g), (h) and (i), for the word "includes" the word "is" shall be substituted;

(iv) the word "and" at the end of clause (i) and the whole of clause (j) shall be omitted;

(v) the following proviso shall be added to the sub-section, namely:—

"Provided that, where the business done or to be done is marine insurance only and relates exclusively to country craft or its cargo or both, the amount to be deposited under this sub-section shall be ten thousand rupees only";

(b) in sub-section (7), for the words "on the day of the first deposit made in compliance with this Act" the words "as at the date of the commencement of this Act" and for the words "in respect of the life insurance business of the insurer" the words "as the instalment or as part of the instalment to be made under the foregoing provisions of this section before the application for registration is made whether any such application is or is not in fact made" shall be substituted and shall be deemed always to have been substituted, respectively;

(c) in sub-section (8), after the words "to the credit of the insurer and shall" the words "except to the extent, if any, to which the cash has been invested in securities under sub-section (9A)" shall be inserted and shall be deemed always to have been inserted;

(d) for sub-section (9) the following sub-sections shall be substituted and shall be deemed always to have been substituted, namely:—

"(9) The insurer may at any time replace any securities deposited by him under this section with the Reserve Bank of India either by cash or by other approved securities or partly by cash and partly by other approved securities, provided that such cash, or the value of such other approved securities estimated at the market rates prevailing at the time of replacement, or such cash together with such value, as the case may be, is not less than the value of the securities replaced estimated at the market rates prevailing when they were deposited.

(9A) The Reserve Bank of India shall, if so requested by the insurer,—

(a) sell any securities deposited by him with the Bank under this section and hold the cash realised by such sale as deposit, or

(b) invest in approved securities specified by the insurer the whole or any part of a deposit held by it in cash or the whole or any part of cash received by it on the sale of or on the maturing of securities deposited by the insurer, and hold the securities in which investment is so made as deposit.

(9B) Where sub-section (9A) applies,—

(a) if the cash realised by the sale of or on the maturing of the securities (excluding in the former case the interest accrued) falls short of the market value of the securities at the date on which they were deposited with the Bank, the insurer shall make good the deficiency by a further deposit either in cash or in approved securities estimated at the market value of the securities on the day on which they are deposited, or partly in cash and partly in approved securities so estimated, within a period of two months from the date on which the securities matured or

were sold or where the securities matured or were sold before the 21st day of March, 1940, within a period of four months from the commencement of the Insurance (Amendment) Act, 1940; and unless he does so the insurer shall be deemed to have failed to comply with the requirements of this section as to deposits; and

(*b*) if the cash realised by the sale of, or on the maturing of the securities (excluding in the former case the interest accrued) exceeds the market value of the securities at the date on which they were deposited with the Bank, the Central Government may, if satisfied that the full amount required to be deposited under sub-section (1) is in deposit, direct the Reserve Bank to return the excess." ;

(*e*) in sub-section (10), after the words "approved securities" the words "estimated at the market value of the securities on the day of deposit, or partly in cash and partly in such securities," shall be inserted.

Amendment of section 27, Act IV of 1938.

5. In the proviso to sub-section (3) of section 27 of the said Act, for the words "commencement of this Act" the figures and words "30th day of June, 1939," shall be substituted.

Amendment of section 28, Act IV of 1938.

6. In section 28 of the said Act,—

(*a*) in sub-section (1), after the word and figure "section 27" the words "and all other particulars necessary to establish that the requirements of that section have been complied with" shall be inserted ;

(*b*) in sub-section (2),—

(*i*) after the word and figure "section 27" the following shall be inserted, namely :—

"or for the purpose of securing the particulars necessary to establish that the requirements of that section have been complied with" ;

(*ii*) for the words "and the insurer shall comply with all requisitions made by the Superintendent on that behalf" the following shall be substituted, namely :—

"The insurer shall comply with any requisition made in this behalf by the Superintendent of Insurance, and if he fails to do so within two months from the receipt of the requisition he shall be deemed to have made default in complying with the requirements of this section."

Amendment of section 35, Act IV of 1938.

7. In section 35 of the said Act,—

(*a*) in sub-section (1), after the words "shall be transferred to" the words "any person or transferred to" shall be inserted and for the words "insurers concerned" the words "parties concerned" shall be substituted ;

(*b*) in sub-section (3), for clauses (*b*) and (*c*) the following shall be substituted, namely :—

"(*b*) balance-sheets in respect of the insurance business of each of the insurers concerned in such amalgamation or transfer, prepared in the Form set forth in Part II of the First Schedule and in accordance with the regulations contained in Part I of that Schedule ;

(*c*) actuarial reports and abstracts in respect of the life insurance business of each of the insurers so concerned, prepared in conformity with the requirements of Part II of the Fourth and Fifth Schedules and in accordance with the regulations contained in Part I of the Schedule concerned ;

(*d*) a report on the proposed amalgamation or transfer, prepared by an independent actuary who has never been professionally connected with any of the parties concerned in the amalgamation or transfer at any time in the five years preceding the date on which he signs his report ;

(*e*) any other reports on which the scheme of amalgamation or transfer was founded.

The balance-sheets, reports and abstracts referred to in clauses (*b*), (*c*) and (*d*) shall

all be prepared as at the date at which the amalgamation or transfer if sanctioned by the Court is to take effect, which date shall not be more than twelve months before the date on which the application to the Court is made under this section :

Provided that if the Central Government so directs in the case of any particular insurer there may be substituted respectively for the balance-sheet, report and abstract referred to in clauses (*b*) and (*c*) prepared in accordance with this sub-section certified copies of the last balance-sheet and last report and abstract prepared in accordance with sections 11 and 13, if that balance-sheet is prepared as at a date not more than twelve months, and that report and abstract as at a date not more than five years, before the date on which the application to the Court is made under this section."

Amendment of section 36, Act IV of 1938.

8. To section 36 of the said Act the following words shall be added, namely:—

" and shall make such consequential orders as are necessary to give effect to the arrangement, including orders as to the disposal of any deposit made under section 7 or section 98."

Amendment of section 42, Act IV of 1938.

9. In sub-section (3) of section 42 of the said Act,—

(*a*) for the words " shall expire on the 31st day of March in each year " the words " shall remain in force for a period of twelve months only from the date of issue " shall be substituted ;

(*b*) to the sub-section the following provisos shall be added, namely :—

" Provided that when any licence is issued or renewed within the year beginning on the day on which the Insurance (Amendment) Act, 1940, came into operation, the Superintendent of Insurance may specify the date, not being earlier than one year nor later than two years from the date of issue or renewal, on which the licence shall cease to be in force :

Provided further that the Central Government may, by notification in the Official Gazette, make provision in respect of licences in force at the commencement of the Insurance (Amendment) Act, 1940, extending the period for which they are to remain in force by a term of from one to eleven months."

Substitution of new sections for sections 65 and 66, Act IV of 1938.

10. For sections 65 and 66 of the said Act the following sections shall be substituted and shall be deemed always to have been substituted, namely :—

Definition of "provident society."

" 65. (1) In this Part " provident society " means a person who, or a body of persons (whether corporate or unincorporate) which, not being an insurer registered for the time being under part II of this Act, carries on the business of insuring the payment, on the happening of any of the contingencies mentioned in sub-section (2), of—

(*a*) an annuity of or equivalent to fifty rupees or less, payable for an uncertain period, or

(*b*) a gross sum of five hundred rupees or less, whether paid or payable in a lump sum or in two or more instalments over a certain period,

exclusively in both cases (*a*) and (*b*) of any profit or bonus not being a guaranteed profit or bonus.

Explanation.—For the purposes of this sub-section, a period is " certain " if its duration is ascertainable in advance and " uncertain " if its duration is not so ascertainable.

(2) The contingencies referred to in sub-section (1) are the following, namely :—

(*a*) the birth, marriage or death of any person or the survival by a person of a stated or implied age or contingency ;

(b) failure of issue ;

(c) the occurrence of a social, religious or other ceremonial occasion ;

(d) loss of or retirement from employment ;

(e) disablement in consequence of sickness or accident ;

(f) the necessity of providing for the education of a dependent ;

(g) any other contingency which may be prescribed or which may be authorised by the Provincial Government with the approval of the Central Government.

(3) For the purposes of sub-sections (1) and (2)—

(a) contracts entered into before the commencement of this Act shall not be taken into account ;

(b) two or more policies issued to one person shall, for the purposes of determining whether the limits fixed by sub-section (1) have or have not been exceeded, be deemed to be one policy if the contingencies on the happening of which the sums are payable under the policies (whether the contingencies be the same or different) relate to one person only, whether he be the policy-holder or some other person.

(4) Every person or body of persons for the time being registered as a provident society under the Provident Insurance Societies Act, 1912, and every person or body of persons for the time being registered as a provident society under this Act shall be deemed to be a provident society for all the purposes of this Act.

(5) If any question arises whether any person or body of persons is or is not a provident society within the meaning of this section, the Superintendent of Insurance shall decide the question and his decision shall be final.

Restrictions on provident societies.

66. No provident society shall undertake any form of insurance not falling within the limits fixed by sub-section (1) of section 65, nor shall any provident society be eligible to be registered under section 3.

Amendment of section 73, Act IV of 1938.

11. In sub-section (2) of section 73 of the said Act, after the brackets and figure " (9) " the brackets, figures and letters " (9A), (9B) " shall be inserted, and after the word and figure " section 8 " the words and figure " and of section 9 " shall be inserted.

Amendment of section 84, Act IV of 1938.

12. In section 84 of the said Act, before the word and figure " section 65 " the words, brackets and figure " sub-section (2) of " shall be inserted.

Amendment of section 85, Act IV of 1938.

13. In section 85 of the said Act,—

(a) in sub-section (3)—

(i) for the words " any director or officer of the society " the words " any director, manager, managing agent, auditor, actuary, officer or partner of the society " shall be substituted ;

(ii) for the words " a director or officer of the society is a director or partner " the following words shall be substituted, namely :—

" a director, manager, managing agent, actuary, officer or partner of the society is a director, manager, managing agent, actuary, officer, or partner ; "

(b) after sub-section (3) the following sub-section shall be inserted, namely :—

" (3A) Any loan prohibited under sub-section (3), made before and outstanding at the commencement of the Insurance (Amendment) Act, 1940, shall be repaid before the 1st day of January, 1941, and in case of default the director, manager, managing agent, auditor, actuary, officer or partner who has received the loan or is connected with the concern which has received the loan, as the case may be, shall cease to hold office in or be a partner of the society and shall be ineligible to hold office in or be a partner of the society until the loan is repaid." ;

(c) in sub-section (4), for the words " or officer " the words " manager, managing agent, auditor, actuary, officer or partner " shall be substituted.

Insertion of new section 106A in Act IV of 1938.

14. After section 106 of the said Act the following section shall be inserted, namely :—

Notice to and hearing of Superintendent of Insurance.

" 106A. (1) When application is made to the Court for the making of any order to which this section applies the Court shall, unless the Superintendent of Insurance has himself made the application or has been made a party thereto, send a copy of the application together with intimation of the date fixed for the hearing thereof to the Superintendent of Insurance, and shall give him an opportunity of being heard.

(2) The orders to which this section applies are the following, namely:—

(*a*) an order for the attachment in execution of a decree of any deposit made under section 7 or section 98 ;

(*b*) an order under section 9 or section 59 for the return of any such deposit ;

(*c*) an order under section 36 sanctioning any arrangement for the transfer or amalgamation of life insurance business or any order consequential thereon ;

(*d*) an order for the winding up of an insurance company or a provident society ;

(*e*) an order under section 58 confirming a scheme for the partial winding up of an insurance company ;

(*f*) an order under section 89 reducing the amount of the insurance contracts of a provident society."

Insertion of new sections 110A and 110B in Act IV of 1938.

15. After section 110 of the said Act the following sections shall be inserted, namely :—

Delegation of powers and duties of Superintendent of Insurance.

" 110A. The Superintendent of Insurance may by general or special order delegate any of his powers or duties under this Act to any person subordinate to him. The exercise or discharge of any of the powers or duties so delegated shall be subject to such restrictions, limitations and conditions if any, as the Superintendent of Insurance may impose, and shall be subject to his control and revision.

Signature of documents.

110B. Every document which is required by this Act or by any rule made thereunder to be signed by the Superintendent of Insurance or by any person subordinate to him or by any officer authorised by him under sub-section (1) of section 42 shall be deemed to be properly signed, if it bears a facsimile of the signature of such Superintendent, person or officer printed, engraved, lithographed or impressed by any other mechanical process approved by the Central Government."

Amendment of s. 114, Act IV of 1938.

16. In section 114 of the said Act,—

(*a*) in sub-section (2),—

(*i*) in clause (*h*), before the word and figure "section 65" the words, brackets and figure "sub-section (2) of" shall be inserted ;

(*ii*) the word "and" at the end of clause (*k*) shall be omitted ;

(*iii*) after clause (*l*) the following clause shall be inserted, namely :—

"(*m*) any other matter which is to be or may be prescribed.";

(*iv*) the proviso shall be omitted ;

(*b*) sub-section (3) shall be re-numbered as sub-section (4) and the following shall be inserted as sub-section (3), namely :—

"(3) Every rule made under this section shall be laid as soon as may be after it is made before each of the Chambers of the Central Legislature, while it is in session, for a total period of one month which may be comprised in one session or in two or more sessions, and if before the expiry of that period, or where the period for which the rule is so laid before one Chamber does not coincide with that

for which it is so laid before the other, before the expiry of the later of these periods, both Chambers agree in making any modification in the rule or both Chambers agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be."

Amendment of section 116, Act IV of 1938.

17. In section 116 of the said Act,—

(*a*) for the words, figures and brackets "from the provisions of section 7 or section 98 relating to deposits or from the provisions of sub-section (2) of section 27 relating to the keeping of assets in India" the words "from any of the provisions of this Act which may be specified in the notification" shall be substituted;

(*b*) to the section the following proviso shall be added, namely:—

"Provided that no such notification shall be issued unless the Central Government is satisfied that insurers constituted, incorporated or domiciled in British India are under the law or practice in such State entitled therein to benefits corresponding to those conferred by the notification or to benefits which in the opinion of the Central Government are at least equivalent thereto."

Amendment of First Schedule, Act IV of 1938.

18. In Form A contained in Part II of the First Schedule to the said Act, in the first column, in the entry, "Accident and Miscellaneous Insurance Business Account" the words "Accident and" shall be omitted.

Amendment of Third Schedule, Act IV of 1938.

19. In the Third Schedule to the said Act—

(*a*) in Part I, in regulation 2 the words "accident and" and the words "including workmen's compensation and motor car insurance" shall be omitted;

(*b*) in Part II,—

(*i*) in note (*a*) appended to Form D, for the words "payable outside India" the words "ordinarily paid outside India" shall be substituted, and the following sentence shall be added, namely:—

"If any question arises whether any premiums are ordinarily paid outside India, the Superintendent of Insurance shall decide the question and his decision shall be final.";

(*ii*) in the heading to Form F, the words "*Accident and*" and the words "*including Workmen's Compensation and Motor Car Insurance Business*" shall be omitted.

THE INDIAN TARIFF (AMENDMENT) ACT, 1940.

ACT NO. XXI OF 1940.

[*10th April*, 1940.

An Act further to amend the Indian Tariff Act, 1934.

WHEREAS it is expedient further to amend the Indian Tariff Act, 1934, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN TARIFF (AMENDMENT) ACT, 1940.

Amendment of First Schedule, Act XXXII of 1934.

2. In the First Schedule to the Indian Tariff Act, 1934, in Item No. 13 (1), in the third column the word "Revenue" shall be inserted, and in the fourth column for the word "Free" the figure and words "3 per cent. *ad valorem* shall" be substituted.

THE INDIAN TARIFF (SECOND AMENDMENT) ACT, 1940.

ACT No. XXII OF 1940.

[10th April, 1940.

An Act further to amend the Indian Tariff Act, 1934.

WHEREAS it is expedient further to amend the Indian Tariff Act, 1934, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN TARIFF (SECOND AMENDMENT) ACT, 1940.

Amendment of the First Schedule Act XXXII of 1934.

2. In the First Schedule to the Indian Tariff Act, 1934,—

(a) in Items Nos. 10 (1), 10 (2) and 11 (1), in the last column, for the figure, " 1940 " the figure " 1941 " shall be substituted;

(b) in Items Nos. 46, 46 (1), 47, 47 (1), 48 and 48 (4), in the last column, for the figure " 1940 " the figure " 1942 " shall be substituted.

THE DRUGS ACT, 1940.

ACT No. XXIII OF 1940.

[10th April, 1940.

An Act to regulate the import, manufacture, distribution and sale of drugs.

WHEREAS it is expedient to regulate the import into, and the manufacture, distribution and sale in, British India of drugs;

AND WHEREAS the Legislatures of all the Provinces have passed resolutions in terms of section 103 of the Government of India Act, 1935, in relation to such of the above-mentioned matters and matters ancillary thereto as are enumerated in List II of the Seventh Schedule to the said Act; It is hereby enacted as follows:—

CHAPTER I.

INTRODUCTORY.

Short title, extent and commencement.

1. (1) This Act may be called THE DRUGS ACT, 1940.

(2) It extends to the whole of British India.

(3) It shall come into force at once; but Chapter III shall take effect only from such date as the Central Government may, by notification in the Official Gazette, appoint in this behalf, and Chapter IV shall take effect in a particular Province only from such date as the Provincial Government may, by like notification, appoint in this behalf.

Application of other laws not barred.

2. The provisions of this Act shall be in addition to, and not in derogation of, the Dangerous Drugs Act, 1930, and any other law for the time being in force.

Definitions.

3. In this Act, unless there is anything repugnant in the subject or context,—

(a) " the Board " means the Drugs Technical Advisory Board constituted under section 5;

(b) " drug " includes all medicines for internal or external use of human beings or animals, and all substances intended to be used for or in the treatment, mitigation or prevention of disease in human beings or animals, other than medicines and substances exclusively used or prepared for use in accordance with the Ayurvedic or Unani systems of medicine;

(c) "to import", with its grammatical variations and cognate expressions, means to bring into British India;

(d) "patent or proprietary medicine" means a drug which is a remedy or prescription prepared for internal or external use of human beings or animals, and which is not for the time being recognised by the Permanent Commission on Biological Standardisation of the League of Nations or in the latest edition of the British Pharmacopoeia or the British Pharmaceutical Codex or any other Pharmacopoeia authorised in this behalf by the Central Government after consultation with the Board;

(e) "prescribed" means prescribed by rules made under Chapter II or Chapter III by the Central Government, or under Chapter IV by the Provincial Government.

Presumption as to poisonous substances.

4. Any substance specified as poisonous by rule made under Chapter III or Chapter IV shall be deemed to be a poisonous substance for the purposes of Chapter III or Chapter IV, as the case may be.

CHAPTER II.

THE DRUGS TECHNICAL ADVISORY BOARD, THE CENTRAL DRUGS LABORATORY AND THE DRUGS CONSULTATIVE COMMITTEE.

The Drugs Technical Advisory Board.

5. (1) The Central Government shall, as soon as may be, constitute a Board (to be called the Drugs Technical Advisory Board) to advise the Central Government and the Provincial Governments on technical matters arising out of the administration of this Act and to carry out the other functions assigned to it by this Act.

(2) The Board shall consist of the following members, namely:—

(i) the Director-General, Indian Medical Service, *ex-officio*, who shall be Chairman;

(ii) the Director of the Central Drugs Laboratory, *ex-officio*;

(iii) the Director of the Central Research Institute, *ex-officio*;

(iv) the Director of the Imperial Veterinary Research Institute, Muktesar, *ex-officio*;

(v) the Chief Chemist, Central Revenues, *ex-officio*;

(vi) two persons holding the appointment of Government Analyst under this Act, to be nominated by the Central Government;

(vii) one pharmacologist and one pharmaceutical chemist to be elected by the Scientific Advisory Board of the Indian Research Fund Association;

(viii) three persons to be elected by the Medical Council of India, two of whom shall be from among teachers of medicine or therapeutics on the staff of a university or college in British India providing a course of study which qualifies for admission to the examination for a degree which is a recognised qualification under the Indian Medical Council Act, 1933, and one shall be a registered medical practitioner not being a servant of the Crown;

(ix) one member of the pharmaceutical profession to be nominated by the Central Government;

(x) two persons to be elected by the Council of the Indian Chemical Society;

(xi) one person to be elected by the Central Council of the Indian Medical Association and one person to be elected by the branches in India of the British Medical Association.

(3) The nominated and elected members of the Board shall hold office for three years, but shall be eligible for re-nomination and re-election.

(4) The Board may, subject to the previous approval of the Central Government, make by-laws fixing a quorum and regulating its own procedure and the conduct of all business to be transacted by it.

(5) The Board may constitute sub-committees and may appoint to such sub-committees for such periods, not exceeding three years, as it may decide, or temporarily for the consideration of particular matters, persons who are not members of the Board.

(6) The functions of the Board may be exercised notwithstanding any vacancy therein.

(7) The Central Government shall appoint a person to be secretary of the Board and shall provide the Board with such clerical and other staff as the Central Government considers necessary.

The Central Drugs Laboratory.

6. (1) The Central Government shall, as soon as may be, establish a Central Drugs Laboratory under the control of a Director to be appointed by the Central Government, to carry out the functions entrusted to it by this Act or any rules made under this Chapter :

Provided that, if the Central Government so prescribes, the functions of the Central Drugs Laboratory in respect of any drug or class of drugs shall be carried out at the Central Research Institute, Kasauli, or at any other prescribed Laboratory and the functions of the Director of the Central Drugs Laboratory in respect of such drug or class of drugs shall be exercised by the Director of that Institute or of that other Laboratory, as the case may be.

(2) The Central Government may, after consultation with the Board, make rules prescribing—

(*a*) the functions of the Central Drugs Laboratory ;

(*b*) the procedure for the grant of certificates of registration under this Act by the said Laboratory in respect of patent or proprietary medicines not having displayed on the label or container thereof the true formula or list of ingredients contained therein in a manner readily intelligible to members of the medical profession, the forms of such certificates and the fees payable therefor ;

(*c*) the procedure for preserving the secrecy of the formulae of patent or proprietary medicines when disclosed to the said Laboratory under this Act ;

(*d*) the procedure for the submission to the said Laboratory under Chapter IV of samples of drugs for analysis or test, the forms of the Laboratory's reports thereon and the fees payable in respect of such reports ;

(*e*) such other matters as may be necessary or expedient to enable the said Laboratory to carry out its functions ;

(*f*) the matters necessary to be prescribed for the purposes of the proviso to sub-section (1).

Drugs Consultative Committee.

7. (1) The Central Government may constitute an advisory committee to be called "the Drugs Consultative Committee" to advise the Central Government, the Provincial Governments and the Drugs Technical Advisory Board on any matter tending to secure uniformity throughout the Provinces in the administration of this Act.

(2) The Drugs Consultative Committee shall consist of two representatives of the Central Government to be nominated by that Government and one representative of each Provincial Government to be nominated by the Provincial Government concerned.

(3) The Drugs Consultative Committee shall meet when required to do so by the Central Government and shall have power to regulate its own procedure.

CHAPTER III.

IMPORT OF DRUGS.

Standards of quality.

8. (1) For the purposes of this Chapter the expression "standard quality" when applied to a drug means that the drug complies with the standard set out in the Schedule.

(2) The Central Government, after consultation with the Board and after giving by notification in the official Gazette not less than three months' notice of its intention so to do, may by a like notification add to or otherwise amend the Schedule for the purposes of this Chapter, and thereupon the Schedule shall be deemed to be amended accordingly.

Misbranded drugs.

9. For the purposes of this Chapter a drug shall be deemed to be misbranded—

(*a*) if it is an imitation of, or substitute for, or resembles in a manner likely to deceive, another drug, or bears upon it or upon its label or container the name of another drug, unless it is plainly and conspicuously marked so as to reveal its true character and its lack of identity with such other drug ; or

(*b*) if it purports to be the product of a place or country of which it is not truly a product; or

(*c*) if it is imported under a name which belongs to another drug ; or

(*d*) if it is so coloured, coated, powdered or polished that damage is concealed, or if it is made to appear of better or greater therapeutic value than it really is ; or

(*e*) if it is not labelled in the prescribed manner ; or

(*f*) if its label or container or anything accompanying the drug bears any statement, design or device which makes any false claim for the drug or which is false or misleading in any particular ; or

(*g*) if the label or container bears the name of an individual or company purporting to be the manufacturer or producer of the drug, which individual or company is fictitious or does not exist.

Prohibition of import of certain drugs.

10. From such date as may be fixed by the Central Government by notification in the official Gazette in this behalf, no person shall import—

(*a*) any drug which is not of standard quality ;

(*b*) any misbranded drug ;

(*c*) any drug for the import of which a licence is prescribed, otherwise than under, and in accordance with, such licence ;

(*d*) any patent or proprietary medicine, unless there is displayed, in the prescribed manner on the label or container thereof either the true formula or list of ingredients contained in it in a manner readily intelligible to members of the medical profession, or the number of the certificate of registration granted in the prescribed manner in respect of such medicine by the Central Drugs Laboratory after being correctly informed of the formula of such medicine ;

(*e*) any drug which by means of any statement, design or device accompanying it or by any other means, purports or claims to cure or mitigate any such disease or ailment, or to have any such other effect, as may be prescribed ;

(*f*) any drug the import of which is prohibited by rule made under this Chapter :

Provided that nothing in this section shall apply to the import, subject to prescribed conditions, of small quantities of any drug for the purpose of examination test or analysis or for personal use :

Provided further that the Central Government may, after consultation with the Board, by notification in the official Gazette, permit, subject to any conditions specified in the notification, the import of any drug or class of drugs not being of standard quality.

Explanation.—The formula or list of ingredients mentioned in clause (*d*) shall be deemed to be true and a sufficient compliance with that sub-clause if, without disclosing a full and detailed recipe of the ingredients, it indicates correctly all potent or poisonous substances contained therein together with an approximate statement of the composition of the medicine.

Application of law relating to sea customs and powers of Customs officers.

11. (1) The law for the time being in force relating to sea customs and to goods, the import of which is prohibited by section 18 of the Sea Customs Act, 1878, shall, subject to the provisions of section 13 of this Act, apply in respect of drugs the import of which is prohibited under this Chapter, and officers of customs and officers empowered under that Act to perform the duties imposed thereby on a Customs Collector and other officers of Customs, shall have the same powers in respect of such drugs as they have for the time being in respect of such goods as aforesaid.

(2) Without prejudice to the provisions of sub-section (1), the Customs Collector, or any servant of the Crown authorised by the Provincial Government in this behalf, may detain any imported package which he suspects to contain any drug the import of which is prohibited under this Chapter, and shall forthwith report such detention to the Director of the Central Drugs Laboratory and, if required by him, forward the package or samples of any suspected drug found therein to the said Laboratory.

Power of Central Government to make rules.

12. (1) The Central Government may, after consultation with the Board and after previous publication by notification in the official Gazette, make rules for the purpose of giving effect to the provisions of this Chapter.

(2) Without prejudice to the generality of the foregoing power, such rules may—

(*a*) specify the drugs or classes of drugs for the import of which a licence is required, and prescribe the form and conditions of such licences, the authority empowered to issue the same, and the fees payable therefor ;

(*b*) prescribe the methods of test or analysis to be employed in determining whether a drug is of standard quality ;

(*c*) prescribe, in respect of biological and organometallic compounds, the units or methods of standardisation ;

(*d*) specify the diseases or ailments which an imported drug may not purport or claim to cure or mitigate and such other effects which such drug may not purport or claim to have ;

(*e*) prescribe the conditions subject to which small quantities of drugs, the import of which is otherwise prohibited under this Chapter, may be imported for the purpose of examination, test or analysis or for personal use ;

(*f*) prescribe the places at which drugs may be imported, and prohibit their import at any other place ;

(*g*) require the date of manufacture and the date of expiry of potency to be clearly and truly stated on the label or container of any specified imported drug or class of such drug, and prohibit the import of the said drug or class of drug after the expiry of a specified period from the date of manufacture ;

(*h*) regulate the submission by importers, and the securing, of samples of drugs for examination, test or analysis by the Central Drugs Laboratory, and prescribe the fees, if any, payable for such examination, test or analysis ;

(*i*) prescribe the evidence to be supplied, whether by accompanying documents or otherwise, of the quality of drugs sought to be imported, the procedure of officers of Customs in dealing with such evidence, and the manner of storage at places of import of drugs detained pending admission ;

(j) provide for the exemption, conditionally or otherwise, from all or any of the provisions of this Chapter and the rules made thereunder of drugs imported for the purpose only of transport through, and export from, British India ;

(k) prescribe the conditions to be observed in the packing in bottles, packages or other containers of imported drugs ;

(l) regulate the mode of labelling drugs imported for sale in packages, and prescribe the matters which shall or shall not be included in such labels ;

(m) prescribe the maximum proportion of any poisonous substance which may be added to or contained in any imported drug, prohibit the import of any drug in which that proportion is exceeded, and specify substances which shall be deemed to be poisonous for the purposes of this Chapter and the rules made thereunder ;

(n) require that the accepted scientific name of any specified drug shall be displayed in the prescribed manner on the label or wrapper of any imported patent or proprietary medicine containing such drugs ;

(o) provide for the exemption, conditionally or otherwise, from all or any of the provisions of this Chapter or the rules made thereunder of any specified drug or class of drugs.

Offences.

13. (1) Whoever contravenes any of the provisions of this Chapter or of any rule made thereunder shall, in addition to any penalty to which he may be liable under the provision of section 11, be punishable with imprisonment which may extend to one year, or with fine which may extend to five hundred rupees, or with both.

(2) Whoever, having been convicted under sub-section (1), is again convicted under that sub-section shall, in addition to any penalty as aforesaid, be punishable with imprisonment which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

Confiscation.

14. Where any offence punishable under section 13 has been committed, the consignment of the drug in respect of which the offence has been committed shall be liable to confiscation.

Jurisdiction.

15. No Court inferior to that of a Presidency Magistrate or of a Magistrate of the first class shall try an offence punishable under section 13.

CHAPTER IV.

Manufacture, Sale and Distribution of Drugs.

Standards of quality

16. (1) For the purposes of this Chapter the expression "standard quality" when applied to a drug means that the drug complies with the standard set out in the Schedule.

(2) The Provincial Government, after consultation with the Board and after giving by notification in the official Gazette not less than three months' notice of its intention so to do, may by a like notification add to or otherwise amend the Schedule for the purposes of this Chapter, and thereupon the Schedule shall be deemed to be amended accordingly.

Misbranded drugs.

17. For the purposes of this Chapter a drug shall be deemed to be misbranded—

(a) if it is an imitation of, or substitute for, or resembles in a manner likely to deceive, another drug, or bears upon it or upon its label or container the name of another drug, unless it is plainly and conspicuously marked so as to reveal its true character and its lack of identity with such other drug; or

(b) if it purports to be the product of a place or country of which it is not truly a product ; or

(c) if it is sold, or offered or exposed for sale, under a name which belongs to another drug ; or

(*d*) if it is so coloured, coated, powdered or polished that damage is concealed or if it is made to appear of better or greater therapeutic value than it really is ; or

(*e*) if it is not labelled in the prescribed manner ; or

(*f*) if its label or container or anything accompanying the drug bears any statement, design or device which makes any false claim for the drug or which is false or misleading in any particular ; or

(*g*) if the label or container bears the name of an individual or company purporting to be the manufacturer or producer of the drug, which individual or company is fictitious or does not exist.

Prohibition of manufacture and sale of certain drugs.

18. From such date as may be fixed by the Provincial Government by notification in the official Gazette in this behalf, no person shall himself or by any other person on his behalf—

(*a*) manufacture for sale, or sell, or stock or exhibit for sale, or distribute—

(i) any drug which is not of standard quality ;

(ii) any misbranded drug ;

(iii) any patent or proprietary medicine, unless there is displayed in the prescribed manner on the label or container thereof either the true formula or list of ingredients contained in it in a manner readily intelligible to members of the medical profession, or the number of the certificate of registration granted, in the manner prescribed by the Central Government, in respect of such medicine by the Central Drugs Laboratory after being correctly informed of the formula of such medicine ;

(iv) any drug which by means of any statement, design or device accompanying it or by any other means, purports or claims to cure or mitigate any such disease or ailment, or to have any such other effect as may be prescribed ;

(v) any drug, in contravention of any of the provisions of this Chapter or any rule made thereunder ;

(*b*) sell, or stock or exhibit for sale, or distribute any drug which has been imported or manufactured in contravention of any of the provisions of this Act or any rule made thereunder ;

(*c*) manufacture for sale, or sell, or stock or exhibit for sale, or distribute any drug, except under, and in accordance with the conditions of, a licence issued for such purpose under this Chapter :

Provided that nothing in this section shall apply to the manufacture, subject to prescribed conditions, of small quantities of any drug for the purpose of examination, test or analysis ;

Provided further that the Provincial Government may, after consultation with the Board, by notification in the official Gazette, permit, subject to any conditions specified in the notification, the manufacture for sale, sale or distribution of any drug or class of drugs not being of standard quality.

Explanation.—The formula or list of ingredients mentioned in sub-clause (*iii*) of clause (*a*) shall be deemed to be true and a sufficient compliance with that sub-clause if, without disclosing a full and detailed recipe of the ingredients, it indicates correctly all the potent or poisonous substances contained therein together with an approximate statement of the composition of the medicine.

Pleas.

19. (1) Save as hereinafter provided in this section, it shall be no defence in a prosecution under this Chapter to prove merely that the accused was ignorant of the nature, substance or quality of the drug in respect of which the offence has been committed or of the circumstances of its manufacture or import, or that a purchaser, having bought only for the purpose of test or analysis, has not been prejudiced by the sale.

(2) For the purposes of section 18 a drug shall not be deemed to be misbranded or to be below standard quality only by reason of the fact that—

(*a*) there has been added thereto some innocuous substance or ingredient because the same is required for the manufacture or preparation of the drug as an article of commerce in a state fit for carriage or consumption, and not to increase the bulk, weight or measure of the drug or to conceal its inferior quality or other defects; or

(*b*) in the process of manufacture, preparation or conveyance some extraneous substance has unavoidably become intermixed with it, provided that this clause shall not apply in relation to any sale or distribution of the drug occurring after the vendor or distributor became aware of such intermixture.

(3) A person, not being the manufacturer of a drug or his agent for the distribution thereof, shall not be liable for a contravention of section 18 if he proves—

(*a*) that he did not know, and could not with reasonable diligence have ascertained, that the drug in any way contravened the provisions of that section, and that the drug while in his possession remained in the same state as when he acquired it; or

(*b*) that he acquired the drug from a person resident in British India under a written warranty in the prescribed form and signed by such person that the drug does not in any way contravene the provisions of section 18, and that the drug while in his possession remained in the same state as when he acquired it:

Provided that a defence under clause (*b*) shall be open to a person only—

(*i*) if he has, within seven days of the service on him of the summons, sent to the Inspector a copy of the warranty with a written notice stating that he intends to rely upon it and giving the name and address of the warrantor, and

(*ii*) if he proves that he has, within the same period, sent written notice of such intention to the said warrantor.

Government Analysts

20. The Provincial Government may, by notification in the official Gazette, appoint such persons as it thinks fit, having the prescribed qualifications, to be Government Analysts for such areas and in respect of such drugs or classes of drugs as may be specified in the notification:

Provided that a servant of the Crown serving under the Central Government or another Provincial Government shall not be so appointed without the previous consent of the Government under which he is serving.

Inspectors.

21. (1) The Provincial Government may, by notification in the Official Gazette, appoint such persons as it thinks fit, having the prescribed qualifications, to be Inspectors for the purposes of this Chapter within such local limits as it may assign to them respectively:

Provided that no person who has any financial interest in the manufacture, import or sale of drugs shall be appointed to be an Inspector under this sub-section.

(2) Every Inspector shall be deemed to be a public servant within the meaning of the Indian Penal Code, and shall be officially subordinate to such authority as the Provincial Government may specify in this behalf.

Powers of Inspectors.

22. Subject to the provisions of section 23 and of any rules made by the Provincial Government in this behalf, an Inspector may, within the local limits for which he is appointed,—

(*a*) inspect any premises wherein any drug is being manufactured and in the case of sera, vaccines and any other drug prescribed in this behalf the plant and process of manufacture and the means employed for standardising and testing the drug;

(*b*) take samples of any drug which is being manufactured, or being sold or stocked or exhibited for sale, or is being distributed;

(*c*) where he has reason to believe that any drug which is being manufactured for sale, or being sold or is stocked or exhibited for sale, or is being distributed, contravenes any of the provisions of section 18, order in writing the person, in

whose possession such drug may be, not to dispose of any stock of such drug for a specified period not exceeding ten days, or, unless the alleged contravention is such that the defect may be removed by the possessor of the drug, seize the stock of such drug :

Provided that the Inspector shall not take any action under this clause unless he has reported the facts to the District Magistrate or the Chief Presidency Magistrate and has been authorised by such Magistrate to take such action ;

(*d*) for any of the aforesaid purposes enter at all reasonable times, with such assistants, if any, as he considers necessary, any premises wherein any drug is being manufactured, or being sold, or is stocked or exhibited for sale, or is kept for distribution;

(*e*) exercise such other powers as may be necessary for carrying out the purposes of this Chapter or any rules made thereunder.

Procedure of Inspectors.

23. (1) Where an Inspector takes any sample of a drug under this Chapter, he shall tender the fair price thereof and may require a written acknowledgment therefor.

(2) Where the price tendered under sub-section (1) is refused, or where the Inspector seizes the stock of any drug under clause (*c*) of section 22, he shall tender a receipt therefor in the prescribed form.

(3) Where an Inspector takes a sample of a drug for the purpose of test or analysis, he shall intimate such purpose in writing in the prescribed form to the person from whom he takes it and, in the presence of such person unless he wilfully absents himself, shall divide the sample into four portions and effectively seal and suitably mark the same and permit such person to add his own seal and mark to all or any of the portions so sealed and marked :

Provided that where the sample is taken from premises whereon the drug is being manufactured, it shall be necessary to divide the sample into three portions only :

Provided further that where the drug is made up in containers of small volume, instead of dividing a sample as aforesaid, the Inspector may, and if the drug be such that it is likely to deteriorate or be otherwise damaged by exposure shall, take three or four, as the case may be, of the said containers after suitably marking the same and, where necessary, sealing them.

(4) The Inspector shall restore one portion of a sample so divided or one container, as the case may be, to the person from whom he takes it, and shall retain the remainder and dispose of the same as follows :—

(*i*) one portion or container he shall forthwith send to the Government Analyst for test or analysis ;

(*ii*) the second he shall produce to the Court before which proceedings, if any, are instituted in respect of the drug ; and

(*iii*) the third, where taken, he shall send to the warrantor, if any, named under the proviso to sub-section (3) of section 19.

(5) Where an Inspector takes any action under clause (*c*) of section 22,—

(*a*) he shall use all despatch in ascertaining whether or not the drug contravenes any of the provisions of section 18 and, if it is ascertained that the drug does not so contravene, forthwith revoke the order passed under the said clause or, as the case may be, take such action as may be necessary for the return of the stock seized ;

(*b*) if he seizes the stock of the drug, he shall as soon as may be inform a Magistrate and take his orders as to the custody thereof ;

(*c*) without prejudice to the institution of any prosecution, if the alleged contravention be such that the defect may be remedied by the possessor of the drug, he shall, on being satisfied that the defect has been so remedied, forthwith revoke his order under the said clause.

Persons bound to disclose place where drugs are manufactured or kept.

24. Every person for the time being in charge of any premises whereon any drug is being manufactured or is kept for sale or distribution shall, on being required by an Inspector so to do, be legally bound to disclose to the Inspector the place where the drug is being manufactured or is kept, as the case may be.

Reports of Government Analysts.

25. (1) The Government Analyst to whom a sample of any drug has been submitted for test or analysis under sub-section (4) of section 23, shall deliver to the Inspector submitting it a signed report in triplicate in the prescribed form.

(2) The Inspector on receipt thereof shall deliver one copy of the report to the person from whom the sample was taken and another copy to the warrantor, if any, named under the proviso to sub-section (3) of section 19, and shall retain the third copy for use in any prosecution in respect of the sample.

(3) Any document purporting to be a report signed by a Government Analyst under this Chapter shall be evidence of the facts stated therein, and such evidence shall be conclusive unless the person from whom the sample was taken or the said warrantor has, within twenty-eight days of the receipt of a copy of the report, notified in writing the Inspector or the Court before which any proceedings in respect of the sample are pending that he intends to adduce evidence in controversion of the report.

(4) Unless the sample has already been tested or analysed in the Central Drugs Laboratory, where a person has under sub-section (3) notified his intention of adducing evidence in controversion of a Government Analyst's report, the Court may, of its own motion or in its discretion at the request either of the complainant or the accused, cause the sample of the drug produced before the Magistrate under sub-section (4) of section 23 to be sent for test or analysis to the said Laboratory, which shall make the test or analysis and report in writing signed by, or under the authority of, the Director of the Central Drugs Laboratory the result thereof, and such report shall be conclusive evidence of the facts stated therein.

(5) The cost of a test or analysis made by the Central Drugs Laboratory under sub-section (4) shall be paid by the complainant or accused as the Court shall direct.

Purchaser of drug enabled to obtain test or analysis.

26. Any person shall, on application in the prescribed manner and on payment of the prescribed fee, be entitled to submit for test or analysis to a Government Analyst any drug purchased by him and to receive a report of such test or analysis signed by the Government Analyst.

Penalty for manufacture, sale, etc., of drugs in contravention of this Chapter.

27. Whoever himself or by any other person on his behalf manufactures for sale, sells, stocks or exhibits for sale, or distributes any drug in contravention of any of the provisions of this Chapter or any rule made thereunder shall be punishable with imprisonment which may extend to one year, or with fine which may extend to five hundred rupees, or with both.

Penalties for giving false warranty or misuse of warranty

28. (1) Whoever, in respect of any drug sold by him whether as principal or agent, gives to the purchaser a false warranty that the drug does not in any way contravene the provisions of section 18 shall, unless he proves that when he gave the warranty he had good reason to believe the same to be true, be punishable with imprisonment which may extend to one year, or with fine which may extend to five hundred rupees, or with both.

(2) Whoever applies or permits to be applied to any drug sold, or stocked or exhibited for sale, by him, whether on the container or label or in any other manner, a warranty given in respect of any other drug, shall be punishable with

imprisonment which may extend to one year, or with fine which may extend to five hundred rupees, or with both.

Penalty for use of Government Analyst's report for advertising.

29. Whoever uses any report of a test or analysis made by the Central Drugs Laboratory or by a Government Analyst, or any extract from such report, for the purpose of advertising any drug, shall be punishable with fine which may extend to five hundred rupees.

Penalty for subsequent offences.

30. Whoever having been convicted of any offence under section 27 or section 28 or section 29, is again convicted of an offence under the same section shall be punishable with imprisonment which may extend to two years, or with fine which may extend to one thousand rupees, or with both.

Confiscation.

31. Where any person has been convicted under this Chapter for contravening any such provision of this Chapter or any rule made thereunder as may be specified by rule made in this behalf, the stock of the drug in respect of which the contravention has been made shall be liable to confiscation.

Cognizance of offences.

32. (1) No prosecution under this Chapter shall be instituted except by an Inspector.

(2) No Court inferior to that of a Presidency Magistrate or of a Magistrate of the first class shall try an offence punishable under this Chapter.

(3) Nothing contained in this Chapter shall be deemed to prevent any person from being prosecuted under any other law for any act or omission which constitutes an offence against this Chapter.

Power of Provincial Government to make rules.

33. (1) The Provincial Government may, after consultation with the Board and after previous publication by notification in the Official Gazette, make rules for the purpose of giving effect to the provisions of this Chapter.

(2) Without prejudice to the generality of the foregoing power, such rules may—

(*a*) provide for the establishment of laboratories for testing and analysing drugs;

(*b*) prescribe the qualifications and duties of Government Analysts and the qualifications of Inspectors;

(*c*) prescribe the methods of test or analysis to be employed in determining whether a drug is of standard quality;

(*d*) prescribe, in respect of biological and organometallic compounds, the units or methods of standardisation;

(*e*) prescribe the forms of licences for the manufacture for sale, for the sale and for the distribution of drugs or any specified drug or class of drugs, the form of application for such licences, the conditions subject to which such licences may be issued, the authority empowered to issue the same and the fees payable therefor;

(*f*) specify the diseases or ailments which a drug may not purport or claim to cure or mitigate and such other effects which a drug may not purport or claim to have;

(*g*) prescribe the conditions subject to which small quantities of drugs may be manufactured for the purpose of examination, test or analysis;

(*h*) require the date of manufacture and the date of expiry of potency to be clearly and truly stated on the label or container of any specified drug or class of drugs, and prohibit the sale, stocking or exhibition for sale, or distribution of the said drug or class of drugs after the expiry of a specified period from the date of manufacture or after the expiry of the date of potency;

(*i*) prescribe the conditions to be observed in the packing in bottles, packages and other containers of drugs, and prohibit the sale, stocking or exhibition for sale, or distribution of drugs packed in contravention of such conditions;

(*j*) regulate the mode of labelling packed drugs, and prescribe the matters which shall or shall not be included in such labels;

(*k*) prescribe the maximum proportion of any poisonous substance which may be added to or contained in any drug, prohibit the manufacture, sale or stocking or exhibition for sale, or distribution of any drug in which that proportion is exceeded and specify substances which shall be deemed to be poisonous for the purposes of this Chapter and the rules made thereunder;

(*l*) require that the accepted scientific name of any specified drug shall be displayed in the prescribed manner on the label or wrapper of any patent or proprietary medicine containing such drug;

(*m*) prescribe the form of warranty referred to in sub-section (1) of section 19;

(*n*) regulate the powers and duties of Inspectors;

(*o*) prescribe the forms of report to be given by Government Analysts, and the manner of application for test or analysis under section 26 and the fees payable therefor;

(*p*) specify the offences against this Chapter or any rule made thereunder in relation to which the stock of the drug shall be liable to confiscation under section 31;

(*q*) provide for the exemption, conditionally or otherwise, from all or any of the provisions of this Chapter or the rules made thereunder of any specified drug or class of drugs.

Protection to persons acting under this Chapter.

34. No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done under this Chapter.

THE SCHEDULE.

(*See* sections 8 and 16.)

Standards to be complied with by imported drugs and by drugs manufactured for sale, sold, stocked or exhibited for sale, or distributed.

Class of drug.	Standard to be complied with.
1. Patent or proprietary medicines ..	The formula or list of ingredients displayed in the prescribed manner on the label or container, or the formula disclosed to the Central Drugs Laboratory, as the case may be.
2. Substances commonly known as vaccines, sera, toxins, toxoids, antitoxins, and antigens and biological products of such nature.	The standards maintained at the National Institute for Medical Research, London, and such further standards of strength quality and purity as may be prescribed
3. Vitamins, hormones and analogous products.	The standards maintained at the National Institute for Medical Research, London, and such further standards of strength quality and purity as may be prescribed.
4 Other drugs ..	The standards of identity, purity and strength specified in the latest edition of the British Pharmacopoeia or the British Pharmaceutical Codex or any other prescribed pharmacopoeia, or adopted by the Permanent Commission on Biological Standardisation of the League of Nations.

THE INDIAN MINES (AMENDMENT) ACT, 1940.

ACT No. XXIV OF 1940.

[*10th April, 1940.*

An Act further to amend the Indian Mines Act, 1923.

WHEREAS it is expedient further to amend the Indian Mines Act, 1923, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN MINES (AMENDMENT) ACT, 1940.

Amendment of section 10, Act IV of 1923.

2. In clause (*a*) of sub-section (1) of section 10 of the Indian Mines Act, 1923 (hereinafter referred to as the said Act), for the words "the Government" the words "the Crown" shall be substituted.

Amendment of section 19, Act IV of 1923.

3. In sub-section (1-A) of section 19 of the said Act—

(*a*) the brackets and letter "(*a*)" at the beginning, and the word "or" at the end of clause (*a*) shall be omitted; and

(*b*) clause (*b*) shall be omitted.

Amendment of section 29, Act IV of 1923.

4. In section 29 of the said Act, after clause (*k*) the following clause shall be inserted, namely:—

"(*kk*) for prohibiting the employment in a mine either as manager or in any other specified capacity of any persons except persons paid by the owner of the mine and directly answerable to the owner or manager of the mine;".

THE PETROLEUM (AMENDMENT) ACT, 1940.

ACT No. XXV OF 1940.

[*10th April, 1940.*

An Act further to amend the Petroleum Act, 1934.

WHEREAS it is expedient further to amend the Petroleum Act, 1934, for the purposes hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE PETROLEUM (AMENDMENT) ACT, 1940.

Amendment of section 9, Act XXX of 1934

2. In section 9 of the Petroleum Act, 1934 (hereinafter referred to as the said Act),—

(*a*) to sub-section (1) the following proviso shall be added, namely:—

"Provided further that the total quantity of dangerous petroleum which may be stored without a licence under clause (*b*) shall not exceed twenty gallons, notwithstanding that such owner may possess other motor conveyances or engines.";

(*b*) in sub-section (2), after the word, brackets and letter "clause (*b*)" the words, brackets and figure "of sub-section (1)" shall be inserted.

Amendment of section 28, Act XXX of 1934.

3. In section 28 of the said Act,—

(*a*) in sub-section (1), after the word "shall" the following shall be inserted, namely:—

"unless section 8 of the Coroners Act, 1871, is applicable to the circumstances";

(*b*) in sub-section (3), for the words "this section" the word, brackets and figure "sub-section (2)" shall be substituted;

(c) in sub-section (4), after the words "in pursuance of this section" the words, brackets and figure "and of any inquiry held by a coroner in a case to which sub-section (1) refers" and after the words "the Central Government" the words "the Chief Inspector of Explosives in India" shall be inserted.

THE MOTOR VEHICLES (AMENDMENT) ACT, 1940.

ACT No. XXVI OF 1940.

[10th April, 1940.

An Act further to amend the Motor Vehicles Act, 1939.

WHEREAS it is expedient further to amend the Motor Vehicles Act, 1939, for the purpose hereinafter appearing; It is hereby enacted as follows:—

Short title.

1. This Act may be called THE MOTOR VEHICLES (AMENDMENT) ACT, 1940.

Amendment of section 48, Act IV of 1939.

2. In section 48 of the Motor Vehicles Act, 1939,—

(a) for clauses (a) and (b) the following clause shall be substituted, namely:—

"(a) limit the number of stage carriages or stage carriages of any specified type for which stage carriage permits may be granted in the region or in any specified area or on any specified route within the region;";

(b) clauses (c), (d) and (e) shall be re-lettered as clauses (b), (c) and (d), respectively;

(c) in clause (d) as so re-lettered, after sub-clause (ii) the following sub-clause shall be inserted, namely:—

"(iia) that the stage carriage or stage carriages shall be used only on specified routes or in a specified area;".

THE AGRICULTURAL PRODUCE CESS ACT, 1940.

ACT No. XXVII OF 1940.

[15th April, 1940.

An Act to make better financial provision for the Imperial Council of Agricultural Research.

WHEREAS it is expedient to make better financial provision for the carrying out by the Imperial Council of Agricultural Research of the objects for which it is established as set forth in the Memorandum of Association of that body, and for this purpose to impose on certain articles a cess by way of customs duty on export, the proceeds of which shall be paid to the said Council;

It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE AGRICULTURAL PRODUCE CESS ACT, 1940.

(2) It extends to the whole of British India.

Definition.

2. In this Act, unless there is anything repugnant in the subject or context,—

(a) "Collector" means a Customs-Collector as defined in clause (c) of section 3 of the Sea Customs Act, 1878, or a Collector of land Customs as defined in clause (c) of section 2 of the Land Customs Act, 1924, as the case may be, and

(b) "Council" means the Imperial Council of Agricultural Research.

Imposition of cess.

3. (1) A customs duty at the rate of one-half of one per cent. *ad valorem* shall be levied on all articles included in the Schedule which are exported from British India:

Provided that the said duty shall not be levied on articles proved to the satisfaction of the Collector not to have been produced in India.

(2) The Central Government may, by notification in the official Gazette, fix for the purposes of levying the said duty tariff values of any articles included in the Schedule, and may alter any tariff values for the time being in force.

Power to exclude articles from schedule

4. The Central Government may, after previous consultation with the Council, by notification in the official Gazette, direct that any article specified in the Schedule shall cease to be subject to the duty imposed by section 3, and thereupon, so long as the notification remains in force, that article shall be deemed not to be included in the Schedule.

Refund of, and exemption from, cess.

5. The Central Board of Revenue may make rules providing, on such conditions as may be specified in the rules, for—

(a) the refund of duty levied where articles are exported by land and subsequently imported into India, and

(b) the export by land, without payment of the duty, of articles which are subsequently to be imported into India.

Payment of cess to Council and expenditure of cess by Council.

6. (1) The proceeds of the duty levied under this Act reduced by the cost of collection as determined by the Central Government shall be paid to the Council.

(2) The amount so due shall be paid by the Central Government to the Council at intervals of not more than six months.

(3) The expenditure of the money so paid to the Council shall be subject to such limitations as may be imposed by rules made in this behalf by the Central Government.

Standing Finance Committee.

7. (1) The Council shall constitute a Standing Finance Committee, of which one member shall be chosen from among the representatives of the Central Legislature on the governing body of the Council, and one member shall be an officer appointed by the Central Government.

(2) Subject to the provisions of sub-section (1), the constitution, functions and procedure of the Standing Finance Committee shall be regulated in such manner as the Council may with the previous approval of the Central Government determine.

Reserve fund.

8. The Council shall in accordance with the rules made in this behalf by the Central Government create and maintain a reserve fund.

Power of Central Government to make rules.

9. (1) The Central Government may, after consultation with the Council, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, the Central Government may make rules regulating the expenditure of the money paid to the Council under section 6 and providing for the creation, maintenance and management of the reserve fund referred to in section 8.

(3) All rules made under this Act shall be laid before both Chambers of the Central Legislature as soon as may be after they are made.

THE SCHEDULE.

(See section 3.)

1. Bones.
2. Bristles
3. Butter.

4. Cereals, other than Rice and Wheat.
5. Drugs.
6. Fibre for brushes.
7. Fish.
8. Fruits.
9. Ghee.
10. Hides, raw.
11. Manures.
12 Oilcakes.
13. Pulses.
14. Seeds.
15. Skins, raw.
16. Spices.
17. Tobacco, unmanufactured.
18. Vegetables.
19. Wheat.
20. Wheat Flour.
21. Wool, raw.

THE INDIAN WORKS OF DEFENCE (AMENDMENT) ACT, 1940.

ACT No. XXVIII OF 1940.

[*27th November, 1940.*

An Act further to amend the Indian Works of Defence Act, 1903.

WHEREAS it is expedient further to amend the Indian Works of Defence Act, 1903, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN WORKS OF DEFENCE (AMENDMENT) ACT, 1940.

Amendment of section 7, Act VII of 1903.

2. In section 7 of the Indian Works of Defence Act, 1903,—

(*a*) in sub-clause (*i*) of clause (*b*), for the words preceding the first proviso the following words shall be substituted, namely:—

"no building, wall, bank or other construction of permanent materials above the ground shall be maintained otherwise than with the written approval of the General Officer Commanding the District and on such conditions as he may prescribe, and no such building, wall, bank or other construction shall be erected:";

(*b*) in the proviso to clause (*c*), after the word "prescribe" the following words shall be inserted, namely:—

"a building or other construction on the surface may be maintained and."

THE INDIAN NAVY (DISCIPLINE) AMENDMENT ACT, 1940.

ACT No. XXIX OF 1940.

[*27th November, 1940.*

An Act further to amend the Indian Navy (Discipline) Act, 1934, for certain purposes.

WHEREAS it is expedient further to amend the Indian Navy (Discipline) Act, 1934, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN NAVY (DISCIPLINE) AMENDMENT ACT, 1940.

Amendment of First Schedule to Act XXXIV of 1934.

2. In the Naval Discipline Act as set out in the First Schedule to the Indian Navy (Discipline) Act, 1934,—

(*a*) to the first paragraph of section 45 the following shall be added, namely:—

" or, except in the case of an offence punishable under the said section 302 or 377, with such other punishment as is hereinafter mentioned " ;

and

(*b*) in section 55, for the words " corporal punishment shall be deemed equal in degree to imprisonment, and" the following shall be substituted, namely:—

" transportation shall be deemed equal in degree to penal servitude, and corporal punishment shall be deemed equal in degree to imprisonment and."

THE INDIAN NAVY (DISCIPLINE) SECOND AMENDMENT ACT, 1940.

ACT No. XXX OF 1940.

[*27th November, 1940.*

An Act further to amend the Indian Navy (Discipline) Act, 1934.

WHEREAS it is expedient further to amend the Indian Navy (Discipline) Act, 1934, for the purpose hereinafter appearing ;

It is hereby enacted as follows :—

Short title.

1. This Act may be called THE INDIAN NAVY (DISCIPLINE) SECOND AMENDMENT ACT, 1940.

Amendment of First Schedule Act XXXIV of 1934.

2. In sub-section (1) of section 90-C of the Naval Discipline Act as set forth in the First Schedule to the Indian Navy (Discipline) Act, 1934, after the words " self-governing Dominion", wherever they occur, the words " or Burma " shall be inserted.

THE CANTONMENTS (AMENDMENT) ACT, 1940.

ACT No. XXXI OF 1940.

[*27th November, 1940.*

An Act further to amend the Cantonments Act, 1924.

WHEREAS it is expedient further to amend the Cantonments Act, 1924, for the purposes hereinafter appearing ;

It is hereby enacted as follows :—

Short title.

1. This Act may be called THE CANTONMENTS (AMENDMENT) ACT, 1940.

Amendment of section 27, Act II of 1924.

2. For clause (*i*) of sub-section (2) of section 27 of the Cantonments Act, 1924 (hereinafter referred to as the said Act), the following clause shall be substituted, namely :—

" (*i*) is not either a British subject or a subject of an Indian State, or."

Amendment of section 32, Act II of 1924.

3. In section 32 of the said Act, after the words, " meeting of the Board" the words " or of any committee of the Board " shall be inserted.

Amendment of section 34, Act II of 1924.

4. In section 34 of the said Act,—

(*a*) in clause (*a*) of sub-section (1), for the words, brackets and figures " or in sub-section (2) of section 28 " the words and figures " or in section 28 " shall be substituted ;

(*b*) after sub-section (2) the following sub-section shall be inserted, namely:—

"(2-A) The Central Government may, on receipt of a report from the Officer Commanding the station, through the Officer Commanding-in-Chief, the Command, remove from a Board any military officer nominated a member of the Board who is, in the opinion of the Officer Commanding the station, unable to discharge his duties as member of the Board and has failed to resign his office."

Amendment of section 35, Act II of 1924.

5. In sub-section (1) of section 35 of the said Act, after the word, brackets and figure "sub-section (1)" the words, brackets, figure and letter "or under sub-section (2-A)" shall be inserted.

Amendment of section 186, Act II of 1924.

6. In clause (*b*) of section 186 of the said Act, for the words "in any specified area or areas" the words "in the cantonment or any part thereof" shall be substituted.

Amendment of section 188, Act II of 1924.

7. In section 188 of the said Act, for the word "building" the word "structure" shall be substituted.

Amendment of Schedule V, Act II of 1924.

8. In Schedule V to the said Act, the entry relating to section 137 shall be omitted.

THE REPEALING AND AMENDING ACT, 1940.

ACT No. XXXII OF 1940.

[*27th November, 1940*.

An Act to repeal certain enactments and to amend certain other enactments.

WHEREAS it is expedient that the enactments specified in the First Schedule, which are spent or have otherwise become unnecessary, or have ceased to be in force otherwise than by expressed specific repeal, should be expressly and specifically repealed;

AND WHEREAS it is expedient that certain amendments should be made in the enactments specified in the Second Schedule;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE REPEALING AND AMENDING ACT, 1940.

Repeal of certain enactments.

2. The enactments specified in the First Schedule are hereby repealed to the extent mentioned in the fourth column thereof.

Amendment of certain enactments.

3. The enactments specified in the Second Schedule are hereby amended to the extent and in the manner mentioned in the fourth column thereof.

4. The repeal by this Act of any enactment shall not affect any Act or Regulation in which such enactment has been applied, incorporated or referred to;

and this Act shall not affect the validity, invalidity, effect or consequences of anything already done or suffered or any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand or any indemnity already granted, or the proof of any past act or thing;

nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognised or derived by, in or from any enactment hereby repealed;

nor shall the repeal by this Act of any enactment revive or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or in force.

THE FIRST SCHEDULE.

REPEALS.

(See section 2.)

Year. 1	No. 2	Short title. 3	Extent of repeal. 4
		Acts of the Governor-General in Council.	
1836	XX	The Batwaras Act, 1836	The whole in any areas where not already specifically repealed.
1837	XXVII	The Bombay Salt Works Act, 1837.	The whole in any areas where not already specifically repealed.
1838	XI	The Bengal Ameens Act, 1838	The whole in any areas where not already specifically repealed.
1838	XVIII	The Bombay Sureties Act, 1838	The whole.
1848	XVIII	The Nawab of Surat Act, 1848	The whole in any areas where not already specifically repealed.
1858	XXXVII.	The Nawab of Carnatic Act, 1858.	The whole.
1859	XIV	The Summary Dispossession Act, 1859.	The whole in any areas where not already specifically repealed.
1868	XIII	The King of Oudh's Act, 1868	The whole.
1873	XVII	The Nawab Nazim's Debts Act, 1873.	The whole.
1895	XX	*Ex*-King Thebaw's Act, 1895	The whole.
		Acts of the Indian Legislature.	
1931	I	The Punjab Criminal Procedure Amendment (Supplementary) Act, 1931.	The whole.
1931	XIV	The Salt (Additional Import Duty) Act, 1931.	The whole.
1933	XXIV	The Indian Tea Control Act, 1933.	The whole.
1933	XVII	The Indian Wireless Telegraphy Act, 1933.	Section 9, and in section 10 (2) the word "and" at the end of clause (*o*) and the whole of clause (*n*).
1936	II	The Salt Additional Import Duty (Extending) Act, 1936.	The whole.
1936	VI	The Cochin Port Act, 1936	The whole.
1936	VII	The Indian Aircraft (Amendment) Act, 1936.	The whole.
1936	VIII	The Factories (Amendment) Act, 1936.	The whole.
1936	IX	The Indian Lac Cess (Amendment) Act, 1936.	The whole.
1936	X	The Indian Tariff (Amendment) Act, 1936.	The whole.
1936	XI	The Indian Mines (Amendment) Act, 1936.	The whole.
1936	XII	The Indian Tariff (Second Amendment) Act, 1936.	The whole.
1936	XIII	The Indian Tea Cess (Amendment) Act, 1936.	The whole.
1936	XV	The Indian Rubber Control (Amendment) Act, 1936.	The whole.
1936	XVII	The Indian Tea Control (Amendment) Act, 1936.	The whole.
1936	XIX	The General Clauses (Amendment) Act, 1936.	The whole.
1936	XX	The Chittagong Port (Amendment) Act, 1936.	The whole.
1936	XXI	The Code of Civil Procedure (Amendment) Act, 1936.	The whole.
1936	XXIV	The Cantonments (Amendment) Act, 1936.	The whole.

Year. 1	No. 2	Short title. 3	Extent of repeal. 4
		Act of the Governor-General.	
1936	..	The Indian Finance Act, 1936 ..	In the long title and preamble, the words and figures "to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to fix maximum rates of postage under the Indian Post Office Act, 1898, and." Sections 2 and 3 and Schedule I.
		Act of the Governor of Bombay in Council.	
1867	VI ..	The Bombay City Sanitary Regulation Act, 1867.	So much of the Act as relates to any matter included in the Federal Legislative List.
		Regulations made by the Governor-General in Council.	
1936	VIII ..	The Andaman and Nicobar Islands Land-tenure (Amendment) Regulation, 1936.	The whole.
1936	IX	The Sind Laws (Amendment) Regulation, 1936.	The whole.
1936	X ..	The Sind Laws (Second Amendment) Regulation, 1936.	The whole.
1936	XI ..	The Orissa Laws (Amendment) Regulation, 1936.	The whole.
193	XV ..	The British Baluchistan Laws (Amendment) Regulation, 1936.	The whole.

THE SECOND SCHEDULE.

AMENDMENTS.

(*See* section 3.)

Year. 1	No. 2	Short title. 3	Amendments. 4
		Acts of the Governor-General in Council.	
1897	X ..	The General Clauses Act, 1897 ..	For clause (27*b*) of section 3 the following clause shall be substituted, namely :— " (27*b*) 'Indian State' shall mean any territory, not being part of British India, which His Majesty recognises as being such a State whether described as a State, an Estate, a Jagir or otherwise;".
1908	XVI ..	Indian Registration Act, 1908 ..	In section 29 (1), for the words and figures "other than a document referred to in section 28, and a copy of a decree or order" the words and figures "not being a document referred to in section 28 or a copy of a decree or order" shall be substituted.
1910	IX ..	The Indian Electricity Act, 1910 ..	In section 52 the word "Indian" shall be omitted.
1913	III ..	The Administrator-General's Act, 1913.	In section 33, for the word "presidency" the word "division" shall be substituted.

Year. 1	No. 2	Short title. 3	Amendments. 4
1913	VII ..	The Indian Companies Act, 1913.	In sub-sections (1) and (3) of section 152 the word "Indian" shall be omitted. In sub-section (6) of section 208-C for the words and figures "Indian Arbitration Act, 1899" the words and figures "Arbitration Act, 1940" shall be substituted.
		Acts of the Indian Legislature.	
1922	VIII ..	The Delhi University Act, 1922 ..	In sub-section (2) of section 46, for the figures "1897" the figures "1925" shall be substituted.
1923	VI ..	The Cantonments (House-Accommodation) Act, 1923.	In sub-section (3) of section 36, for the word "Authority" the word "Board" shall be substituted.
1923	XIV ..	The Indian Cotton Cess Act, 1923.	In clause (1a) of section 4 the words "in agricultural matters" shall be omitted.
1924	II ..	The Cantonments Act, 1924.	In sub-section (5) of section 73, for the words "every transfer on devolution" the words "every transfer or devolution" shall be substituted. In clause (a) of sub-section (2) of section 254, for the words "on any one of them" the words "to any one of them" shall be substituted.
1937	VI ..	The Arbitration (Protocol and Convention) Act, 1937.	In section 3, for the words and figures "Indian Arbitration Act, 1899" the words and figures "Arbitration Act, 1940" shall be substituted.
		Acts of the Central Legislature.	
1937	XVIII ..	The Hindu Women's Rights to Property Act, 1937.	In sub-section (2) of section 1, the words "including British Baluchistan and the Sonthal Parganas but excluding Burma" shall be omitted.
1937	XIX ..	The Arya Marriage Validation Act, 1937.	In sub-section (2) of section 1, the words "including British Baluchistan and the Sonthal Parganas" shall be omitted.
		Regulation made by the Governor-General in Council.	
1913	II ..	The British Baluchistan Laws Regulation, 1913.	In Schedule I, for the item— "1934 | XXXIV | The Indian Tariff Act, 1932. | Section 5 only." the following item shall be substituted, namely :— "1934 | XXXII | The Indian Tariff Act, 1934. | Section 5 only."

<table>
<tr><th>Year.
1</th><th>No.
2</th><th>Short title.
3</th><th>Amendments.
4</th></tr>
<tr><td colspan="4">Regulation made by the Governor-General.</td></tr>
<tr><td>1939</td><td>VI</td><td>The British Baluchistan Criminal and Civil Justice and Laws Extension Regulation, 1939.</td><td>In clause (c) of section 3, for the item—<table><tr><td>"1934</td><td>xxxiv</td><td>The Indian Tariff Act, 1932.</td><td>Section 5 only."</td></tr></table>the following item shall be substituted, namely:—<table><tr><td>"1934</td><td>xxxii</td><td>The Indian Tariff Act, 1934.</td><td>Section 5 only."</td></tr></table></td></tr>
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THE INDIAN REGISTRATION (AMENDMENT) ACT, 1940.

ACT NO. XXXIII OF 1940.

[27th November, 1940.

An Act further to amend the Indian Registration Act, 1908, for certain purposes.

WHEREAS it is expedient further to amend the Indian Registration Act, 1908, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN REGISTRATION (AMENDMENT) ACT, 1940.

Amendment of section 18, Act XVI of 1908.

2. In section 18 of the Indian Registration Act, 1908 (hereinafter referred to as the said Act), after clause (*c*) the following clause shall be inserted, namely:—

"(*cc*) instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of a value less than one hundred rupees, to or in immovable property;".

Amendment of section 28, Act XVI of 1908.

3. In section 28 of the said Act,—

(*a*) for the word, brackets and latter " and (*d*) " the words, brackets, letters and figures " , (*d*) and (*e*) , section 17, sub-section (2), in so far as such document affects immovable property," shall be substituted; and

(*b*) for the word, brackets and letter " and (*c*) " the word, brackets and letters " , (*c*) and (*cc*) " shall be substituted.

THE CODE OF CIVIL PROCEDURE (AMENDMENT) ACT, 1940.

ACT NO. XXXIV OF 1940.

[27th November, 1940.

An Act further to amend the Code of Civil Procedure, 1908.

WHEREAS it is expedient further to amend the Code of Civil Procedure, 1908, for the purposes hereinafter appearing;

It is hereby enacted as follows :—

Short title.

1. This Act may be called THE CODE OF CIVIL PROCEDURE (AMENDMENT) ACT, 1940.

Amendment of section 29, Act V of 1908.

2. (1) In section 29 of the Code of Civil Procedure, 1908 (hereinafter referred to as the said Code),—

(*a*) in the paragraph preceding the proviso—

(*i*) after the word "Summonses" the words "and other processes" shall be inserted ;

(*ii*) for the words "had been" the words "were summonses" shall be substituted ; and

(*b*) in the proviso—

(*i*) after the word "summonses" the words "or processes" shall be inserted;

(*ii*) for the words "by whose Courts a summons is" the words "of the Province in which such summonses or processes are" shall be substituted ;

(*iii*) for the words "Courts of the Province" the words "such Courts" shall be substituted.

(2) The substitution made in the said Code by sub-clause (*iii*) of clause (*b*) of sub-section (1) and the substitution so made by sub-clause (*ii*) of the said clause with the omission of the words "or processes" shall be deemed to have taken effect on the 1st day of April, 1937.

3. In clause (*b*) of sub-section (2) of section 48 of the said Code, for the figures and words "180 of the Second Schedule to the Indian Limitation Act, 1877" the figures and words "183 of the First Schedule to the Indian Limitation Act, 1908" shall be substituted.

THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) ACT, 1940.

ACT No. XXXV OF 1940.

[*27th November, 1940.*

An Act further to amend the Code of Criminal Procedure, 1898.

WHEREAS it is expedient further to amend the Code of Criminal Procedure, 1898, for the purpose hereinafter appearing ;

It is hereby enacted as follows :—

Short title and commencement.

1. (1) This Act may be called THE CODE OF CRIMINAL PROCEDURE (AMENDMENT) ACT, 1940.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.

Amendment of section 503, Act V of 1898.

2. After sub-section (2) of section 503 of the Code of Criminal Procedure, 1898 (hereinafter referred to as the said Act), the following sub-section shall be inserted, namely :—

"(2-A) When the witness resides in British Burma, the commission may be issued to any District Magistrate or Magistrate of the first class within the local limits of whose jurisdiction in British Burma such witness resides."

Insertion of new section 508-A in Act V of 1898

3. After section 508 of the said Act the following section shall be inserted, namely :—

Application of this Chapter to commissions issued in British Burma.

"508-A. The provisions of sub-section (3) of section 503, sub-sections (1) and (1-A) of section 504 and so much of sections 505 and 507 as relates to the execution of a commission and its return by the Magistrate or officer to whom the commission is directed shall apply in respect of commis-

sions issued by a Magistrate or Court in British Burma under the law in force in British Burma relating to commissions for the examination of witnesses, as they apply to commissions issued under section 503 or section 506."

THE INDIAN COMPANIES (AMENDMENT) ACT, 1940.

ACT No. XXXVI OF 1940.

[27th November, 1940.

An Act further to amend the Indian Companies Act, 1913.

WHEREAS it is expedient further to amend the Indian Companies Act, 1913, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title and commencement.

1. (1) This Act may be called THE INDIAN COMPANIES (AMENDMENT) ACT, 1940.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

Insertion of new section 244-B in Act VII of 1913.

2. After section 244-A of the Indian Companies Act, 1913, the following section shall be inserted, namely:—

Unclaimed dividends and undistributed assets to be paid to Companies Liquidation Account.

"244-B. (1) Where any company is being wound up, if the liquidator has in his hands or under his control any money of the company representing unclaimed dividends payable to any creditor or undistributed assets refundable to any contributory which have remained unclaimed or undistributed for six months after the date on which they became payable or refundable, the liquidator shall forthwith pay the said money into the Reserve Bank of India to the credit of the Central Government in an account to be called the Companies Liquidation Account, and the liquidator shall, on the dissolution of the company, similarly pay into the said account any money representing unclaimed dividends or undistributed assets in his hands at the date of dissolution.

(2) The liquidator shall, when making any payment referred to in sub-section (1), furnish to such officer as the Central Government may appoint in this behalf a statement in the prescribed form setting forth in respect of all sums included in such payment the nature of the sums, the names and last known addresses of the persons entitled to participate therein, the amount to which each is entitled and the nature of his claim thereto, and such other particulars as may be prescribed.

(3) The receipt of the Reserve Bank of India for any money paid to it under sub-section (1) shall be an effectual discharge of the liquidator in respect thereof.

(4) Where the company is being wound up by the Court, the liquidator shall make the payments referred to in sub-section (1) by transfer from the special banking account referred to in sub-section (3) of section 244-A, and where the company is wound up voluntarily, or subject to the supervision of the Court, the liquidator shall, when filing a statement in pursuance of sub-section (1) of section 244, indicate the sum of money which is payable to the Reserve Bank of India under sub-section (1) which he has had in his hands or under his control during the six months preceding the date to which the said statement is brought down, and shall, within fourteen days of the date of filing the said statement, pay that sum into the Companies Liquidation Account.

(5) Any person claiming to be entitled to any money paid into the Companies Liquidation Account in pursuance of this section may apply to the Court for an order for payment thereof, and the Court, if satisfied that the person claiming is entitled, may make an order for the payment to that person of the sum due:

Provided that before making such order the Court shall cause a notice to be served on such officer as the Central Government may appoint in this behalf. calling on the officer to show cause within one month from the date of the service of the notice why the order should not be made.

(6) Any money paid into the Companies Liquidation Account in pursuance of this section, which remains unclaimed thereafter for a period of fifteen years, shall be transferred to the general revenue account of the Central Government; but any claim preferred under sub-section (5) to any money so transferred shall be allowable as if such transfer had not been made, the order for payment on such claim being treated as an order for refund of revenue.

(7) Any liquidator retaining any money which should have been paid by him into the Companies Liquidation Account under this section shall pay interest on the amount retained at the rate of twenty per cent. per annum and shall also be liable to pay any expenses occasioned by reason of his default, and, where the winding up is by or under the supervision of the Court, he shall also be liable to disallowance of all or such part of his remuneration as the Court may think just and to be removed from his office by the Court.

(8) Nothing in this section shall apply in relation to companies with objects confined to a single province which are not trading corporations."

THE WAR DONATIONS AND INVESTMENTS (COMPANIES) ACT, 1940.

ACT No. XXXVII OF 1940.

[27th November, 1940.

An Act to enable companies in British India to make donations to public funds formed, and to make investments in Government loans floated, for the purpose of assisting the prosecution of the present war.

WHEREAS it is expedient to enable companies in British India to make donations to public funds formed, and to make investments in Government loans floated, for the purpose of assisting the prosecution of the present war;

AND WHEREAS it is also expedient to remove doubts as to the legality of such donations and investments where already made;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE WAR DONATIONS AND INVESTMENTS (COMPANIES) ACT, 1940.

Interpretation.

2. In this Act "Government loan" includes a loan floated by the Government of the United Kingdom.

Power of companies to make donations and investments.

3. Any company formed and registered under the Indian Companies Act, 1913, or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act or Acts repealed thereby may, notwithstanding anything contained in the Indian Companies Act, 1913, and notwithstanding that the memorandum of association or the articles of association of the company do not enable it so to do, by special resolution authorise the making of a donation from the company's assets to a public fund formed, or the making of an investment of the company's assets in a Government loan floated, for the purpose of assisting the prosecution of the present war.

Validation of donations and investments already made.

4. Any donation to a public fund formed, and any investment in a Government loan floated, for the purpose of assisting the prosecution of the present war made by any company to which this Act applies between the 3rd day of September, 1939, and the commencement of this Act shall be as valid in all respects

as if it had been made in accordance with the provisions of section 3, and after the commencement of this Act.

Decision of doubts.

5. If any question arises whether for the purposes of this Act a loan is a Government loan floated for the purpose of assisting the prosecution of the present war or whether a fund is a public fund formed for the purpose of assisting the prosecution of the present war, the question shall be decided by the Central Government whose decision shall be final.

THE RESERVE BANK OF INDIA (THIRD AMENDMENT) ACT, 1940.

ACT No. XXXVIII OF 1940.

[27th November, 1940.

An Act further to amend the Reserve Bank of India Act, 1934.

WHEREAS it is expedient further to amend the Reserve Bank of India Act, 1934, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE RESERVE BANK OF INDIA (THIRD AMENDMENT) ACT, 1940.

Amendment of section 42, Act II of 1934.

2. After sub-section (3) of section 42 of the Reserve Bank of India Act, 1934, the following sub-section shall be inserted, namely:—

"(3-A) When under the provisions of sub-section (3) penal interest at the increased rate of five per cent. above the bank rate has become payable by a scheduled bank, if thereafter on the day fixed for the next return the balance held at the Bank is still below the prescribed minimum as disclosed by this return,—

(*a*) every director and any managing agent, manager or secretary of the scheduled bank, who is knowingly and wilfully a party to the default, shall be punishable with fine which may extend to five hundred rupees and with a further fine which may extend to five hundred rupees for each subsequent day on which the default continues, and

(*b*) the Bank may prohibit the scheduled bank from receiving after the said day any fresh deposit,

and, if default is made by the scheduled bank in complying with the prohibition referred to in clause (*b*), every director and officer of the scheduled bank who is knowingly and wilfully a party to such default or who through negligence or otherwise contributes to such default shall in respect of each such default be punishable with fine which may extend to five hundred rupees and with a further fine which may extend to five hundred rupees for each day after the first on which a deposit received in contravention of such prohibition is retained by the scheduled bank.

Explanation.—In this sub-section 'officer' includes a managing agent, manager, secretary, branch manager, and branch secretary."

THE MOTOR SPIRIT (DUTIES) AMENDMENT ACT, 1940.

ACT No. XXXIX OF 1940.

[27th November, 1940.

An Act further to amend the Motor Spirit (Duties) Act, 1917.

WHEREAS it is expedient further to amend the Motor Spirit (Duties) Act, 1917, for the purpose hereinafter appearing;

It is hereby enacted as follows :—

Short title.

1. This Act may be called THE MOTOR SPIRIT (DUTIES) AMENDMENT ACT, 1940.

Amendment of section 2, Act II of 1917.

2. In section 2 of the Motor Spirit (Duties) Act, 1917, for the definition of motor spirit the following shall be substituted, namely :—

"'Motor spirit' means—

(*a*) any inflammable hydrocarbon (including any mixture of hydrocarbons or any liquid containing hydrocarbons) which is capable of being used for providing reasonably efficient motive power for any form of motor vehicle, and

(*b*) power alcohol, that is ethyl alcohol of any grade (including such alcohol when denatured or otherwise treated) which, either by itself or in admixture with any such hydrocarbon, is capable of being used as aforesaid."

THE INDIAN INCOME-TAX (AMENDMENT) ACT, 1940.

ACT NO. XL OF 1940.

[*3rd December*, 1940.

An Act further to amend the Indian Income-tax Act, 1922, and to make certain transitory provisions with respect to the operation of that Act on the coming into force of Part II of the Indian Income-tax (Amendment) Act, 1939.

WHEREAS it is expedient further to amend the Indian Income-tax Act, 1922, for the purposes hereinafter appearing, and to make certain transitory provisions with respect to the operation of that Act on the coming into force of Part II of the Indian Income-tax (Amendment) Act, 1939;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN INCOME-TAX (AMENDMENT) ACT, 1940.

Amendment of section 2, Act XI of 1922.

2. For clause (6) of section 2 of the Indian Income-tax Act, 1922 (hereinafter referred to as the said Act), the following clause shall be substituted, namely:—

'(6) "company" means a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, or of an Act of the Legislature of a British possession or of a law of an Indian State, and includes any foreign association, whether incorporated or not, which the Central Board of Revenue may, by general or special order, declare to be a company for the purposes of this Act;'.

Amendment of section 5, Act XI of 1922.

3. (1) In section 5 of the said Act,—

(*a*) in sub-section (3), the words "for any area" shall be omitted;

(*b*) in sub-sections (4) and (5), for the words "and of such incomes or classes of income and" the words "or of such incomes or classes of income or" shall be substituted;

(*c*) in sub-section (4), for the words "and, where two or more Appellate Assistant Commissioners have been appointed for the same area" the following words shall be substituted, namely:—

" and, where such directions have assigned to two or more Appellate Assistant Commissioners of Income-tax, the same persons or classes of persons or the same incomes or classes of income or the same area";

(*d*) in sub-section (5), for the words "and, where two or more Inspecting Assistant Commissioners of Income-tax or Income-tax Officers have been appointed for the same area" the following words shall be substituted, namely:—

"and, where such directions have assigned to two or more Inspecting Assistant Commissioners of Income-tax or Income-tax Officers, the same persons or classes of persons or the same incomes or classes of income or the same area";

(*e*) in sub-section (6), for the words "and for such area" the words "or such area" shall be substituted, the words "within the specified area" shall be omitted, and after the words "specified classes of persons or classes of income" the words "or area" shall be inserted;

(*f*) after sub-section (7) the following sub-section shall be inserted, namely:—

"(7-A) The Commissioner of Income-tax may transfer any case from one Income-tax Officer subordinate to him to another, and the Central Board of Revenue may transfer any case from any one Income-tax Officer to another. Such transfer may be made at any stage of the proceedings, and shall not render necessary the re-issue of any notice already issued by the Income-tax Officer from whom the case is transferred."

(2) The amendments made by clauses (*a*), (*b*), (*c*); (*d*) and (*e*) of sub-section (1) shall be deemed to have taken effect on the 1st day of April, 1939.

Insertion of headings after section 5, and amendment of section 5-A of Act XI of 1922.

4. After section 5 of the said Act the following headings shall be inserted, namely:—

"CHAPTER II-A.

APPELLATE TRIBUNAL."

and in sub-section (8) of section 5-A for the word "place" the word "places" shall be substituted

Amendment of section 9, Act XI of 1922.

5. In sub-section (1) of section 9 of the said Act, in clause (*vii*), for the words "the net annual value after deducting the foregoing allowances", in both places where they occur, the words "the annual value" shall be substituted.

Amendment of section 18, Act XI of 1922

6. To sub-section (3-A) of section 18 of the said Act the following provisos shall be added, namely:—

"Provided that where the person so payable is a British subject as defined in section 27 of the British Nationality and Status of Aliens Act, 1914, or a subject of a State in India or Burma, and the Income-tax Officer gives a certificate in writing (which certificate he shall give in every proper case on the application of the assessee) that to the best of his belief the total world income of such person will be less than the minimum liable to income-tax or that his total income will be liable to a rate of income-tax less than the maximum rate, the person responsible for paying any income referred to in this sub-section shall, until such certificate is cancelled by the Income-tax Officer, pay the income without deduction or deduct the tax at such less rate, as the case may be:

Provided further that nothing in this sub-section shall apply to any payment made in the course of transactions in respect of which the person responsible for making the payment is deemed under the first proviso to section 43 not to be an agent of the payee."

Amendment of section 23-A, Act XI of 1922.

7. In sub-section (1) of section (23-A) of the said Act,—

(*a*) after the words "in general meeting" the words "increased by any income-tax payable thereon" shall be omitted;

(*b*) after the words "the assessable income of the company of that previous year" the words "as reduced by the amount of income-tax and super-tax payable by the company in respect thereof" shall be inserted;

(*c*) after the words "as computed for income-tax purposes" the words "and reduced by the amount of income-tax and super-tax payable by the company in respect thereof" shall be inserted;

(*d*) in the first proviso, the words "of the assessable income", in both places where they occur, shall be omitted;

(*e*) in the second proviso, the words "as reduced by the amount of income-tax and super-tax payable by the company in respect thereof" shall be inserted after the words "fifty-five per cent. of the assessable income of the company" and shall also be added at the end of the proviso.

Amendment of section 28, Act XI of 1922.

8. In the proviso to sub-section (1) of section 28 of the said Act, after clause (*c*) the following clause shall be added, namely:—

"(*d*) when the person liable to penalty is a registered firm, or an unregistered firm treated under section 23 (5) (*b*) as a registered firm, so that the amount of the income-tax and super-tax payable by the firm itself has not been determined, that amount shall be taken to be an amount equal to the tax which would have been payable by an unregistered firm on an income equal to the firm's total income, and, in the cases referred to in clauses (*b*) and (*c*), the amount of the income-tax and super-tax which would have been avoided if the income as returned had been accepted as the correct income, shall be taken to be the difference between the amount of the tax which would have been payable by an unregistered firm on an income equal to the firm's total income and the amount of the tax payable by an unregistered firm on an income equal to the income of the firm as actually returned by the firm."

Amendment of section 58-B, Act XI of 1922.

9. After sub-section (3) of section 58-B of the said Act the following sub-section shall be inserted, namely:—

"(3-A) An order according recognition to a provident fund shall not, unless the Commissioner otherwise directs, be affected by the fact that the fund is subsequently amalgamated with another provident fund on the occurrence of an amalgamation of the undertakings in connection with which the two funds are maintained, or that it subsequently absorbs the whole or a part of another provident fund belonging to an undertaking which is wholly or in part transferred to or merged in the undertaking of the employer maintaining the first mentioned fund."

Amendment of section 58-C, Act XI of 1922.

10. (1) In sub-section (1) of section 58-C of the said Act,—

(*a*) to clause (*a*) the following proviso shall be added, namely:—

"Provided that the Commissioner may, if he thinks fit and subject to such conditions, if any, as he thinks proper to attach to the recognition, accord recognition to a fund maintained by an employer whose principal place of business is not in British India notwithstanding that a proportion not exceeding ten per cent. of the employees is employed outside India ;"

(*b*) to clause (*b*) the following proviso shall be added, namely:—

"Provided that an employee who retains his employment while serving in His Majesty's Forces or when taken into or employed in the national service under the National Service (European British Subjects) Act, 1940, or the National Service (Technical Personnel) Ordinance, 1940, may, notwithstand-

ing that he receives from the employer no salary or a salary less than he would have received had he not entered His Majesty's Forces, or been so taken into or employed in the national service, contribute to the fund during his service in His Majesty's Forces or while so taken into or employed in the national service a sum not exceeding the amount he would have contributed had he continued to receive from the employer the same salary (including increments, if any) as he would have received had he not entered His Majesty's Forces or been taken into or employed in the national service.";

(*c*) in clause (*d*), after the words "contributions as above specified" the words "and of donations, if any, received from the trustees" shall be inserted, and for the words "contributions and accumulations" the words "contributions, donations and accumulations" shall be substituted.

(2) The amendment made by clause (*b*) of sub-section (1) shall be deemed to have been made and to have taken effect on the 3rd day of September, 1939.

Amendment of section 61, Act XI of 1922.

11. In sub-section (1) of section 61 of the said Act, after the word "before" the words "the Appellate Tribunal or" shall be inserted.

Amendment of section 64, Act XI of 1922.

12. In clause (*b*) of sub-section (5) of section 64 of the said Act, after the words "whereby" the words "any direction given or" shall be inserted, and after the word and figure "section 5" the words, brackets, figures and letter "or in consequence of any transfer made by him under sub-section (7-A) of section 5" shall be inserted.

Amendment of the schedule, Act XI of 1922.

13. In the Schedule to the said Act, in rule 9, for the words "by a mutual insurance company" the words "by a mutual insurance association" shall be substituted.

Transitory provisions with respect to operation of Act XI of 1922.

14. Notwithstanding the coming into force of Part II of the Indian Income-tax (Amendment) Act, 1939,—

(*a*) all appeals already duly instituted under section 32 of the Indian Income-tax Act, 1922, at the time when the said Part II comes into force,

(*b*) all proceedings then pending before the Commissioner in connection with the exercise of his powers of revision under section 33,

(*c*) all applications to the Commissioner, then pending, for reference to the High Court under sub-section (2) of section 66, and

(*d*) all applications to the High Court, then pending, for the issue of a requisition to the Commissioner under sub-section (3) of section 66.

may be continued and disposed of as if the said Part II had not come into force, and the provisions of sub-sections (2), (3), (3-A); (4); (5) and (6) of section 66, as subsisting before the said Part II came into force, shall continue to have effect in relation to the appeals and proceedings referred to in clauses (*a*) and (*b*):

Provided that where under the provisions of section 33 of the Indian Income-tax Act, 1922, as substituted by the Indian Income-tax (Amendment) Act, 1939, an assessee becomes entitled to appeal to the Appellate Tribunal against any order passed by an Appellate Assistant Commissioner under section 28 or section 31 in respect of which he has already lodged an appeal to the Commissioner under section 32 or made any application to the Commissioner

for the exercise of his powers of revision under section 33, he may at his option elect to proceed with his appeal to the Commissioner or his application, as the case may be, in which case he shall lose his right of appeal to the Appellate Tribunal, or he may elect to appeal to the Appellate Tribunal under section 33, in which case his appeal to the Commissioner or his application, as the case may be, shall lapse.

THE INDIAN SALE OF GOODS (AMENDMENT) ACT, 1940.

ACT NO. XLI OF 1940

[3rd December, 1940.

An Act to amend the Indian Sale of Goods Act, 1930.

WHEREAS it is expedient to amend the Indian Sale of Goods Act, 1930, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title.

1. This Act may be called THE INDIAN SALE OF GOODS (AMENDMENT) ACT, 1940.

Insertion of new section 64-A in Act III of 1930.

2. After section 64 of the Indian Sale of Goods Act, 1930, the following section shall be inserted, namely:—

In contracts of sale amount of increased or decreased duty to be added or deducted.

"64-A. In the event of any duty of customs or excise on any goods being imposed, increased, decreased or remitted after the making of any contract for the sale of such goods without stipulation as to the payment of duty where duty was not chargeable at the time of the making of the contract, or for the sale of such goods duty-paid where duty was chargeable at that time,—

(*a*) if such imposition or increase so takes effect that the duty or increased duty, as the case may be, or any part thereof, is paid, the seller may add so much to the contract price as will be equivalent to the amount paid in respect of such duty or increase of duty, and he shall be entitled to be paid and to sue for and recover such addition, and

(*b*) if such decrease or remission so takes effect that the decreased duty only or no duty, as the case may be, is paid, the buyer may deduct so much from the contract price as will be equivalent to the decrease of duty or remitted duty, and he shall not be liable to pay, or be sued for or in respect of, such deduction."

Repeal of section 10 of Act XXXII of 1934.

3. (1) Section 10 of the Indian Tariff Act, 1934, is hereby repealed.

(2) Nothing in the repeal effected by sub-section (1) shall affect or be deemed to affect—

(*a*) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

(*b*) any legal proceedings or remedy in respect of any such right, title, interest, obligation or liability, or

(*c*) anything done or suffered before the commencement of this Act.

THE EXCESS PROFITS TAX (AMENDMENT) ACT, 1940.

ACT No XLII OF 1940.

[*3rd December,* 1940.

***An Act to amend the Excess Profits Tax Act,* 1940.**

WHEREAS it is expedient to amend the Excess Profits Tax Act, 1940, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Short title, commencement and effect.

1. (1) This Act may be called THE EXCESS PROFITS TAX (AMENDMENT) ACT, 1940.

(2) It shall come into force at once; but its provisions shall be deemed to have taken effect on the day on which the Excess Profits Tax Act, 1940, came into force.

Amendment of section 2, Act XV of 1940.

2. In clause (21) of section 2 of the Excess Profits Tax Act, 1940 (hereinafter referred to as the said Act), for sub-clause (*b*) the following sub-clauses shall be substituted, namely:—

"(*b*) in relation to a business carried on by a partnership of which one or more of the partners is a body corporate (other than a company the directors whereof have a controlling interest therein), such a rate per cent. as is equivalent to—

(i) eight per cent. per annum on so much of the average amount of the capital employed in the business during the chargeable accounting period as represents the share of any such body corporate, and

(ii) ten per cent. per annum on the remainder of that amount;

(*c*) in relation to a business to which neither sub-clause (*a*) nor sub-clause (*b*) applies, ten per cent. per annum."

Amendment of section 6, Act XV of 1940.

3. In sub-section (3) of section 6 of the said Act, after the word and figure "section 13" the following words shall be inserted, namely:—

"or within the extended period allowed by the Excess Profits Tax Officer under the proviso to that sub-section"

and to the sub-section the following proviso shall be added, namely:—

"Provided further that a determination on an application under this sub-section—

(*a*) shall have effect with respect to all subsequent chargeable accounting periods;

(*b*) shall exclude any further application under this sub-section."

Amendment of section 8, Act XV of 1940.

4. In section 8 of the said Act,—

(*a*) in sub-section (3), after the words "in computing the capital employed in the business after the change", and in sub-section (4), after the words "in computing the capital employed in the resulting business" the following words shall be inserted, namely:—

"and in considering, for the purposes of computing the profits of, and the capital employed during, any chargeable accounting period, whether any and, if so, what deductions are to be made in respect of depreciation of buildings, plant and machinery,";

(*b*) in sub-section (5), the words "subject to any necessary modifications" shall be omitted;

(*c*) in sub-section (6), the words "subject, however, to such modifications (including modifications as respects the computation of capital) as he may consider just" shall be omitted;

(*d*) after sub-section (7), the following sub-section shall be added, namely:—

"(8) Where—

(*a*) a business is, by virtue of sub-section (2) or sub-section (3), deemed not to have been discontinued; or

(*b*) a business is, by virtue of sub-section (4), to be treated as if it had been in existence throughout the period during which there was in existence any other business; or

(*c*) a business is, by virtue of sub-section (5), to be treated as a continuation of another business; or

(*d*) any person who is carrying on a business after a transfer is treated, by virtue of sub-section (6), as having carried on the business as from a date before the transfer,

the provisions of this Act relating to the computation of profits and capital for the purposes of excess profits tax shall, both as respects the standard period and any chargeable accounting period, have effect subject to such modifications, if any, as the Excess Profits Tax Officer may think just, and the Excess Profits Tax Officer may make such alterations in the periods which would otherwise be the chargeable accounting periods of the business as he thinks proper:

Provided that if the Excess Profits Tax Officer makes any such modifications and the person carrying on the business is dissatisfied with the modifications so made, or if the person carrying on the business is dissatisfied with the refusal of the Excess Profits Tax Officer to make any such modifications, he may, at any time before the expiry of forty-five days from the date on which the order of the Excess Profits Tax Officer is communicated to him, appeal to the Board of Referees through the Excess Profits Tax Officer."

Amendment of section 9, Act XV of 1940.

5. After sub-section (1) of section 9 of the said Act the following sub-section shall be inserted, namely:—

"(1-A) Where—

(*a*) any debt is owing to any company by another company; and

(*b*) one of those companies is a subsidiary of the other, or both are subsidiaries of a third company; and

(*c*) no interest is payable in respect of the debt, but the circumstances in which the debt came into existence or is allowed to continue to exist are such that the debt represents in substance capital employed in the business of the debtor company,

the capital of both companies shall be computed as if the debt did not exist."

Amendment of section 12, Act XV of 1940.

6. In sub-section (2) of section 12 of the said Act,—

(*a*) for the words "to the extent that such profits arose in the said country" the words "to the extent to which such profits are liable to excess profits tax under this Act" shall be substituted;

(*b*) in the proviso, for the words "chargeable accounting period", where those words occur for the second time, the following shall be substituted, namely:—

"previous year (as determined for that business for the purposes of the Indian Income-tax Act, 1922)".

Amendment of section 17, Act XV of 1940.

7. For the second proviso to sub-section (1) of section 17 of the said Act the following shall be substituted, namely:—

"Provided further that no appeal shall lie under this section against any apportionment made by the Excess Profits Tax Officer under the proviso to sub-section (5) of section 8, against any modifications made by the Excess Profits Tax Officer under sub-section (8) of section 8, against any decision of the Excess Profits Tax Officer under rule 11 of the First Schedule, or against any decision of the Board of Referees or the Central Board of Revenue."

Amendment of section 26, Act XV of 1940.

8. In section 26 of the said Act,—

(*a*) in sub-section (1) and in sub-section (3), after the word "If" the following words shall be inserted, namely:—

"on an application made to it through the Excess Profits Tax Officer";

(*b*) to sub-section (1) the following proviso shall be added, namely:—

"Provided further that a determination on an application under this sub-section—

(*a*) shall have effect with respect to all subsequent chargeable accounting periods;

(*b*) shall exclude any further application under this sub-section.";

(*c*) after sub-section (3) the following sub-section shall be added, namely:—

"(4) An application to the Central Board of Revenue under this section shall be presented to the Excess Profits Tax Officer before the expiry of the period specified in the notice issued under sub-section (1) of section 13 or of the extended period allowed by the Excess Profits Tax Officer under the proviso to that sub-section, but in the case of an application under sub-section (1) of this section, if the person carrying on the business has made or is making an application under sub-section (3) of section 6, the application shall be presented to the Excess Profits Tax Officer before the expiry of forty-five days from the date on which the order of the Board of Referees disposing of the application under sub-section (3) of section 6 is communicated to the person who has made that application."

Amendment of Schedule I, Act XV of 1940.

9. In Schedule I to the said Act,—

(*a*) in rule 1, in the first proviso, after the word "Provided" the word "further" shall be inserted, and before that proviso, as so amended, the following proviso shall be inserted, namely:—

"Provided that any sums excluded under the proviso to clause (*iii*) of sub-section (2) or clause (*a*) of sub-section (4) of that section from the allowances made in computing the profits of the business for the purposes of income-tax shall, if paid, be included in those allowances when computing the profits of the business for the purposes of excess profits tax:";

(*b*) in rule 4,—

(i) in sub-rule (1) after the brackets and figure "(2)" the brackets, figure and letter "(2-A)" shall be inserted;

(ii) after sub-rule (2) the following sub-rule shall be inserted, namely:—

"(2-A) In the case of a business part of which consists in banking, insurance or dealing in investments, not being a business to which sub-rule (2) of this rule applies, the profits shall include all income received from investments held for the purposes of that part of the business, being income to which the persons carrying on the business are beneficially entitled.";

(iii) in sub-rule (3), after the brackets and figure "(2)" the word, brackets, figure and letter "or (2-A)" shall be inserted;

(c) in rule 7,—

(i) for sub-rule (1) the following sub-rule shall be substituted, namely:—

"(1) In the case of a business carried on, in any accounting period which constitutes or includes a chargeable accounting period, by a company the directors whereof have throughout that accounting period a controlling interest therein—

(a) in computing the profits for that accounting period; and

(b) if the standard profits of the business are computed by reference to the profits of a standard period, also in computing, in relation to any such chargeable accounting period, the profits for the standard period,

no deduction shall be made in respect of directors' remuneration.";

(ii) in sub-rule (2), for the words "In this rule" the words, brackets and figure "In sub-rule (1) of this rule" shall be substituted;

(iii) after sub-rule (2) the following sub-rule shall be added, namely:—

"(3) If, in the case of a business carried on by a company in any accounting period which constitutes or includes a chargeable accounting period, the directors of the company—

(a) have during any part of that accounting period, or

(b) had during the whole or any part of any previous accounting period which includes the whole or any part of any chargeable accounting period or the whole or any part of the standard period (if any),

a controlling interest therein, and the case is not one to which sub-rule (1) of this rule applies, then, except in so far as the Central Board of Revenue otherwise directs, no deduction shall be made in respect of directors' remuneration either in computing the profits for the first-mentioned accounting period or in computing in relation to any chargeable accounting period wholly or partly included in that accounting period, the profits of the standard period (if any).";

(d) after rule 10, the following rule shall be added, namely:—

"11. Where in respect of any accounting period a deduction would, apart from the provisions of this rule, be allowable in computing profits, and, in the opinion of the Excess Profits Tax Officer, the deduction does not represent a sum reasonably and properly attributable to that accounting period, only such part of the deduction shall be allowable as a deduction for that period as appears to the Excess Profits Tax Officer to be reasonably and properly attributable to that period, and any balance of the deduction shall be treated as attributable to such other accounting period or periods (whether or not they include, or fall wholly or partly within, the standard period, if any, or any chargeable accounting period) as the Excess Profits Tax Officer thinks proper.

Any person who is dissatisfied with a determination of the Excess Profits Tax Officer under this rule may, at any time before the expiry of forty-five days from the date on which such determination is communicated to him, appeal to the Board of Referees through the Excess Profits Tax Officer."

Amendment of Schedule II, Act XV of 1940.

10. In Schedule II to the said Act,—

(a) in sub-rule (2) of rule 1, after the words "written down value" the following words shall be inserted, namely:—

"and to such other deductions in respect of reduced values of assets as are allowable in computing profits for the purposes of income-tax";

(b) at the end of sub-rule (1) of rule 2 the following shall be inserted, namely:—

"The debts to be deducted under this sub-rule shall include any such sums in respect of accruing liabilities as are allowable as a deduction in computing profits for the purposes of excess profits tax or would have been so allowable if the period for which the amount of capital is being computed had been a chargeable accounting period; and the said sums shall be deducted notwithstanding that they have not become payable.";

(*c*) after rule 6 the following rule shall be added, namely:—

"7. (1) If—

(*a*) the Central Board of Revenue is satisfied, as respects any assets of any business the standard profits of which are computed by reference to the profits of a standard period, that during that period or any part thereof those assets were inherently unproductive, and

(*b*) an application that this rule shall have effect is made through the Excess Profits Tax Officer to the Central Board of Revenue by the person carrying on the business,

then, in computing the average amount of the capital employed in the business in the standard period and in all chargeable accounting periods, those assets, and any other assets of the business, shall be treated as not having been assets thereof during any part of the period during which, in the opinion of the Central Board of Revenue, they were inherently unproductive:

Provided that in the case of a business the standard profits of which depend directly or indirectly upon a direction of the Board of Referees under sub-section (3) of section 6, or of the Central Board of Revenue under sub-section (1) of section 26 of this Act the provisions of this rule shall have effect to such extent only as the Central Board of Revenue thinks proper:

Provided further that an application to the Central Board of Revenue under this rule shall be presented to the Excess Profits Tax Officer before the expiry of the period specified in the notice issued under sub-section (1) of section 13 of this Act or of the extended period allowed by the Excess Profits Tax Officer under the proviso to that sub-section.

(2) Where sub-rule (1) of this rule has effect on the application of the person carrying on any business, any computation of capital of the business made before the making of the application, and any assessment affected by that computation shall be revised accordingly."

THE INDIA ACTS
AND
THE MADRAS ACTS
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MADRAS ACTS, 1940.

THE MADRAS LOCAL BOARDS (AMENDMENT) ACT, 1940.

ACT No. I OF 1940.

[30th January, 1940.

An Act further to amend the Madras Local Boards Act, 1920, for a certain purpose.

WHEREAS it is expedient further to amend the Madras Local Boards Act, 1920, for the purpose hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS LOCAL BOARDS (AMENDMENT) ACT, 1940.

Amendment of section 198, Madras Act XIV of 1920.

2. In section 198 of the Madras Local Boards Act, 1920, clause (*c*) and the word "and" occurring at the end of clause (*b*) shall be omitted, and at the end of clause (*a*) the word "and" shall be inserted.

THE MADRAS FINANCE ACT, 1940.

ACT No. II OF 1940.

[4th March, 1940.

An Act to reduce the scale of tax leviable under the Madras General Sales Tax Act, 1939, for the year beginning on the 1st day of April, 1940.

WHEREAS it is expedient to reduce the scale of tax leviable under the Madras General Sales Tax Act, 1939, for the year beginning on the 1st day of April, 1940;

AND WHEREAS the Governor of Madras has, by a proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act, in the Provincial Legislature;

NOW THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title and extent.

1. (1) This Act may be called THE MADRAS FINANCE ACT, 1940.

(2) It extends to the whole of the Province of Madras.

Amendment of section 3, Madras Act IX of 1939.

2. Sub-section (1) of section 3 of the Madras General Sales Tax Act, 1939, shall, in regard to the tax payable for the year beginning on the 1st day of April, 1940, be construed as if for the words "Five rupees" the words "Four rupees" and for the words "One-half of one per cent" the words "One-quarter of one per cent" were substituted.

THE MADRAS COMMERCIAL CROPS MARKETS (AMENDMENT) ACT, 1940.

ACT No. III OF 1940.

[26th March, 1940.

An Act further to amend the Madras Commercial Crops Markets Act, 1933, for certain purposes.

WHEREAS it is expedient further to amend the Madras Commercial Crops Markets Act, 1933, for the purposes hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS COMMERCIAL CROPS MARKETS (AMENDMENT) ACT, 1940.

Amendment of section 2, Madras Act XX of 1933.

2. In section 2 of the Madras Commercial Crops Markets Act, 1933 (hereinafter referred to as the said Act)—

(a) in clause (iii) for the words "a taluk board", the words "a district board" shall be substituted; and

(b) clause (vi) and the word "and" occurring at the end of clause (v) shall be omitted and at the end of clause (iv), the word "and" shall be inserted.

Amendment of section 4, Madras Act XX of 1933.

3. In section 4 of the said Act—

(a) in the first paragraph of sub-section (1), for the words "licence granted by the Provincial Government", the words "licence granted by the Collector of the district" shall be substituted; and

(b) for sub-section (2) the following sub-section shall be substituted, namely:—

"(2) Subject to such rules as may be made by the Provincial Government the Collector of the district may, on the report of the market committee and after such inquiry as he deems fit, cancel or suspend any licence granted under sub-section (1)."

Amendment of section 6, Madras Act XX of 1933.

4. In section 6 of the said Act—

(a) sub-sections (2) and (3) shall be renumbered as sub-sections (4) and (5) respectively and for sub-section (1), the following sub-sections shall be substituted, namely:—

"(1) Every market committee shall consist of such number of members not exceeding twelve as may be fixed for it by the Provincial Government.

(2) Each of the following electorates shall elect to the market committee such number of members as the Privincial Government may determine—

(a) growers of the commercial crop or crops in the notified area from among themselves,

(b) persons licensed under section 4 and buyers, sellers and buyers and sellers in the notified area of the commercial crop or of any of the commercial crops concerned, registered as such for a period of not less than one year under the rules prescribed in that behalf, from among themselves, and

(c) members of the local body or local bodies having jurisdiction over the notified area, from among themselves.

(3) The Provincial Government may appoint to every market committee such number of members as they think fit, not exceeding the number of members to be elected :

Provided that where a market committee is established for any notified area for the first time—

(i) the Provincial Government may appoint all the members of such committee for a period of one year, and

(ii) if before the expiry of the period of one year aforesaid elections of members to the committee could not be held or if for any reason the Provincial Government consider it desirable that the committee should consist solely of members appointed by them, they may extend the term of office of all or any of the members appointed under clause (*i*), or appoint new members in their places, for such period or periods not exceeding one year in the aggregate as they may think fit." ;

(*b*) in sub-section (4) as so renumbered—

(i) in the first paragraph, for the expression " sub-section (1) ", the expression " sub-section (3) ", and for the word " nomination ", the word " appointment " shall be substituted ; and

(ii) in the first proviso, for the expression " clause (iii) or clause (iv) of sub-section (1) ", the expression " clause (*b*) or clause (*c*) of sub-section (2) " shall be substituted ; and

(*c*) in sub-section (5) as so renumbered, the words " and another member to be its vice-chairman " shall be added at the end.

Amendment of section 16, Madras Act XX of 1933.

5. In clause (*a*) of sub-section (2) of section 16 of the said Act, for the words " the chairman ", the words " the chairman and vice-chairman " shall be substituted.

Amendment of section 18, Madras Act, XX of 1933.

6. In sub-section (2) of section 18 of the said Act—

(*a*) in clause (i), for the word " nomination ", the word " appointment " shall be substituted ;

(*b*) in clause (ii), for the words " chairman of a market committee and his term of office ", the words " chairman and vice-chairman of a market committee and their term of office " shall be substituted ; and

(*c*) in clause (iii) for the words " chairman or member ", the words " chairman, vice-chairman or member " shall be substituted.

Addition of new section 23 in Madras Act XX of 1933.

7. After section 22 of the said Act, the following section shall be added, namely :—

Saving.

" 23. Nothing in this Act shall apply to any place set up, established or continued by or on behalf of the Crown for the purchase, sale, storage, weighment, pressing or processing of any commercial crop or to the purchase or sale of any such crop by or on behalf of the Crown."

THE MADRAS TOBACCO (TAXATION OF SALES AND LICENSING) (AMENDMENT) ACT, 1940.

ACT No. IV OF 1940.

[30th March, 1940.

An Act to amend the Madras Tobacco (Taxation of Sales and Licensing) Act, 1939, for certain purposes.

WHEREAS it is expedient to amend the Madras Tobacco (Taxation of Sales and Licensing) Act, 1939, for the purposes hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature ;

Now, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows :—

Short title and commencement.

1. (1) This Act may be called THE MADRAS TOBACCO (TAXATION OF SALES AND LICENSING) (AMENDMENT) ACT, 1940.

(2) It shall come into force on the 1st day of April, 1940.

Amendment of section 2, Madras Act VIII of 1939.

2. In section 2 of the Madras Tobacco (Taxation of Sales and Licensing) Act, 1939 (hereinafter referred to as the said Act)—

(i) for clause (1), the following clause shall be substituted, namely :—

" (1) " broker " means any person who in the ordinary course of his business negotiates and makes contracts on behalf of others for the sale or purchase of tobacco but neither stocks tobacco for delivery on such sale nor takes possession of tobacco on such purchase ; " ; and

(ii) after clause (2), the following clause shall be inserted, namely :—

" (2-A) " commission agent " means any person who in the ordinary course of his business negotiates and makes contracts on behalf of others for the sale or purchase of tobacco and also stocks tobacco for delivery on such sale or takes possession of tobacco on such purchase ; ".

Amendment of section 3, Madras Act VIII of 1939.

3. In section 3 of the said Act—

(i) in sub-section (1), after Explanation II, the following Explanation shall be inserted, namely :—

"*Explanation III.*—Where manufactured tobacco in any form whether packed in receptacles or not, is found in the shop of a retail dealer, it shall be presumed until the contrary is proved that such tobacco is exposed for sale." ; and

(ii) after sub-section (1), the following sub-section shall be inserted, namely :—

" (1-A) A licensed manufacturer shall not be required to obtain a separate licence as a wholesale dealer either for the purpose of purchasing tobacco required for his manufacture or for the purpose of selling wholesale tobacco manufactured by him."

Amendment of section 5, Madras Act VIII of 1939.

4. In sub-section (1) of section 5 of the said Act—

(*a*) for item (i), the following item shall be substituted, namely :—

	Fee.
" (i) Any wholesale dealer who sells or buys tobacco leaf cured or uncured or any preparation or mixture of tobacco (not being manufactured tobacco) for trade therein—	
(*a*) If his turnover is estimated at less than one thousand rupees per annum.	Five rupees.
(*b*) If his turnover is estimated at one thousand rupees or above, but at less than three thousand rupees per annum.	Ten rupees.
(*c*) If his turnover is estimated at three thousand rupees or above, but at less than six thousand rupees per annum.	Twenty-five rupees.
(*d*) If his turnover is estimated at six thousand rupees or above, but at less than ten thousand rupees per annum.	Fifty rupees.
(*e*) If his turnover is estimated at ten thousand rupees or above, but at less than fifteen thousand rupees per annum.	Seventy-five rupees.
(*f*) If his turnover is estimated at fifteen thousand rupees or above per annum.	One-hundred rupees.";

(*b*) in item (iv) the words " broker or " shall be omitted ;
(*c*) after item (iv) the following item shall be inserted, namely :—
" (v) A broker . . . Ten rupees." ; and
(*d*) in the proviso, the figure and brackets " (i) " shall be omitted.

THE PRISONS (MADRAS AMENDMENT) ACT, 1940.

ACT No. V OF 1940.

[2nd April, 1940.

An Act further to amend the Prisons Act, 1894, in its application to the Province of Madras, for certain purposes.

WHEREAS it is expedient further to amend the Prisons Act, 1894, in its application to the Province of Madras, for the purposes hereinafter appearing ;

AND WHEREAS the Governor of Madras has, by a proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature ;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows :—

Short title.

1. This Act may be called THE PRISONS (MADRAS AMENDMENT) ACT, 1940.

Amendment of section 39-A Act IX of 1894.

2. In section 39-A of the Prisons Act, 1894, (hereinafter referred to as the said Act), the Explanation shall be renumbered as Explanation I and the following shall be added as Explanation II, namely :—

" *Explanation II.*—In this section, 'prisoner' means a convicted criminal prisoner."

Insertion of new sections 39-B and 39-C in Act IX of 1894.

3. After section 39-A of the said Act, the following sections shall be inserted, namely :—

Punishment for escape or attempt to escape from hospital or asylum.

" 39-B. If any prisoner dealt with under section 39-A escapes or attempts to escape from the hospital or asylum to which he has been sent or when going thereto or returning therefrom, he shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

The punishment under this section shall be in addition to the punishment for which the prisoner was liable for the offence of which he was already convicted.

Provisions applicable to bonds referred to in section 39-A.

39-C. The provisions of Chapter XLII of the Code of Criminal Procedure, 1898, shall, so far as may be, apply to the bonds referred to in section 39-A."

THE MADRAS IRRIGATION CESS (AMENDMENT) ACT, 1940.

ACT No. VI OF 1940.

[12th April, 1940.

An Act further to amend the Madras Irrigation Cess Act, 1865, for certain purposes.

WHEREAS it is expedient further to amend the Madras Irrigation Cess Act, 1865, for the purposes hereinafter appearing ;

AND WHEREAS the Governor of Madras has, by a proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature ;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows :—

Short title.

1. This Act may be called THE MADRAS IRRIGATION CESS (AMENDMENT) ACT, 1940.

Substitution of new section for section 1, Madras Act VII of 1865.

2. For section 1 of the Madras Irrigation Cess Act, 1865 (hereinafter referred to as the said Act), the following section shall be substituted, namely :—

Power to levy water-cess in addition to assessment on land.

" 1. (*a*) Whenever water is supplied or used for purposes of irrigation from any river, stream, channel, tank or work belonging to, or constructed by or on behalf of, the Crown, and

(*b*) whenever water from any such river, stream, channel, tank or work, by direct flow or percolation, or by indirect flow, percolation or drainage from or through adjoining land, irrigates any land under cultivation, or flows into a reservoir and thereafter, by direct flow or percolation, or by indirect flow, percolation or drainage from or through adjoining land, irrigates any land under cultivation, and in the opinion of the Revenue Officer empowered to charge water-cess, subject to the control of the Collector and the Board of Revenue, such irrigation is beneficial to, and sufficient for the requirements of, the crop on such land,

it shall be lawful for the Provincial Government before the end of the revenue year succeeding that in which the irrigation takes place to levy at pleasure on the land so irrigated a separate cess for such water, and the Provincial Government may prescribe the rules under which and the rates at which, such water-cess shall be levied, and alter or amend the same from time to time :

Provided that where a zamindar or inamdar or any other description of landholder not holding under ryotwari settlement is by virtue of engagements with the Crown entitled to irrigation free of separate charge, no cess under this Act shall be imposed for water supplied to the extent of this right and no more :

Provided also that no cess shall be leviable under this Act in respect of land held under ryotwari settlement which is classified and assessed as wet, unless the same be irrigated, whether voluntarily or involuntarily and whether wholly or in part—

(i) from any source hereinbefore mentioned, not being a source which has been assigned by the Revenue authorities or adjudged by a competent Civil Court as the source of irrigation of such land ; or

(ii) from any source assigned or adjudged as aforesaid in respect of such lands otherwise than in accordance with any notification or order of the Provincial Government or of any authority subordinate to them, regulating or specifying the time, method and conditions of supply of water for the irrigation of such land from such source and the number of crops which may be irrigated on such land with such supply, free of separate charge."

Insertion of new section 1-B in Madras Act VII of 1865.

3. After section 1-A of the said Act the following section shall be inserted, namely :—

Rules to have effect as if enacted in the Act.

" 1-B. All rules made under this Act shall have effect as if enacted in this Act."

Indemnification for acts done before the commencement of this Act.

4. (1) No suit or other proceeding shall lie against the Provincial Government or any officer or servant of the said Government, or any authority subordinate to them, or any person acting under the authority of or with the permission of the said Government, officer, servant or authority, in respect of any act done or purporting to be done before the commencement of this Act under section 1 of the said Act, if such act could have been done under the said section 1 as amended by this Act, and the Provincial Government and all officers, servants, authorities and persons aforesaid are hereby indemnified and discharged from all liability in respect of all such acts in so far as they could have been done under the said section 1 as amended by this Act.

(2) Any suit or other proceeding instituted before the commencement of this Act in respect of any act done or purporting to be done under section 1 of the

said Act shall be disposed of as if the said section 1 as amended by this Act, had been in force at the time of the institution of the said suit or proceeding in the Court of first instance.

THE MADRAS CITY POLICE (AMENDMENT) ACT, 1940.

ACT No. VII OF 1940.

[22nd April, 1940.

An Act further to amend the Madras City Police Act, 1888, for a certain purpose.

WHEREAS it is expedient further to amend the Madras City Police Act, 1888, for the purpose hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

Now, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS CITY POLICE (AMENDMENT) ACT, 1940.

Amendment of section 71, Madras Act III of 1888.

2. Clause iv of section 71 of the Madras City Police Act, 1888, shall be omitted.

THE MADRAS SUPPRESSION OF IMMORAL TRAFFIC (AMENDMENT) ACT, 1940.

ACT No. VIII OF 1940.

[20th May, 1940.

An Act further to amend the Madras Suppression of Immoral Traffic Act, 1930, for certain purposes.

WHEREAS it is expedient further to amend the Madras Suppression of Immoral Traffic Act, 1930, for the purposes hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

Now, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS SUPPRESSION OF IMMORAL TRAFFIC (AMENDMENT) ACT, 1940.

Amendment of section 6, Madras Act V of 1930.

2. In sub-section (i) of section 6 of the Madras Suppression of Immoral Trafic Act, 1930, (hereinafter referred to as the said Act), for the words "shall be entitled to remove such girl forthwith from such brothel, disorderly house or place of assignation", the words and figures "shall be entitled to remove forthwith from such brothel, disorderly house or place of assignation, such girl and any other girl found therein if, in his opinion, she is under the age of 18 years and is living, or is carrying on or being made to carry on the business of prostitution, in such brothel, disorderly house or place of assignation" shall be substituted.

Amendment of section 14, Madras Act V of 1930.

3. Section 14 of the said Act shall be renumbered as sub-section (1) of that section, and to the section as so renumbered, the following sub-section shall be added, namely:—

"(2) Any Police officer entering any premises under sub-section (1) shall be entitled to remove therefrom any girl if, in his opinion, she is under the age of 18 years and is carrying on or being made to carry on the business of prostitution in such premises. All the provisions of this Act shall apply in regard to any girl so removed as if she had been removed under sub-section (i) of section 6."

THE MADRAS MOTOR VEHICLES TAXATION (AMENDMENT) ACT, 1940.

ACT No. IX OF 1940.

[29th May 1940.

An Act further to amend the Madras Motor Vehicles Taxation Act, 1931, for certain purposes.

WHEREAS it is expedient further to amend the Madras Motor Vehicles Taxation Act, 1931, for the purposes hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS MOTOR VEHICLES TAXATION (AMENDMENT) ACT, 1940.

Amendment of section 2, Madras Act III of 1931.

2. In section 2 of the Madras Motor Vehicles Taxation Act, 1931 (hereinafter referred to as the said Act)—

(i) clauses (iii), (vii) and (viii) shall be omitted; clauses (i), (ii), (iv-*a*), (v), (vi) and (viii-*a*) shall be renumbered as clauses (ii), (iii), (v), (vi), (vii) and (viii) respectively; and the following shall be inserted as clause (i), namely:—

"(i) the following expressions shall have the meanings assigned to them in the Motor Vehicles Act, 1939:—

(*a*) "goods";
(*b*) "goods vehicle";
(*c*) "invalid carriage";
(*d*) "motor vehicle";
(*e*) "trailer"; and
(*f*) "unladen weight";"

(ii) in the definition of "registered owner" [clause (vi) as renumbered] for the words and figures "registered under the Indian Motor Vehicles Act, 1914", the words and figures "registered or deemed to be registered under the Motor Vehicles Act, 1939", shall be substituted;

(iii) in the definition of "laden weight" [clause (viii) as renumbered], for the words and figures "in pursuance of the rules made by the Provincial Government under the Indian Motor Vehicles Act, 1914" occurring in both the paragraphs, the words and figures "under the Motor Vehicles Act, 1939" shall be substituted; and

(iv) at the end of clause (viii) as renumbered, the word "and" shall be inserted.

Amendment of section 5, Madras Act III of 1931.

3. In sub-clause (ii) of clause (*a*) of sub-section (3) of section 5 of the said Act, for the words and figures "in the certificate of registration granted or renewed in respect of the vehicle under the rules made by the Provincial Government under the Indian Motor Vehicles Act, 1914, or in the case of vehicles not registered under the said rules", the words and figures "in the certificate of registration

granted or deemed to be granted in respect of the vehicle under the Motor Vehicles Act, 1939, or in the case of vehicles not registered or deemed to be registered under that Act " shall be substituted.

Amendment of Schedule II Madras Act III of 1931.

4. In Schedule II to the said Act—

(i) in class 2, for the expression " Motor vehicles not exceeding 5 cwt. in weight unladen, adapted and used for invalids," the words " Invalid carriages " shall be substituted ;

(ii) in class 3, for the words " Motor lorries " and " Lorries " wherever they occur, the words " Goods vehicles " and " Vehicles " shall respectively be substituted ; and

(iii) in class 4, for items (*a*) and (*b*) in the entry in the first column, the following items shall be substituted, namely :—

" (*a*) Vehicles in respect of which permits have been issued under the Motor Vehicles Act, 1939, to carry in all not more than five persons.

(*b*) Vehicles in respect of which permits have been issued under the Motor Vehicles Act, 1939, to carry more than five persons—for every person which the vehicle is so permitted to carry excluding the driver and the conductor."

Amendment of Schedule III, Madras Act III of 1931.

5. In schedule III to the said Act—

(i) in class 2, for the expression " Motor vehicles not exceeding 5 cwt. in weight unladen, adapted and used for invalids ", the words " Invalid carriages " shall be substituted ;

(ii) in class 3, for the words " Motor Lorries " and " Lorries " wherever they occur, the words " Goods vehicles " and " Vehicles " shall respectively be substituted ; and

(iii) in class 4, for items (a) and (b) in the entry in the first column, the following items shall be substituted, namely:—

"(*a*) Vehicles in respect of which permits have been issued under the Motor Vehicles Act, 1939, to carry in all not more than four persons.

(*b*) Vehicles in respect of which permits have been issued under the Motor Vehicles Act, 1939, to carry more than four persons—for every person which the vehicle is so permitted to carry."

THE MADRAS PAYMENT OF SALARIES AND REMOVAL OF DISQUALIFICATIONS (TEMPORARY REPEAL) ACT, 1940.

ACT No. X OF 1940.

[*10th June, 1940.*

An Act to repeal the Madras Payment of Salaries and Removal of Disqualifications Act, 1937, during the continuance in force of the Proclamation issued under the Government of India Act, 1935.

WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all the powers vested by or under the said Act in the Provincial Legislature :

AND WHEREAS the provisions of the Act aforesaid relating to the salaries of the Ministers, the Speaker and the Deputy Speaker of the Legislative Assembly, the President and the Deputy President of the Legislative Council and the members of the Legislature have been suspended by the Proclamation aforesaid :

AND WHEREAS it is expedient that the provisions of the Madras Payment of Salaries and Removal of Disqualifications Act, 1937, should cease to have effect during the period the Proclamation aforesaid is in force :

"Now, THEREFORE, in exercise of the powers of the Provincial Legislature assumed to himself by the Proclamation aforesaid the Governor is pleased to enact as follows :

Short title and commencement.

1. (1) This Act may be called THE MADRAS PAYMENT OF SALARIES AND REMOVAL OF DISQUALIFICATIONS (TEMPORARY REPEAL) ACT, 1940.

(2) It shall come into force on the 1st day of July, 1940.

Temporary repeal of Madras Act IX of 1937.

2. So long as the Proclamation under section 93 of the Government of India Act, 1935, issued by the Governor of Madras on the 30th day of October, 1939, is in force, the Madras Payment of Salaries and Removal of Disqualifications Act, 1937, shall be deemed to have been repealed.

THE METTUR TOWNSHIP ACT, 1940.

ACT No. XI OF 1940.

[25th June, 1940.]

An Act to provide for the better administration and governance of the Mettur township.

WHEREAS it is expedient to provide for the better administration and goverance of the Mettur township;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE METTUR TOWNSHIP ACT, 1940.

Constitution of committee for administration of Mettur township.

2. (1) As soon as may be after the passing of this Act, the Provincial Government shall, by notification in the *Fort St. George Gazette* and with effect from such date as may be specified therein, constitute a Committee, to be called the Mettur Township Committee (hereinafter referred to as the Township Committee), for the purpose of administering the municipal affairs of the Mettur township.

(2) The Township Committee shall be a body corporate, having perpetual succession and a common seal, and subject to any restrictions or qualifications imposed by or under this or any other enactment, shall be vested with the capacity of suing and being sued in its corporate name, of acquiring, holding and transferring property, movable or immovable, of entering into contracts, and of doing all things necessary, proper or expedient for the purposes for which it is constituted.

Composition of the Township Committee.

3. (1) The Township Committee shall consist of six members who shall be appointed by the Provincial Government or by an authority or officer empowered by them in this behalf. Of the six members, not less than two shall be non-officials of whom one shall be a representative of industrial interests in the township.

(2) The Provincial Government shall appoint one of the members of the Township Committee to be its Chairman and another person (whether a member of the Committee or not) to be its Executive Officer.

Application of Madras Act V of 1920 and other enactments to Mettur township subject to specified modifications, additions and restrictions.

4. (1) The Provincial Government may, by notification in the *Fort St. George Gazette*, direct that any of the provisions of the Madras District Municipalities Act, 1920, or of any other enactment for the time being in force elsewhere in the Province of Madras but not in the township, shall apply to the township to such extent and subject to such modifications, additions and restrictions as may be specified in the notification.

(2) In particular and without prejudice to the generality of the foregoing provision, such notification may authorize—

(*a*) the Township Committee to levy all or any of the taxes and fees which may be levied by virtue of the provisions applied to the township under this section; and

(*b*) the Executive Officer of the Township Committee to exercise and perform in regard to the township, the powers and duties assigned to the executive authority of a municipality under the provisions applied as aforesaid, subject to such restrictions, limitations and conditions and to such control, if any, as may be specified in the notification.

Power to define and alter boundaries of Mettur township.

5. The Provincial Government may, by notification in the *Fort St. George Gazette*, define the boundaries of the Mettur township for the purposes of this Act, and may from time to time by a like notification, alter such boundaries.

THE MADRAS LEGISLATURE (WAR SERVICE REMOVAL OF DISQUALIFICATIONS) ACT, 1940.

ACT No. XII OF 1940.

[*16th July, 1940*.

An Act for the removal of certain disqualifications for the membership of the Madras Legislature.

WHEREAS it is necessary to remove the disqualification imposed on persons holding office in any branch of His Majesty's Military, Naval or Air Forces or in the Defence Department of the Central Government, for being chosen as, and for being, members of the Madras Legislative Assembly or the Madras Legislative Council;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act, in the Provincial Legislature.

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:

Short title.

1. This Act may be called THE MADRAS LEGISLATURE (WAR SERVICE REMOVAL OF DISQUALIFICATIONS) ACT, 1940.

Removal of disqualification imposed on membership of the Madras Legislature in certain cases.

2. No person shall be disqualified for being chosen as, or for being, a member of the Madras Legislative Assembly or the Madras Legislative Council, by reason only of the fact that he holds any office in the Army in India Reserve of Officers, the Indian Territorial Force, or any other branch of His Majesty's Military, Naval or Air Forces, or in the Defence Department of the Central Government.

THE MADRAS CITY MUNICIPAL, DISTRICT MUNICIPALITIES AND LOCAL BOARDS (AMENDMENT) ACT, 1940.

ACT No. XIII OF 1940.

[14th *August*, 1940.

An Act further to amend the Madras City Municipal Act, 1919, the *Madras District Municipalities Act,* 1920, *and the Madras Local Boards Act,* 1920.

WHEREAS it is expedient further to amend the Madras City Municipal Act, 1919, the Madras District Municipalities Act, 1920, and the Madras Local Boards Act, 1920, for the purposes hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS CITY MUNICIPAL, DISTRICT MUNICIPALITIES AND LOCAL BOARDS (AMENDMENT) ACT, 1940.

Extension of the term of office of the councillors and aldermen of the Corporation of Madras

2. (1) The term of office of the councillors and aldermen of the Corporation of Madras who will vacate their offices at noon on the first day of November, 1940, shall extend instead up to noon on the first day of November, 1941, and the provisions of the Madras City Municipal Act, 1919, as amended by this section, shall have effect accordingly:

Provided that the Provincial Government shall have power to direct that the term of office aforesaid shall expire at noon on such earlier date in 1941 as may be fixed by them and from time to time to postpone any date so fixed and fix instead another date not being later than the first day of November, 1941.

(2) Where any date earlier than the first day of November, 1941, is fixed under the proviso to sub-section (1), the provisions of the Madras City Municipal Act, 1919, shall be subject to the following modifications, namely:—

(*a*) The Provincial Government shall cause elections and appointments of councillors and aldermen to be held or made to the new council so that the newly elected or appointed councillors and aldermen may come into office on the date fixed under the proviso aforesaid.

(*b*) The term of office of the newly elected or appointed councillors and aldermen shall, subject to the provisions of the Madras City Municipal Act, 1919, expire at noon on the first day of November, 1944 or at noon on the first day of November, 1943, as the Provincial Government may determine.

(*c*) The election of the Mayor, Deputy Mayor and members of the standing committees shall be held at the first meeting of the new council, and the election of the chairman of each standing committee shall be held at the first meeting of such committee.

(*d*) The Provincial Government shall have power to direct that the elections of the Mayor and the Deputy Mayor shall not be held as required by sub-section (1) of section 28 of the Madras City Municipal Act, 1919, at the first meeting of the council after the first day of November, 1941.

3. (1) The term of office of the councillors of every municipality constituted under the Madras District Municipalities Act, 1920, who will vacate their offices at noon on the first day of November, 1940, shall extend instead up to noon on the first day of November, 1941, and the provisions of that Act as amended by this section, shall have effect accordingly:

Extension of the term of office of the councillors of certain district municipalities.

Provided that the Provincial Government shall have power to direct that the term of office aforesaid shall, in the case of any municipality, expire at noon on such earlier date in 1941 as may be fixed by them and from time to time to postpone any date so fixed and fix instead another date not being later than the first day of November, 1941.

(2) Where any date earlier than the first day of November, 1941, is fixed under the proviso to sub-section (1), the provisions of the Madras District Municipalities Act, 1920, shall be subject to the following modifications, namely:—

(a) The Provincial Government shall cause elections to be held to the new council so that the newly elected councillors may come into office on the date fixed under the proviso aforesaid.

(b) The term of office of the newly elected councillors shall, subject to the provisions of the Madras District Municipalities Act, 1920, and the Madras District Municipalities and Local Boards (Amendment) Act, 1921, expire at noon on the first day of November, 1944 or at noon on the first day of November, 1943, as the Provincial Government may determine.

4. (1) The term of office of the members of every local board constituted under the Madras Local Boards Act, 1920, and situated in any of the districts included in Group I of the Schedule to the Madras Local Boards (Amendment) Act, 1935, who will vacate their offices at noon on the first day of November, 1940 or on any other date in the year 1940, shall extend instead up to noon on the first day of November, 1941, and the provisions of the Madras Local Boards Act, 1920, as amended by this section, shall have effect accordingly:

Extension of the term of office of the members of certain local boards.

Provided that the Provincial Government shall have power to direct that the term of office aforesaid shall, in the case of any local board, expire at noon on such earlier date in 1941 as may be fixed by them and from time to time to postpone any date so fixed and fix instead another date not being later than the first day of November, 1941.

(2) Where any date earlier than the first day of November, 1941 is fixed under the proviso to sub-section (1), the provisions of the Madras Local Boards Act, 1920, shall be subject to the following modifications, namely:—

(a) The Provincial Government shall cause elections to be held to the new local board so that the newly elected members may come into office on the date fixed under the proviso aforesaid.

(b) The term of office of the newly elected members shall, subject to the provisions of the Madras Local Boards Act, 1920, and the Madras District Municipalities and Local Boards (Amendment) Act, 1921, expire at noon on the first day of November, 1943.

5. If any difficulty arises in giving effect to the provisions of this Act or of the Madras City Municipal Act, 1919, the Madras District Municipalities Act, 1920, or the Madras Local Boards Act, 1920, as amended by

Power to remove difficulties.

this Act, the Provincial Government may, as occasion may arise, by order, do anything which appears to them necessary for the purpose of removing the difficulty.

THE MADRAS DISTRICT MUNICIPALITIES AND LOCAL BOARDS (AMENDMENT) ACT, 1940.

ACT No. XIV OF 1940.

[29th August, 1940.

An Act further to amend the Madras District Municipalities Act, 1920, and the Madras Local Boards Act, 1920, for certain purposes.

WHEREAS it is expedient further to amend the Madras District Municipalities Act, 1920, and the Madras Local Boards Act, 1920, for the purposes hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS DISTRICT MUNICIPALITIES AND LOCAL BOARDS (AMENDMENT) ACT, 1940.

Amendment of Madras Act V of 1920.

2. In the Madras District Municipalities Act, 1920—

(i) in sub-section (2) of section 49—

(a) the word "or" occurring at the end of clause (e) shall be omitted; and

(b) after clause (f), the following word and clause shall be added, namely:—

"or

(g) in arrears of any kind due by him (otherwise than in a fiduciary capacity) to the municipality up to and inclusive of the previous year, in respect of which a bill or notice has been duly served upon him and the time if any specified therein for payment has expired."; and

(ii) in sub-section (1) of section 50—

(a) the word "or" occurring at the end of clause (h) shall be omitted; and

(b) after clause (h), the following clause shall be inserted, namely:—

"(hh) fails to pay arrears of any kind due by him (otherwise than in a fiduciary capacity) to the municipality, within three months after a bill or notice has been served upon him under this Act, or where in the case of any arrear this Act does not require the service of any bill or notice, within three months after a notice requiring payment of the arrear (which notice it shall be the duty of the executive authority to serve at the earliest possible date) has been duly served upon him by the executive authority; or".

Amendment of Madras Act XIV of 1920.

3. In the Madras Local Boards Act, 1920—

(i) in sub-section (2) of section 55—

(a) the word "or" occurring at the end of clause (e) shall be omitted; and

(b) after clause (f), the following word and clause shall be added, namely:—

"or

(g) in arrears of any kind due by him (otherwise than in a fiduciary capacity) to the local board up to and inclusive of the previous year, in respect of which a bill or notice has been duly served upon him and the time if any specified therein for payment has expired."; and

(ii) in sub-section (1) of section 56—

(a) the word "or" occurring at the end of clause (g) shall be omitted; and

(b) after clause (g), the following clause shall be inserted, namely:—

"(gg) fails to pay arrears of any kind due by him (otherwise than in a fiduciary capacity) to the local board, within three months after a bill or notice has been served upon him under this Act, or where in the case of any arrear this Act does not require the service of any bill or notice, within three months after a notice requiring payment of the arrear (which notice it shall be the duty of the president of the local board to serve at the earliest possible date) has been duly served upon him by the president; or".

THE MADRAS LIVE-STOCK IMPROVEMENT ACT, 1940.

ACT No. XV OF 1940.

[29th August, 1940.

An Act to provide for the improvement of live-stock in the Province of Madras.

WHEREAS it is expedient to provide for the improvement of live-stock in the Province of Madras;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE MADRAS LIVE-STOCK IMPROVEMENT ACT, 1940.

(2) It extends to the whole of the Province of Madras.

(3) This section shall come into force at once, and the Provincial Government may from time to time by notification in the *Fort St. George Gazette* apply all or any of the remaining provisions of this Act to the whole or any portion of the Province of Madras from such date and for such period, if any, as may be specified in the notification, and may cancel or modify any such notification.

Definitions.

2. In the Act, unless there is anything repugnant in the subject or context—

(a) "bull" includes a buffalo-bull;

(b) "cow" includes a buffalo-cow and a heifer;

(c) "Director" means the officer appointed by the Provincial Government as the Director of Veterinary Services for the Province of Madras and includes any other person on whom the powers or duties of the Director under this Act have been conferred or imposed under section 3;

(d) "licence" means a licence granted under section 4;

(e) "licensing officer" means the Director or any other officer or person authorized to grant licences under section 4;

(f) "prescribed" means prescribed by rules made under this Act;

(g) a person is said to "keep a bull" if he owns the bull or has the bull in his possession or custody; and

(h) a bull is said to be "castrated" if it is rendered incapable of propagating its species.

Appointment of Director.

3. The Provincial Government may by general or special order confer or impose on any person all or any of the powers or duties of a Director under this Act.

Bulls which have attained a certain age to be licensed.

4. (1) No person shall keep a bull which has attained the prescribed age except under and in accordance with the terms, conditions and restrictions of a licence granted under this section, unless it is certified by the prescribed officer that the bull has been effectively castrated by a method and in a manner approved by the Director.

Explanation.—Where a person keeps more than one bull, he shall obtain a separate licence in respect of each bull.

(2) Every licence under this section shall be granted by the Director or any officer or person authorized by him by general or special order. It shall be in such form, for such period, and subject to such terms, conditions and restrictions as may be prescribed.

No fee shall be charged for the grant of the licence.

Refusal and revocation of licences.

5. (1) Subject to such rules as may be prescribed, the licensing officer may refuse to grant or may revoke a licence in respect of any bull if in his opinion the bull appears to be—

(a) of defective or inferior conformation and consequently likely to beget defective or inferior progeny, or

(b) suffering from an incurable contagious or infectious disease or from any other disease rendering the bull unsuitable for breeding purposes, or

(c) of a breed which it is undesirable to propagate in the district or part of the district in which it is kept.

(2) The licensing officer may also revoke a licence granted in respect of any bull kept within his jurisdiction (whether such licence was granted by himself or by any other officer) if in his opinion—

(a) the licence was granted under circumstances of which the licensing officer was not aware at the time of granting the licence, or

(b) there has been a breach of any of the terms, conditions or restrictions of the licence.

(3) If a licence is revoked under this section, the officer revoking the licence shall give notice thereof to the person keeping the bull or to the person stated in the licence to be the owner of the bull. The notice shall set out the grounds for the revocation.

(4) No person shall be entitled to any compensation for the refusal or revocation of any licence under this section.

Surrender of licence.

6. A licence granted in respect of a bull shall be surrendered without delay to the licensing officer, if

(a) the period specified in the licence expires, or

(b) the licence is revoked under this Act, or

(c) the bull dies, or is certified by the prescribed officer to have been effectively castrated by a method and in a manner approved by the Director.

Inspection of bulls

7. The licensing officer may by order require any person keeping a bull to submit it for inspection by himself or by any officer or person deputed by him for the purpose, at any reasonable time, either at the place where the bull is kept for the time being or at any other reasonable place specified in the order, and thereupon it shall be the duty of the person keeping the bull to submit it for inspection accordingly, and render all reasonable assistance in connexion with such inspection to the officer concerned.

Power to order castration of bulls.

8. (1) The licensing officer may by order require any person keeping a bull which in his opinion has attained the prescribed age, and in respect of which no licence is for the time being in force under this Act, to have it castrated, within one month from the date of the service of the order, by a method and in a manner approved by the Director and specified in the order.

(2) Such castration shall be performed or caused to be performed by the licensing officer free of charge, unless the owner or other person keeping the bull desires to make his own arrangements for complying with the order.

Duty to inform owner of contents of notice, or order of castration.

9. If any notice or order is served under section 5, section 7, or section 8 on any person who is not the owner of the bull, it shall be the duty of that person forthwith to take all reasonable steps to inform the owner of the contents of such notice or order, and if he fails to do so, he shall be liable to indemnify the owner against any loss the owner may sustain by reason of such failure.

Production of licence.

10. It shall be the duty of any person who for the time being keeps a bull in respect of which a licence has been obtained and is in force, to produce such licence—

(a) within a reasonable time, at any place where the bull is for the time being, on demand made by a licensing officer or an officer of the Veterinary Department not below the rank of Veterinary Assistant Surgeon, or an officer of the Agricultural Department not below the rank of Upper Subordinate, or an officer of the Revenue Department not below the rank of Revenue Inspector, or such other officer as may be authorized in this behalf by the Provincial Government by general or special order, or

(b) before a cow is served by the bull, on demand made by the person in charge of the cow.

Penalties.

11. Whoever—

(a) keeps a bull in contravention of this Act or of any rule or order made thereunder, or of any terms, conditions or restrictions of a licence, or

(b) neglects or fails to submit a bull for inspection when required to do so under section 7, or

(c) neglects or fails to comply with an order served under section 8, or

(*d*) neglects or fails to produce a licence when required to do so under section 10,

shall be punishable with fine which may extend to fifty rupees and in the case of a second or any subsequent offence with fine which may extend to one hundred rupees.

Power of licensing officer to castrate bulls.

12. (1) If a person who keeps a bull neglects or fails to submit it for inspection, or to have it castrated when required to do so under section 7, or section 8, the licensing officer may direct that the bull shall be castrated by a method and in a manner approved by the Director and marked with a prescribed mark in the prescribed manner, free of charge.

(2) (*a*) If it is not known in whose ownership, possession or custody a bull is for the time being and the fact cannot be ascertained after an inquiry in the prescribed manner, the licensing officer may seize the bull or cause it to be seized, and if he is of opinion that the bull has attained the prescribed age and is unsuitable for breeding purposes on any of the grounds specified in sub-section (1) of section 5 may direct that the bull shall be castrated by a method and in a manner approved by the Director and marked with a prescribed mark in the prescribed manner, free of charge.

(*b*) Every bull seized under clause (*a*) shall, after it has been castrated and marked as aforesaid where necessary, be sold by public auction or sent to a pinjrapole or infirmary recognized by the Provincial Government in this behalf.

(*c*) In case the owner of any bull seized under clause (*a*) appears before the licensing officer within such time as may be prescribed in this behalf and proves to the satisfaction of such officer that the bull is owned by him—

(i) in case the bull has been sold by public auction, the proceeds of such sale shall be paid to the owner after deducting therefrom the costs, charges and expenses incurred for the maintenance and sale of the bull; and

(ii) in any other case, the bull shall be delivered to the owner on payment of the costs, charges and expenses incurred for its maintenance.

(*d*) The costs, charges and expenses referred to in sub-clauses (i) and (ii) of clause (*c*) shall be determined in the prescribed manner.

Power of licensing officer, etc., to inspect or mark bulls and enter premises.

13. For the purposes of this Act, a licensing officer or any officer or person authorized by him in this behalf shall have power at all reasonable times—

(*a*) to inspect any bull;

(*b*) to mark any bull with a prescribed mark in the prescribed manner; and

(*c*) subject to such conditions and restrictions, if any, as may be prescribed, to enter any premises or other place where he has reason to believe that a bull is kept.

Duty of officers to report offences, etc.

14. It shall be the duty of all village officers and servants and of all officers of the Veterinary, Agricultural and Revenue Departments—

(*a*) to give immediate information to the nearest licensing officer of the commission of any offence, or of the intention or preparation to commit any offence punishable under this Act, which may come to their knowledge;

(*b*) to take all reasonable measures in their power to prevent the commission of any such offence which they may know or have reason to believe is about or likely to be committed; and

(*c*) to assist any licensing officer in carrying out the provisions of this Act.

Cognizance of offences.

15. No Magistrate shall take cognizance of any offence under this Act except upon a complaint made by a licensing officer or any person authorized by such officer in this behalf.

Officers to be public servants.

16. The Director, every licensing officer, all officers and persons authorized by the Director or a licensing officer under this Act, and all village officers and servants, shall be deemed to be public servants within the meaning of section 21 of the Indian Penal Code.

Bar of certain proceedings.

17. (1) No suit, prosecution or other proceeding shall lie against any officer or servant of the Provincial Government for any act done or purporting to be done under this Act without the previous sanction of the Provincial Government.

(2) No officer or servant of the Provincial Government shall be liable in respect of any such act in any civil or criminal proceeding if the act was done in good faith in the course of the execution of duties or the discharge of functions imposed by or under this Act.

Limitation for certain suits and prosecutions.

18. No suit shall be instituted against the Crown and no suit, prosecution or other proceeding shall be instituted against any officer or servant of the Provincial Government in respect of any act done or purporting to be done under this Act, unless the suit, prosecution or other proceeding is instituted within six months from the date of the act complained of.

Revision.

19. The Provincial Government may at any time either *suo motu* or on application, call for and examine the record of any order passed by, or any proceedings recorded by, any officer or person under this Act, for the purpose of satisfying themselves as to the legality or propriety of such order or as to the regularity of such proceedings, and may pass such order in reference thereto as they think fit.

Nothing contained in this section shall apply to the orders or proceedings of any Court or Magistrate.

Power to make rules.

20. (1) The Provincial Government may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(*a*) all matters expressly required or allowed by this Act to be prescribed;

(*b*) the circumstances in which duplicates of licences may be granted, the fees which may be charged for the grant of such duplicates, and the conditions, restrictions and limitations subject to which they may be granted;

(*c*) the powers to be exercised and the duties to be performed by officers appointed under this Act, and the procedure of such officers; and

(*d*) the service of notices and orders issued under this Act.

(3) In making a rule under sub-section (1) or sub-section (2), the Provincial Government may provide that a person guilty of a breach thereof shall be punishable with fine which may extend to fifty rupees.

(4) The power to make rules conferred by this section shall be subject to the condition of the rules being made after previous publication.

(5) All rules made under this section shall be published in the *Fort St. George Gazette* and upon such publication shall have effect as if enacted in this Act.

Saving.

21. Nothing contained in this Act shall apply to a bull dedicated in good faith to a religious purpose in accordance with any religious usage or custom, provided that notice of the dedication is given in the prescribed manner to the licensing officer.

THE MADRAS CHRISTIAN MARRIAGES VALIDATION ACT, 1940.

ACT No. XVI *of* 1940.

[*26th August*, 1940.

An Act to validate certain marriages solemnized by the Rev. K. Anandam of the American Baptist Mission in the district of Kistna.

WHEREAS a licence was granted by the Government of Madras on the 4th day of December, 1916 to the Rev. K. Anandam of the American Baptist Mission in the district of Kistna to grant certificates of marriage between Indian Christians under section 9 of the Indian Christian Marriage Act, 1872;

AND WHEREAS on the 13th day of March, 1923 the said licence was revoked by the said Government;

AND WHEREAS after the date of the said revocation the said Rev. K. Anandam continued to solemnize marriages and to grant certificates of marriage up to and including the 1st day of April 1940 as if the said licence had not been revoked;

AND WHEREAS it is doubtful whether the marriages so solemnized and the certificates so granted and the other acts done by the said Rev. K. Anandam on and from the 13th day of March, 1923 up to and including the 1st day of April, 1940 are valid in law;

AND WHEREAS there is no reason to doubt that the parties to the said marriages believed in good faith that the said Rev. K. Anandam was legally entitled to solemnize marriages and to grant certificates of marriage between the said dates;

AND WHEREAS it is expedient that all such marriages and all certificates of marriage granted and all other acts relating to such marriages or certificates done by the said Rev. K. Anandam should be validated;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE MADRAS CHRISTIAN MARRIAGES VALIDATION ACT, 1940.

Validation of certain irregular marriages, certificates and acts.

2. All marriages solemnized, all certificates granted and all acts done by the said Rev. K. Anandam on and from the 13th day of March 1923 up to and including the 1st day of April 1940 which would be valid if the licence granted to him on the 4th day of December 1916 had not been revoked, shall be deemed to be as valid as if he had held the licence under section 9 of the Indian Christian Marriage Act, 1872, on and from the 13th day of March 1923 and up to and including the 1st day of April 1940 and no such marriage, certificate or act shall be deemed to be invalid by reason only of the fact that the said licence was revoked.

Validation of records of the said irregular marriages.

3. Certificates of marriages validated by section 2 and register-books and certified copies of true and duly authenticated extracts therefrom deposited in compliance with the provisions of the Indian Christian Marriage Act, 1872, shall, in so far as the register-books and extracts relate to such marriages, be received as evidence of such marriages as if such marriages had been duly solemnized under the said Act.

THE ANDHRA UNIVERSITY (AMENDMENT) ACT, 1940.

ACT No. XVII OF 1940.

[*7th November, 1940.*

An Act further to amend the Andhra University Act, 1925.

WHEREAS it is expedient further to amend the Andhra University Act, 1925, for the purpose hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE ANDHRA UNIVERSITY (AMENDMENT) ACT, 1940.

Amendment of section 19, Madras Act II of 1926.

2. In section 19 of the Andhra University Act, 1925, after clause (*n*), the following clause shall be added, namely:—

"(*o*) shall have power to delegate any of its powers to the Vice-Chancellor, or to a Committee from among its own members, or to the Finance Committee constituted under section 19-A."

THE MADRAS VILLAGE COURTS (AMENDMENT) ACT, 1940.

ACT No. XVIII OF 1940.

[*11th November, 1940.*

An Act further to amend the Madras Village Courts Act, 1888.

WHEREAS it is expedient further to amend the Madras Village Courts Act, 1888, for the purposes hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

Now, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows :—

Short title.

1. This Act may be called THE MADRAS VILLAGE COURTS (AMENDMENT) ACT, 1940.

Amendment of section 13, Madras Act I of 1889

2. In section 13 of the Madras Village Courts Act, 1888 (hereinafter referred to as the said Act), after the words " for the value of such property," the words " or for any tax, fee, or other sum due to a local authority " shall be inserted.

Amendment of section 52, Madras Act I of 1889.

3. In section 52 of the said Act, for the words beginning with " the village court " and ending with " jurisdiction ", the following words shall be substituted, namely :—

" the village court, or in the case of a panchayat court, its president or any other member of the court to whom the president may delegate his power in this behalf, shall attach any movable property within the jurisdiction of the court,".

THE MADRAS RINDERPEST ACT, 1940.

ACT NO. XIX OF 1940.

[11th December, 1940.

An Act to provide for the prevention and control of rinderpest in the Province of Madras.

WHEREAS it is expedient to provide for the prevention and control of rinderpest in the Province of Madras;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

Now, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title, extent and commencement.

1. (1) This Act may be called THE MADRAS RINDERPEST ACT, 1940.

(2) It extends to the whole of the Province of Madras.

(3) This section shall come into force at once, and the Provincial Government may from time to time by notification in the *Fort St. George Gazette* apply all or any of the remaining provisions of this Act to the whole or any portion of the Province of Madras from such date and for such period, if any, as may be specified in the notification, and may cancel or modify any such notification.

Madras Act II of 1866 not to apply to rinderpest.

2. Nothing contained in the Madras Cattle-disease Act, 1866, shall apply to the disease of rinderpest in any area to which the provisions of this Act have been applied by notification under sub-section (3) of section 1 so long as such notification remains in force.

Definitions.

3. In this Act, unless there is anything repugnant in the subject or context—

(*a*) "animal" means any camel, buffalo, bull, bullock, cow, heifer, calf, sheep, lamb, goat, kid, swine or deer;

(*b*) "infective animal" means an animal which is affected with rinderpest or has recently been in contact with, or in close proximity to, an animal so affected ; and

(*c*) "prescribed" means prescribed by rules made under this Act.

Veterinary Surgeons and Inspectors.

4. (1) The Provincial Government may appoint any person they think fit to be a Veterinary Surgeon for the purposes of this Act within such local limits as they may assign to him.

(2) The Provincial Government may appoint any person they think fit to be an Inspector for all or any of the purposes of this Act within such local limits as they may assign to him.

(3) A Veterinary Surgeon shall within the local limits assigned to him have all the powers of an Inspector under this Act, and may exercise such powers concurrently with his powers as Veterinary Surgeon.

(4) Every person appointed under this section shall be deemed to be a public servant within the meaning of the Indian Penal Code.

Power to inoculate and regulate movement of animals and to control the holding of markets, fairs, etc., and traffic in infective animals, etc.

5. The Provincial Government may, for the purpose of preventing the outbreak or spread of rinderpest in or from any area, by notification in the *Fort St. George Gazette*—

(*a*) direct that all animals in such area or any class of such animals shall be compulsorily inoculated in accordance with such rules as may be prescribed or such directions as may be specified in the notification;

(*b*) prohibit or regulate in such manner and to such extent as may be prescribed or as may be specified in the notification, the bringing into such area from any other area in the Province or any part thereof, the removal from such area into any other area in the Province or any part thereof, or the transport from one place to another in such area, of any animals alive or dead, or of any products of animals or of any parts of animals, or of any fodder, bedding or other thing used in connexion with animals which may, in the opinion of the Provincial Government, carry infection; or

(*c*) prohibit or regulate in such manner and to such extent as may be prescribed or as may be specified in the notification in such area or any part thereof or any other area in the Province—

(i) the holding of animal markets, animal fairs, animal exhibitions or other concentrations of animals; or

(ii) the sale of, or other traffic in, infective animals or their products or the carcasses of animals which at the time of their death were infective, or any parts of such animals or any fodder, bedding or other thing used in connexion with such animals which may, in the opinion of the Provincial Government, carry infection.

Duty of certain persons to report rinderpest.

6. Every owner or person in charge of, and every veterinary practitioner who has been called to treat, an animal which he has reason to believe to be affected with rinderpest shall forthwith report the fact to the Inspector exercising powers in the area.

Power of Veterinary Surgeon to hold post-mortem.

7. Subject to such rules as may be prescribed, the Veterinary Surgeon may make or cause to be made a post-mortem examination of any animal which at the time of its death was infective or is suspected to have been then infective, and for this purpose he may cause the carcass of any such animal to be exhumed.

Isolation of infective animals, examination by Veterinary Surgeon, etc.

8. (1) Where an Inspector has reason to believe that any animal is infective, he may, by order in writing, direct the owner or person in charge of such animal to keep it where it is for the time being, or to remove it or allow it to be removed to such place of isolation or segregation as may be specified in the order:

Provided that where there is no person in charge of the animal and the owner is unknown or the order cannot be communicated to him without undue delay, the Inspector may seize the animal and remove it to a place of isolation or segregation.

(2) The Inspector shall forthwith report to the Veterinary Surgeon every order or seizure made under-sub-section (1).

(3) On receipt of a report under sub-section (2), the Veterinary Surgeon shall as soon as possible examine the animal and all animals with which it has been in contact or to which it has been in close proximity, and for this purpose may submit any animal to any test which may be prescribed in this behalf.

(4) (*a*) If after such examination the Veterinary Surgeon is of opinion that any animal is not infective, the Inspector shall forthwith return it to the person who in his opinion is entitled to its possession:

Provided that where such person cannot in the opinion of the Inspector be found after reasonable inquiry, he shall send the animal to the nearest cattle-pound, or deal with it in such other manner as may be prescribed.

(*b*) If after such examination the Veterinary Surgeon certifies in writing that any animal is affected with rinderpest, the Inspector shall destroy the animal or deal with it in such other manner as may be prescribed.

(*c*) If after such examination the Veterinary Surgeon certifies in writing that any animal is infective though not affected with rinderpest, the animal shall be subjected to such treatment, if any, and be otherwise dealt with in such manner as may be prescribed.

Cleansing and disinfection of vessels and vehicles.

9. (1) Every vessel or vehicle used by a common carrier for the transport of animals shall be cleansed and disinfected periodically in such manner as may be prescribed.

(2) The Provincial Government may appoint places where an Inspector may detain and inspect any such vessel or vehicle, and if it is not in a sanitary condition, require it to be cleansed and disinfected in the prescribed manner.

(3) This section shall not apply to the rolling stock of any railway.

Power to require disinfection of infected premises, vessels and vehicles.

10. Subject to such rules as may be prescribed, the Veterinary Surgeon may, by order in writing, require the owner, occupier or person in charge of any building, yard, vessel or vehicle in which an infective animal has been kept, to have such building, yard, vessel or vehicle disinfected, and the internal fittings thereof and other things found therein or near thereto to be disinfected or destroyed, in such manner and to such extent as may be specified in the order.

Declaration of private infected places and examination of such places by Veterinary Surgeon.

11. (1) If the Inspector has reason to believe that there is an infective animal in any field, yard or building in which animals are kept, temporarily or otherwise, he shall at once, by order in writing, declare the place to be an infected place, and shall deliver a copy of the order to the owner, occupier or person in charge of the place and report his action to the Veterinary Surgeon:

Provided that this sub-section shall not apply to any place owned by, or under the control or management of, any local authority, or railway administration where animals are kept temporarily for purposes of sale, exhibition or transit.

(2) On the receipt of a report under sub-section (1), the Veterinary Surgeon shall as soon as possible examine the infected place and the animals kept therein, and confirm or cancel the order of the Inspector.

(3) If the Veterinary Surgeon confirms the order, he may cause notice to be served on the owners, occupiers or persons in charge of all places in which

animals are kept, temporarily or otherwise, within a radius not exceeding one mile from the infected place, declaring such places to be infected places.

The Veterinary Surgeon shall forthwith report his action under the sub-section to the prescribed authority.

(4) If the Veterinary Surgeon cancels the order, the place specified in such order shall cease to be an infected place, and the Inspector shall give notice accordingly to the owner, occupier or person in charge of such place.

Declaration of public infected places.

12. (1) If the Veterinary Surgeon has reason to believe that any infective animal is or has been kept in any place owned, controlled or managed by any local authority or railway administration where animals are kept temporarily for purposes of sale, exhibition or transit, he may, by order in writing, declare such place to be an infected place.

(2) The Veterinary Surgeon shall—

(*a*) cause a copy of the order passed by him under sub-section (1) in the language of the locality, to be exhibited prominently in the infected place;

(*b*) cause a copy of such order to be delivered at the office of the local authority or to the nearest station-master of the railway administration, as the case may be;

(*c*) cause another copy to be sent to the nearest police station; and

(*d*) forthwith report his action to the prescribed authority.

Declaration of infected areas by the Provincial Government.

13. (1) On receipt of the report of the Veterinary Surgeon under sub-section (3) of section 11, or under sub-section (2) of section 12, the prescribed authority shall, after making such further inquiry, if any, as it thinks fit, submit such report with its remarks thereon, if any, to the Provincial Government who may—

(*a*) confirm any declaration made under section 11 (1), 11 (3) or 12 (1) either with or without modifications; or

(*b*) cancel any such declaration.

(2) (*a*) Where the Provincial Government confirm any such declaration either with or without modifications, a notification shall be published in the *Fort St. George Gazette* defining the limits of the area to which the declaration, with the modifications, if any, made therein, shall apply and declaring such area to be an infected area.

(*b*) On the publication of a notification under clause (*a*), any place declared by the Inspector or Veterinary Surgeon to be an infected place and not included in the infected area as defined in such notification shall cease to be an infected place, and the Inspector shall give notice accordingly to the owner, occupier or person in charge of such place.

(*c*) The Inspector shall cause to be exhibited in some prominent place in the infected area and in the language of the area, a copy of the notification under clause (*a*).

(*d*) The Provincial Government may by notification published in the *Fort St. George Gazette* add to, amend, vary or rescind any notification published under clause (*a*) either on their own motion or on a subsequent report of the Veterinary Surgeon submitted through the prescribed authority. The Inspector shall cause to be exhibited in some prominent place in the infected area a copy of every such notification in the language of the area.

(3) Where the Provincial Government cancel any declaration referred to in sub-section (1), the place specified in such declaration shall cease to be an infected place, and the Inspector shall give notice accordingly to all persons to whom copies of such declaration were delivered or on whom notices of such declaration were served.

Removal of animals and other things from infected areas or places.

14. (1) Where any area or place has been declared to be an infected area or place under the foregoing provisions of this Act, no person shall, while such declaration remains in force, remove any animal, alive or dead, or any product of an animal, or any part of an animal, or any fodder, bedding or other thing used in connexion with an animal, save in accordance with the conditions of a licence granted by the Inspector.

(2) Nothing in sub-section (1) shall prevent the carriage by railway of any animal or thing referred to in that sub-section through an infected area or place:

Provided that where any such animal or thing while in transit through an infected area or place is unloaded therein, it shall not be removed therefrom save in accordance with sub-section (1).

Power to return animals, etc., to infected areas.

15. Where any animal or thing is removed from an infected area or place otherwise than in accordance with a licence granted under section 14, any Inspector or Police Officer may require the owner or person in charge of such animal or thing to return it to such area or place:

Provided that nothing in this section shall affect the powers of an Inspector under section 8 to deal with infective animals.

Powers of entry and inspection.

16. Subject to such rules as may be prescribed, an Inspector may enter and inspect any land, building or other place or any vessel or vehicle, for the purpose of exercising the powers or performing the duties conferred or imposed on him by or under this Act.

Time for complying with and enforcement of orders.

17. (1) Where by any notice, requisition, or order under this Act or under any notification or rule issued thereunder any person is required to take any measures or to do anything in respect of any property owned or occupied by him or in his charge, a reasonable time shall be specified in such notice, requisition or order within which such measures shall be taken or such thing shall be done, as the case may be.

(2) If such measures are not taken or such thing is not done within the time so specified, the authority issuing the notice, requisition or order may cause the measures to be taken or the thing to be done at the expense of the person concerned.

Recovery of expenses.

18. Where any action is taken under section 17 or any other provision of this Act or any notification or rule issued thereunder in respect of any property at the expense of any person, the authority taking such action shall draw up a certificate stating the amount of the expenses incurred and the person from whom such amount is recoverable, and the amount specified shall be recoverable from such person as if it were an arrear of land revenue due by him.

Penalties.

19. Whoever—

(*a*) fails to comply with or contravenes the terms of any notification issued under section 5, or

(*b*) fails to report that an animal is infective as required by section 6, or

(*c*) fails to comply with an order made by an Inspector under sub-section (1) of section 8, or

(*d*) being a common carrier, fails to cleanse or disinfect any vessel or vehicle used for the transport of animals in such manner as may be required under sub-section (1) or sub-section (2) of section 9, or

(*e*) fails to comply with an order made by a Veterinary Surgeon under section 10, or

(*f*) removes any animal or thing from any infected area or place in contravention of section 14

shall be punished with fine which may extend to fifty rupees in the case of a first conviction and to one hundred rupees in the case of a second or subsequent conviction whether under the same or any other clause of this section.

Penalty for keeping or grazing infective animal in unenclosed land.

20. Whoever keeps or grazes in or on any forest, open field, roadside, or other unenclosed land, to which other persons have a right of access for their animals, any animal which he knows to be infective, shall be punished with fine which may extend in the case of a first conviction to fifty rupees and in the case of a second or subsequent conviction to one hundred rupees.

Penalty for bringing infective animal to market.

21. Whoever brings or attempts to bring into any market, fair, exhibition or other concentration of animals, any animal which he knows to be infective shall be punished with fine which may extend in the case of a first conviction to fifty rupees and in the case of a second or subsequent conviction to one hundred rupees.

Penalty for placing carcass of infective animal in river.

22. Whoever places, or causes or permits to be placed, in any river, canal, or other water, or in the sea within such distance from the shore as may be prescribed, the carcass or part of the carcass of any animal which at the time of its death was infective or which was destroyed as being infective or suspected of being infective, shall be punished in the case of a first conviction with imprisonment for a term which may extend to six months or with fine which may extend to one hundred rupees or with both and in the case of a second or subsequent conviction with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees or with both.

Penalty for disinterring carcass of diseased animal.

23. Whoever, without lawful authority, disinters or causes to be disinterred the carcass or part of the carcass of any animal which at the time of its death was infective or which was destroyed as being infective or suspected of being infective, shall be punished with fine which may extend in the case of a first conviction to fifty rupees and in the case of a second or subsequent conviction to one hundred rupees.

Arrest without warrant.

24. Any Police Officer not below the rank of Sub-Inspector may, without an order from a Magistrate and without a warrant, arrest any person who has been concerned in an offence against any of the provisions of this Act relating to infective animals or to infected areas or places declared to be such under this Act.

Institution of proceedings.

25. No Magistrate shall take cognizance of any offence under this Act except upon the complaint or report of a Veterinary Surgeon.

Jurisdiction of Magistrates.

26. No Magistrate shall try any offence under this Act unless he is a Presidency Magistrate, a Magistrate of the first class, or a Magistrate of the second class specially empowered in this behalf by the Provincial Government.

Bar of claim to compensation.

27. No person shall be entitled to any compensation in respect of the destruction of any animal or thing or of any other loss, injury, detriment or inconvenience caused to him by reason of anything done under this Act in good faith.

Bar of certain proceedings.

28. (1) No suit, prosecution or other proceeding shall lie against any officer or servant of the Provincial Government for any act done or purporting to be done under this Act, without the previous sanction of the Provincial Government.

(2) No officer or servant of the Provincial Government shall be liable in respect of any such act in any civil or criminal proceeding if the act was done in good faith in the course of the execution of duties or the discharge of functions imposed by or under this Act.

Limitation for certain suits and prosecutions.

29. No suit shall be instituted against the Crown and no suit, prosecution or other proceeding shall be instituted against any officer or servant of the Provincial Government in respect of any act done or purporting to be done under this Act, unless the suit, prosecution or other proceeding is instituted within six months from the date of the act complained of.

Power to make rules.

30. (1) The Provincial Government may make rules to carry out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(*a*) the tests to be applied to animals suspected of being infective;

(*b*) the isolation or segregation, detention, treatment (curative and preventive) and destruction or disposal otherwise of animals which are infective or suspected of being infective; and the destruction or disposal otherwise of the products of such animals, of their carcasses, and of the fodder, bedding or other things used in connexion with them;

(*c*) the manner in which animals and things seized under this Act and not liable to destruction shall be dealt with and disposed of;

(*d*) the disinfection of vessels or vehicles ~~used by common carriers~~, the cleansing and disinfection of buildings, yards and other places used for animals, and the destruction of infected matter or things found therein or near thereto;

(*e*) the circumstances under which licences may be granted by an Inspector under section 14, and the form and conditions of such licences;

(*f*) the determination of the persons from whom any expenses incurred in connexion with the enforcement of this Act shall be recovered;

(*g*) the expenses to be allowed in certificates drawn up under section 18;

(*h*) the powers and functions and the procedure of Inspectors and Veterinary Surgeons;

(*i*) the manner in which any report or notice under this Act shall be made or given; and

(*j*) all other matters expressly required or allowed by this Act to be prescribed.

(3) In making a rule under sub-section (1) or sub-section (2), the Provincial Government may provide that a breach thereof shall be punishable with fine which may extend in the case of a first conviction to fifty rupees and in the case of a second or subsequent conviction to one hundred rupees.

(4) The power to make rules conferred by this section shall be subject to the condition of the rules being made after previous publication for a period of not less than one month.

(5) All rules made under this section shall be published in the *Fort St. George Gazette*, and upon such publication shall have effect as if enacted in this Act.

THE INDIAN MEDICAL DEGREES (MADRAS AMENDMENT) ACT, 1940.

ACT NO. XX OF 1940.

[*11th January, 1941.*

An Act to amend the Indian Medical Degrees Act, 1916, in its application to the Province of Madras for a certain purpose.

WHEREAS it is expedient to amend the Indian Medical Degrees Act, 1916, in its application to the Province of Madras for the purpose hereinafter appearing;

AND WHEREAS the Governor of Madras has, by a Proclamation under section 93 of the Government of India Act, 1935, assumed to himself all powers vested by or under the said Act in the Provincial Legislature;

NOW, THEREFORE, in exercise of the powers so assumed to himself, the Governor is pleased to enact as follows:—

Short title.

1. This Act may be called THE INDIAN MEDICAL DEGREES (MADRAS AMENDMENT) ACT, 1940.

Amendment of the long title and preamble to Act VII of 1916.

2. In the long title and in the preamble to the Indian Medical Degrees Act, 1916 (hereinafter referred to as the said Act), for the words "of such titles," the words "of such titles and of titles implying qualifications in other systems of medicine" shall be substituted.

Insertion of new section 6-A in Act VII of 1916.

3. After section 6 of the said Act, the following section shall be inserted, namely:—

Penalty for unauthorized use of titles, etc., implying medical qualifications.

"6A. (1) No person shall add to his name any title, description, letters or abbreviations which imply that he holds a degree, diploma, licence or certificate as his qualification to practise any system of medicine unless—

(*a*) he actually holds such degree, diploma, licence or certificate; and

(*b*) such degree, diploma, licence or certificate—

(*i*) is recognized by any law for the time being in force in British India or in any part thereof; or

(*ii*) has been conferred, granted or issued by an authority referred to in section 3; or

(*iii*) has been recognized by the General Council of Medical Education of the United Kingdom; or

(*iv*) in cases not falling under sub-clause (*i*), sub-clause (*ii*) or sub-clause (*iii*), has been conferred, granted or issued by an authority empowered, or recognised as competent, by the Provincial Government to confer, grant or issue such degree diploma, licence or certificate.

(2) Whoever contravenes the provisions of sub-section (1) shall, notwithstanding anything contained in section 6, be punished in the case of a first conviction, with fine which may extend to two hundred and fifty rupees and in the case of a subsequent conviction, with fine which may extend to five hundred rupees."